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[1] Resigned June 30, 1948.
[2] Retired July 31, 1948.
[3] Appointed, took office Aug. 14, 1948.

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CALIFORNIA REPORTER

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SECOND SERIES

31 Cal.2d 826

WHITFIELD et al. v. JESSUP et al.

L. A. 20358.

Supreme Court of California, in Bank.

May 6, 1948.

Rehearing Denied June 3, 1948.

1. Sales 🔑285(1)

Purpose of provision of Sales Act respecting notice of seller of breach of warranty, was to ameliorate harshness of common-law rule that mere acceptance by or passage of title to buyer constitutes a waiver of any remedies for breach of warranty, and at same time gives seller some protection against stale claims by requiring notice. Civ.Code, § 1769.

2. Sales 🔑285(2)

Provision of Sales Act requiring buyer of "goods" to give notice to seller of breach of any promise of warranty within a reasonable time before seller can be held liable, is applicable to sale of food. Civ. Code, § 1769.

See Words and Phrases, Permanent Edition, for all other definitions of "Goods".

3. Sales 🔑285(3)

Letter written by attorney of buyer of cream from which buyer allegedly contracted undulant fever, informing sellers of cream that buyer had retained attorney to press a claim against sellers and that buyer's physician advised her that she had undulant fever as result of using sellers' dairy products, was sufficient notice within provision of Sales Act requiring buyer of goods to give notice to seller of breach of warranty within reasonable time. Civ. Code, § 1769.

4. Sales 🔑285(3)

No particular form of notice is required by provision of Sales Act requiring buyer of goods to give notice to seller of breach of any promise or warranty within a reasonable time, before seller can be held liable. Civ.Code, § 1769.

5. Sales 🔑445(5)

Where cream from which buyer allegedly contracted undulant fever was purchased in January, February and March and buyer became ill in March but disease was not diagnosed as undulant fever until first part of June whether notice to seller in November of breach of warranty was within a "reasonable time" as required by Sales Act was for jury. Civ.Code, § 1769.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Time".

6. Sales 🔑285(2)

What constitutes a reasonable time within meaning of provision of Sales Act requiring buyer of goods to give notice to seller of breach of any promise or warranty within a reasonable time, before seller can be held liable, must be determined from the particular circumstances. Civ.Code, § 1769.

SCHAUER, SPENCE and EDMONDS, JJ., dissenting.

◆

Appeal from Superior Court, Los Angeles County; A. F. Bray, Judge.

Action by Claude Jenkins Whitfield and Dorothy Whitfield against Roger Jessup and Marguerite Rice Jessup, copartners doing business under the fictitious firm name and style of Roger Jessup Certified Farms, to recover for breach of warranty in sale of raw cream from which Dorothy Whitfield allegedly contracted undulant fever. From a judgment entered on an order granting a nonsuit, plaintiffs appeal.

Judgment reversed.

Prior opinion, 183 P.2d 133.

Samuel A. Rosenthal, of Los Angeles, for appellants.

Reed & Kirtland and Henry E. Kappler, all of Los Angeles, for respondents.

CARTER, Justice.

Plaintiffs appeal from a judgment entered on an order granting a nonsuit, on the ground that they had failed to give notice to defendants, sellers of raw cream, of a breach of warranty in an action for damages for breach of the warranty.

Defendants are engaged in the business of selling dairy products, including raw cream, to the public for human consumption. During January and March, 1944, defendants sold and plaintiffs purchased for immediate consumption raw cream in containers. Plaintiff, Dorothy Whitfield, consumed the cream in her home, and for the purposes of this decision, it is not disputed that as a result thereof she contracted undulant fever. She commenced to have sensations of tiredness, chilliness, and headaches during the latter part of March and the first of April, 1944. She consulted a doctor on May 9, 1944, who diagnosed her ailment as "flu". She was confined to bed for some time. She remained away from work until October 2, 1944. The doctor called again the second week after the first call and made several other calls in May continuing to refer to the indisposition as "flu". A complete physical examination was given to her on May 31, 1944. On June 1, 1944, she became delirious and was taken to the hospital where she remained until the middle of June. She continued to suffer from the ailment being "up and down" as is typical of the disease.

On November 20, 1944, Mrs. Whitfield's attorney, Mr. Fainer, wrote a letter to defendants stating that his client "has retained me to press a claim against" you; and that "she [Mrs. Whitfield] tells me that her doctor advises her that she now has undulant fever as the result of using your dairy products.

"Before proceeding with this matter I would like to have your attorney get in touch with me in order that we may discuss the matter of an amicable settlement."

Plaintiffs' action was predicated on two counts, one on negligence and the other on breach of implied warranty of the fitness of the cream. Pursuant to stipulation the negligence count was dismissed. The motion for nonsuit was on the ground that plaintiffs had not given defendants notice of the breach of the implied warranty as required by statute.

[1] The statute provides: "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. *But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor."* [Emphasis added.] (Civ.Code, sec. 1769.) It is the italicized portion of the section which is here of concern. The rule stated by the section is the same as that stated in the American Law Institute's Restatement (Rest.Contracts, sec. 412) and probably the rule prevailing in California before the code section was added in 1931 (see cases cited 22 Cal.Jur. 983–988). It is the identical language of the Uniform Sales Act (Uniform Laws Annotated, Sales, sec. 49). One of the purposes of the provision in the Uniform Sales Act was to ameliorate the harshness of the common law rule in some states that the mere acceptance by or passage of title to the buyer of the goods constituted a waiver of any and all remedies for breach of warranty, and at the same time to give the seller some protection against stale claims by requiring notice. (See, discussion, Williston on Contracts [Rev.Ed.], sec. 714.)

[2] It is argued, however, that the notice required does not apply to goods sold for immediate human consumption as distinguished from the sale of other chattels, and reliance is placed upon Kennedy v. F. W. Woolworth Company, 205

App.Div. 648, 200 N.Y.S. 121. (See, also, Silverstein v. R. H. Macy & Co., 266 App. Div. 5, 40 N.Y.S.2d 916, refusing to apply it where the sale was of an article [gymnasium equipment] for immediate use.) The sales act on its face clearly applies to the sale of food or other articles for immediate human use or consumption. The reference throughout the statutory provisions on the law of sales is to the sale of "goods". In determining that there is an implied warranty that the food is fit for human consumption under the statutes dealing with the law of the sales of goods, it is accepted that the sale of food for immediate human consumption is a sale of goods under the statute. (See Klein v. Duchess Sandwich Co., Ltd., 14 Cal.2d 272, 93 P.2d 799; Mix v. Ingersoll Candy Co., 6 Cal.2d 674, 59 P.2d 144; Goetten v. Owl Drug Co., 6 Cal.2d 683, 59 P.2d 142; Gindraux v. Maurice Mercantile Co., 4 Cal. 2d 206, 47 P.2d 708; Jensen v. Berris, 31 Cal.App.2d 537, 88 P.2d 220.) In Kennedy v. F. W. Woolworth Company, supra, the court reasoned, in face of the clear language of the statute requiring notice, that the reason for the requirement of notice is not relevant to such a case: "That section apparently has to do with the sales of goods whose inspection or use discloses a defect of quality, lack of conformance to sample, failure to comply with description, or other cognate circumstances, which causes money damage to the vendee. To require a complaint which, whatever its nomenclature of form, is really grounded on tortious elements, to indicate a notice of rejection or claim of damages within a reasonable time on account of defect of edible goods in a retail transaction, would strain the rule beyond a breaking point of sense or proportion to its intended object." (200 N.Y.S. 121, 122.) There is no intimation in the statute that it is confined to cases where an inspection would show a defect of quality. It is clear that in cases where the article is sold for immediate human consumption the defect will eventually be discovered. Otherwise there would be no controversy over a breach of warranty. When the discovery should be made and what constitutes a reasonable time in cases of this class may well be somewhat different from cases where the article is not for immediate consumption, because of the opportunity for inspection, yet that does not mean the statute should have no application. Provision is made that the point from which the reasonable time runs is when the buyer knows or should have known of the breach. Thus the rule is not unduly hard upon him, and in cases where the defect is not readily discoverable, or an inspection is not feasible (such as in the case at bar where the food is for immediate consumption and the defect—the cause of undulant fever—is latent), we have factors bearing significantly upon when discovery of the breach should be made and what constitutes a reasonable time. The intimation in the Kennedy case, supra, is that the statute should not apply because the action sounds in tort. That may be true of all cases of warranty which pose the much debated question of whether an action on a warranty is in tort or contract. The fact remains that the statute deals with a warranty such as we have here whether an action thereon be said to sound in tort or contract.

The courts in other jurisdictions have constantly refused to follow the Kennedy case and have held that the statute involved applies to warranties in the sale of goods for immediate consumption including food. (Savage v. Alpha Lunch Co., 300 Mass. 520, 16 N.E.2d 38; Johnson v. Kanavos, 296 Mass. 373, 6 N.E.2d 434; Schuler v. Union News Co., 295 Mass. 350, 4 N.E.2d 465; Hazelton v. First Nat. Stores, 88 N.H. 409, 190 A. 280; Baum v. Murray, 23 Wash.2d 890, 162 P.2d 801.)

It is not persuasive to the point of holding the statute inapplicable to sales of food for immediate consumption, that the reason for the notice is to afford the seller an opportunity to make good the defective article, and that cannot be done where it has been consumed. It is doubtful that the seller has any such right. (See Civ.Code, sec. 1789, dealing with remedies of the buyer in case of breach of warranty.) But if that is a reason for the notice requirement it is not the only reason. As stated in Columbia Axle Company v. American Automobile Company, 6 Cir., 63 F.2d 206, at page 207: "While it may be one purpose of the notice required by the statute to permit the seller to make inspection of the goods, whether in the hands of the vendee or not, it is certainly not its only purpose. 'The purpose of the notice,' said Judge Learned Hand, 'is to advise the seller that he must meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning.' American Manufacturing Co. v. United States Shipping Board, etc., 2 Cir., 7 F.2d 565, 566; cf. Truslow & Fulle, Inc., v. Diamond Bottling Co., supra [112 Conn. 181, 151 A. 492, 71 A.L.R. 1142]." (See to the same effect as to the general purpose for the requirement, cases collected, Uniform Laws Annotated, Vol. 1, p. 289, and supp. p. 204.)

[3, 4] There can be no doubt that the notice here given was sufficient in form and content. The letter was from plaintiffs' counsel which in itself indicated that a claim was being made and it advised defendants that a claim was being made for the disease contracted by use of defendants' dairy products sold to plaintiffs by defendants. No particular form of notice is required. It need merely apprize the seller that the buyer intends to look to him for damages. (See Hazelton v. First Nat. Stores, supra; Johnson v. Kanavos, supra; Ace Engineering Co. v. West Bend Malting Co., 244 Wis. 91, 11 N.W.2d 627; Baum v. Murray, supra.)

[5] The trial court was not justified in concluding as a matter of law that the notice was not given within a reasonable time. The purchases of the raw cream from defendants occurred during January, February and March preceding the month (November) the notice was given. The latter part of March and during April Mrs. Whitfield commenced to feel symtoms of the disease (she did not know that they were such) such as headaches and feeling of tiredness and weakness. She consulted a doctor on May 9th. During April she was too ill to even "bother" with cream. The doctor diagnosed her ailment as "flu". She remained away from work until the early part of October. All during May she was seriously incapacitated and the doctor continued to call on her diagnosing her trouble as "flu". During the first two weeks in June she was confined in a hospital. It appears the disease was diagnosed as undulant fever about June 2d. After the two weeks in the hospital Mrs. Whitfield was confined to her bed at home. She was able to be up a few days in July but was finally forced to return to the hospital for two weeks following July 16th. After returning to her home she was confined to bed. There conditions of being up and down continued during August. She was able to be out of bed during September. She had never before heard of the disease, undulant fever.

[6] Having in mind the appropriate rule under this provision of the law of sales, that "It may be taken as axiomatic that what constitutes a reasonable time must be determined from the particular circumstances in the individual case" (Columbia Axle Co. v. American Automobile Ins. Co., supra, 63 F.2d at page 208), this court cannot say as a matter of law that an unreasonable time had elapsed. Certainly the time did not commence to run before Mrs. Whitfield knew the disease was undulant fever. She had never before heard of the disease and it does not appear that she was advised that it may be caused by bacillus in raw cream. Perhaps she did not discover that until she had a complete physical examination in November and consulted her counsel. It is not to be supposed that she would inspect the cream —have it analyzed by a laboratory before it was consumed. The defect is latent and it is reasonable to infer that the only way discovery of it might occur would be through the effects on her body and a physician's advice in respect to such effects. She would not then know the source of her illness until she had been advised of it. By reason of her illness she may not have been in a position to form an intelligent conclusion and be sufficiently alert to protect her rights. What constitutes a reasonable time where the goods sold are foods containing latent defects, which are immediately consumed, presents a different question than does the ordinary sale where the article is subject to examination and use which will reveal its defect. For all these reasons little light is shed upon the issue by an examination of the cases deciding that certain periods of time were or were not

reasonable. The case must be controlled by its special circumstances.

The judgment is reversed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

SCHAUER, Justice (dissenting).

I agree with Mr. Justice CARTER that "what constitutes a reasonable time [within the purview of Civil Code section 1769] must be determined from the particular circumstances in the individual case," but I do not agree with him that "Certainly the time did not commence to run before Mrs. Whitfield knew the disease was undulant fever," etc.

It is my view that the "reasonable time" contemplated by section 1769 is not to be determined solely by consideration of the circumstances of the buyer but, rather, that the test relates to the circumstances as they surround and affect the seller, and possibly the public, as well as the buyer. Failure of the buyer to discover the defect promptly may be an element in the reasonableness of the time of notice but I do not subscribe to the implication, if any be intended, that it prevents, or even necessarily postpones, the lapse of the full period beyond which it would be unreasonable, when the public interest, if any, and the seller's interests are considered, to permit the notice as a basis for action.

I think the case here is a close one, on non-suit, but in the light of the authorities cited in the opinion of the District Court of Appeal (183 P.2d 133), of the nature of the article sold and of the importance to the public as well as to the defendant of prompt notice as to a defect such as that claimed here, I am not persuaded that the conclusion of the trial judge that the issue is one of law, is unreasonable.

Accordingly I would affirm the judgment.

SPENCE, Justice.

I dissent.

The questions presented on this appeal were thoroughly considered and, in my opinion, were correctly decided by the District Court of Appeal when this case came before it. Whitfield v. Jessup, —— Cal.App.2d ——, 183 P.2d 133. As shown by the opinion of that court, no notice was given by plaintiffs to defendants until almost eleven months after the purchase of the first raw cream, until over seven months after plaintiff, Dorothy Whitfield, experienced her first symptoms of illness, or until five months and eighteen days after plaintiffs had been advised of the nature of such illness. Under these circumstances, the authorities cited by the District Court of Appeal show that the trial court properly granted the nonsuit since it appeared, as a matter of law, from the uncontradicted evidence that plaintiffs had failed to give the required notice "within a reasonable time." Civ.Code, sec. 1769. I am therefore of the opinion that the judgment should be affirmed.

EDMONDS, J., concurs.

Rehearing denied; SCHAUER and SPENCE, JJ., dissenting.

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85 Cal.App.2d 521

PEOPLE v. TENNIS.

Cr. 4211.

District Court of Appeal, Second District.
Division 3, California.
May 17, 1948.

1. Automobiles 🔑357

That defendant had repeatedly tried unsuccessfully to pass another automobile and was so preoccupied in again endeavoring to pass that he failed to see automobile approaching from opposite direction afforded no excuse for driving on lefthand half of highway so as to require instruction as to conditions under which driving on lefthand half of highway would be excusable in prosecution for misdemeanor of wilfully and with gross negligence committing an unlawful act in operation of automobile causing death. Pen.Code, § 192, subd. 3(b); Vehicle Code, § 530.

2. Automobiles 🔑357

In prosecution for wilfully and with gross negligence committing an unlawful act in operation of automobile causing death, evidence disclosed no condition, emergency or otherwise, requiring an instruction that motorist, who, when confronted with a sudden emergency, drives to the left side of highway, is not guilty of negligence, if, in so doing, he obeys dictates of ordinary prudence. Pen.Code, § 192, subd. 3(b); Vehicle Code, § 530.

3. **Automobiles** ⚷357

In prosecution for wilfully and with gross negligence committing an unlawful act in operation of automobile causing death, instructions were incorrect insofar as they incorporated provisions of statute expressly made inapplicable to acts committed in driving a vehicle. Pen.Code, § 192, subds. 2, 3(b).

4. **Criminal law** ⚷814(8)

In prosecution for wilfully and with gross negligence committing an unlawful act in operation of automobile causing death, defendant was not entitled to instruction as to conditions under which he might lawfully have been driving on left-hand half of highway where evidence disclosed no circumstances tending to excuse his being on wrong side of roadway. Pen.Code, § 192, subd. 3(b); Vehicle Code, §§ 525, 530.

◆

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Richard Clair Tennis was convicted of the misdemeanor of wilfully and with gross negligence committing an unlawful act in operation of an automobile causing death and he appeals.

Judgment affirmed.

George Finucane, of Santa Maria, for appellant.

Fred N. Howser, Atty. Gen., and Henry A. Dietz, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

We have for consideration an appeal from a judgment of conviction by a jury upon an information charging defendant with a misdemeanor violation of section 192, subd. 3(b) of the Penal Code, in that he did wilfully and unlawfully, and with gross negligence, commit an unlawful act in the operation of an automobile and thereby cause the deaths of Eric Ruud and Mrs. Eric Ruud.

It is not claimed on the appeal that the evidence was insufficient to justify the verdict. The sole contention is that the court committed error in not giving to the jury, of its own motion, an instruction as to the conditions in which driving an automobile on the left-hand half of the highway would be excusable. It is necessary to preface our discussion of the claimed error with a brief statement of the circumstances of the accident. It occurred about 5:00 o'clock p. m. on the 29th day of December, 1946, on U. S. Highway 101, in the county of San Luis Obispo. Defendant was driving southerly, with Mr. and Mrs. Ruud and Miss Loretta Albert, as passengers. William Bogue and his wife were driving northerly. The two cars came into practically a headon collision on the east half of the highway. The street was dry, the weather was clear and it was approaching dusk. The Bogue car was traveling 40 or 45 miles an hour and defendant's car at a higher speed. Mr. Bogue testified that the visibility was fairly good, it had not turned dark yet, and that he saw defendant's car approaching on the east side of the highway at a distance of about 150 yards. There were two other vehicles traveling south. Defendant was then abreast of the most northerly one and had not overtaken the other. Mr. Bogue drew over to the right-hand side of the road, with his right wheels extending onto a sloping bank. Defendant's car came across the road and struck the Bogue car in this position.

At the point of collision the paved highway was 22 feet wide with a 7½ foot shoulder on the east side and an 8½ foot shoulder on the west. The middle of the pavement was marked with a double white line which extended 400 or 500 yards northerly of the point of collision, and for some 100 yards to the south. At a point 792 feet north of the point of collision, and for 200 or 250 yards north of that, the highway was broader on the west side and automobiles traveling south could pass on the pavement without crossing the middle line. Defendant testified that he had passed one southbound car and had endeavored several times to pass the remaining car that was immediately ahead of him; that the driver of this car would speed up when he attempted to pass and then slow down and that he, defendant, was irked at this procedure and that the other driver also appeared to be irked at defendant's attempts to pass him; that he endeavored to pass at some point to the north where there was room to pass without crossing the middle line; that he was then going 40 or 45 miles an hour; that he did not see any car approaching on the east half of the highway, although he indistinctly remembered seeing the lights of the Ruud (Bogue) car, just before he struck it; that when he pulled abreast of the car ahead of him the car behind him had come close up and that he could not turn back between the two cars; that he had speeded up in attempting to pass the car, stepped on the gas harder when he realized that the Bogue car was upon him and that he was then going 60 or 65 miles an hour; that he did not slow down, apply his brakes or endeavor to turn aside. The point of the collision was between two curves in the highway, each of them curving to the left of a driver coming south. From an examination of maps showing some 1,400 feet of the highway, together with defendant's testimony, it appears clear that from the point where he testified he started to pass the other cars his view was obstructed by a bank on the left-hand side of the highway and he could not then have seen the Bogue car. However, the accident happened approximately midway between the two curves and there was nothing to prevent defendant from having a clear view of the approaching Bogue car for a distance of several hundred feet before he reached the point of the collision.

Appellant's single assignment of error reads as follows: "The trial court committed prejudicial error in failing to instruct the jury sua sponta that violations of the Vehicle Code may not, under certain circumstances, constitute negligence." He merely asserts that there was a logical explanation for defendant's being on the wrong side of the highway and that he was therefore entitled to an instruction that a violation of the Vehicle Code on his part, could be excused. Such violation, it is said, "may be excused, and may not constitute negligence, where the operator of a vehicle is in a position in which he is either unable to comply with the rule of the road, or when the stress of an emergency makes it necessary to violate such section." The argument is addressed to the subject covered by the instruction given, reading as follows: "You are instructed that except when a roadway has been divided into three traffic lanes, no vehicle shall be driven to the left side of the center line of a roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction."

[1] Defendant, according to his own testimony, violated the law as stated in this instruction, and gave no explanation of his conduct except that in his preoccupation of endeavoring to pass one car he wholly failed to use even the slight degree of care that would have enabled him to see the Bogue car approaching. There was in the evidence no excuse for his being on the wrong side of the highway. The fact, if it was a fact, that he had endeavored several times to pass the car ahead of him and had been unable to do so, rather than furnishing an excuse for being on the wrong side of the highway, should have led him to greater caution to make no further attempt until he was certain that the east half of the highway was free from traffic for a long distance ahead of him. Moreover, according to the testimony of Bogue, defendant was driving on the left-hand side of the road while he was passing two cars.

[2] Certain provisions of section 525 of the Vehicle Code allow the use of the left-hand half of the highway in making a left-hand turn, or when the right half

of the highway is closed to traffic while under construction or repair. Neither of these conditions existed, and therefore the legality of defendant's conduct was to be judged according to the requirements of section 530. There was no evidence of circumstances which would have rendered excusable the conduct of defendant, as he, himself, described it. Appellant quotes at some length from Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51, and seeks to invoke the rule there stated under which one who, when confronted with a sudden emergency, drives to the left side of the highway, is not guilty of negligence if, in so doing, he obeys the dictates of ordinary prudence. The circumstance in the Jolley case which made the rule applicable was the sudden appearance of a stray horse on the pavement. It already appears that there was no condition, emergency or otherwise, which would have rendered necessary or even proper an instruction based upon the rule applied in the Jolley case. Nevertheless, at the request of appellant the court gave an instruction favorable to him as to what his duty would have been if he had been confronted with peril arising from the actual presence or appearance of imminent danger. While the instruction was applicable primarily to appellant's conduct after he saw the Bogue car approaching, the principle would also have been applicable if it had been shown by the evidence that turning onto the left half of the roadway reasonably appeared to have been the part of safety.

[3] The instructions defined the offense charged and the terms "negligence" and "gross negligence." They covered all the law applicable to the trial and we find no incorrections except that instructions given at the request of the People, and others given at the request of defendant, incorporated some of the provisions of subdivision 2 of section 192, of the Penal Code, which are expressly made inapplicable to acts committed in the driving of a vehicle.

[4] Defendant in his brief does not call attention to any circumstances in evidence which would even have tended to excuse his being on the wrong side of the roadway. His criticism of the sufficiency of the instructions consists of loosely worded generalities. His claim that an additional instruction should have been given as to conditions under which defendant could have lawfully been on the east half of the roadway has no semblance of merit. No such conditions existed. The vacuous assertion that the court should have given additional instructions of its own motion is unworthy of further discussion.

Defendant's own testimony was a detailed admission of violation of the law. We think anything other than a verdict of guilty would have been a miscarriage of justice.

The appeal is groundless.

The judgment is affirmed.

WOOD, J., and VALLÉE, J. pro tem., concur.

85 Cal.App.2d 249

CLYDE v. CLYDE.

Civ. 7500.

District Court of Appeal, Third District, California.

April 29, 1948.

1. Appeal and error ⚿801(1)

The right to dismissal of an appeal is determined by facts as they existed at time notice of motion was given.

2. Appeal and error ⚿395

Where appellant's attorney wrote appellant advising as to cost of transcript and requesting that money be sent within ten days but appellant was absent from state and on returning after expiration of the ten-day period believed that he had no further remedy and therefore took no action, and there was no showing that, during two months that elapsed after giving of cost estimate and before filing of motion to dismiss appeal, any extension was asked by appellant or granted or attempt made to make arrangements with the clerk or reporter for payment of costs, appeal would be dismissed. Rules on Appeal, rules 5(c), 10, 53.

3. Appeal and error ⚿801(1)

There is a strong public policy in favor of hearing appeals on merits, but a respondent is entitled to have appellant proceed with expedition, and burden is on appellant to use reasonable diligence to perfect appeal.

4. Courts ⚿85(3)

The new rules on appeal are designed to effect just and speedy determination of appeals, and every member of bar must take notice of their provisions and govern himself accordingly, in seeking reviews by appellate courts. Rules on Appeal, rule 53.

◆

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by Cleo Clyde against M. V. Clyde. From an adverse judgment defendant appeals. On motion to dismiss appeal and on appellant's motion for relief from default.

Appellant's motion denied, and appeal dismissed.

John W. Finley, of Chico, for appellant.

Carlton & Shadwell, of Redding, for respondent.

ADAMS, Presiding Justice.

Respondent, on February 13, 1948, filed in this court a motion to dismiss the appeal taken by defendant from a judgment entered September 25, 1947. The certificate of the clerk of the trial court, which is relied upon in support of the motion, shows that notice of appeal was filed November 20th, notice to prepare transcript filed December 1st, estimate of cost of preparing transcript given to county clerk December 4th, and copy of same mailed to attorney for defendant on said date, all in 1947; but that on the date of the certificate, February 11, 1948, payment of the estimated cost had not been made nor had arrangements for extension of credit been made by counsel for appellant, and that the time therefor had expired. The motion to dismiss is also supported by an affidavit made by respondent's attorney stating that appellant's notice to prepare transcript was not served on the attorneys for respondent, or either of them. Said motion was noticed for hearing on March 5, 1948, and copy of the motion was served on appellant's attorney February 12, 1948.

On March 2, 1948, appellant filed herein a notice of motion for relief from default, same being supported by affidavits of appellant M. V. Clyde, John W. Finley, attorney for appellant, and Mar Nell Davis, secretary of said attorney.

The affidavit of appellant Clyde sets forth that on December 1, 1947, his attorney wrote him a letter addressed to his place of business at Long Beach advising him that appeal had been filed and that in about three days moneys would be needed for the costs thereof. Also that on December 8, 1947, said attorney had written him at Long Beach advising that the transcript cost was $100, and requesting that the money be sent to him within ten days. He further avers that at the time said letters were received at his place of business in Long Beach affiant was absent from the state, and that same were not called to his attention until the ten day period had elapsed, and that he therefore believed that he had no further remedy, and did nothing until about February 16, 1948, when he received a letter from his attorney advising of respondent's motion to dismiss and stating that under the circumstances the appellate court might grant relief for the failure to comply with Rule 5 of the Rules on Appeal. With his affidavit appellant transmitted a cashier's check for $100 dated February 19, 1948, payable to the clerk of the trial court.

The affidavits of appellant's attorney, John W. Finley, and his secretary pertain to the asserted failure of appellant to serve on counsel for respondent appellant's notice to prepare transcript, it being averred that Mr. Finley instructed his said secretary to send to the attorneys for respondent a copy of such notice, but that said secretary could not remember whether she did so or not.

[1, 2] On the showing made by respondent, she was, at the time her notice of motion to dismiss was filed, entitled to have the appeal dismissed. In Murphy v. Krumm, 21 Cal.2d 846, 136 P.2d 8, the court said that the right to dismissal of an appeal is determined by the facts as they existed at the time the notice of motion was given. In the case before us it is not denied that at the time such notice was given more than two months had elapsed since appellant's counsel had been given an estimate of the cost of the transcript, and during that time no steps to perfect this appeal had been taken by either appellant or his counsel. The question, therefore, is whether, on the showing made, appellant is entitled to relief from default in failing to deposit with the clerk of the court the estimated cost of the transcript. Rule 10 of the Rules on Appeal provides that if an appellant shall fail to perform any act necessary to procure the filing of the record within the time allowed therefor, or within any valid extension of that time, and such failure is the fault of appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion. Clearly here there was no failure on the part of any court officer or any other party; and there is no showing that during the two months that elapsed after the giving of the cost estimate and before the filing of respondent's motion, any extension of time was asked by appellant or granted by any court, nor any attempt made to make arrangements with the clerk or reporter for payment thereof. Rule 5(c). Nor is any excuse offered by appellant's counsel for not taking steps to ascertain why his client had not forwarded the money requested for payment for the transcript. Also it may be noted that at the time of the hearing in this court on March 5, 1948, the money for same had not been deposited with the clerk of the superior court, though same was presented to this court and is still among the records thereof.

[3] While it has been said that there is a strong public policy in favor of hearing appeals on their merits, on the other hand a respondent is entitled to have an appellant proceed with expedition; and the burden is upon an appellant to use reasonable diligence to perfect his appeal. See Leeper v. Ginsberg, 58 Cal.App.2d 591, 595, 137 P.2d 859; Flint v. Board of Medical Examiners, 72 Cal.App.2d 844, 846, 165 P.2d 694; Whelpton v. Taylor, Cal.App., 185 P.2d 391; Caldwell v. Harvey, Cal.App., 192 P.2d 62.

Just when appellant himself returned from his out-of-state trip and received the letter of his attorney requesting payment of the estimated cost of such transcript is not made to appear; but it is apparent from his affidavit that he did not advance the money until after respondent's motion had been filed here in February, 1948, and that in the meantime he had, in effect, considered his appeal fruitless and had resigned himself to an abandonment thereof; and for all that appears his counsel had acquiesced in such conclusion.

[4] The new Rules on Appeal are designed to effect the just and speedy determination of appeals (Rule 53); and they have now been in effect long enough

for every member of the bar to take notice of their provisions and govern himself accordingly in seeking reviews by appellate courts.

We conclude that appellant has not shown a sufficient excuse for his delay in this case. Appellant's motion for relief is therefore denied, respondent's motion to dismiss the appeal is granted, and the appeal is dismissed.

PEEK and THOMPSON, JJ., concur.

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85 Cal.App.2d 361

HOWARD v. STATE et al.

Civ. 16049.

District Court of Appeal, Second District,
Division 3, California.
May 4, 1948.

1. Licenses 🔑11(5)

One who undertakes to, or does, construct, alter, repair add to substract from, improve, move, wreck or demolish a building is a "contractor" or a "builder" within meaning of the Contractor's License Law. Business and Professions Code, §§ 7026, 7028.

See Words and Phrases, Permanent Edition, for all other definitions of "Builder" and "Contractor".

2. Licenses 🔑11(5)

A painting contractor is a "contractor" within the Contractor's License Law and, hence, is required to have a state license. Business and Professions Code, §§ 7026, 7028.

3. Evidence 🔑20(1)

District Court of Appeal refused to take judicial knowledge that there is no public interest to be served by regulation of the business of painting contractors.

4. Licenses 🔑7(1)

The regulation of building trades is valid as meeting a public need. Business and Professions Code, §§ 7026, 7028; Const.Cal. art. 1, §§ 1, 11, 21; U.S.C.A. Const. art. 1, § 10; Amend. 5.

5. Constitutional law 🔑70(3)

Whether general law affords public all protection it needs against possible frauds by contractors, without necessity of regulatory legislation, in that general law permits recovery of both compensatory and exemplary damages for losses sustained through incompetency, deceit and unfair practices is for Legislature.

6. Licenses 🔑7(1), 11(5)

Contractor's License Law, expressing judgment of Legislature that prospect of having to pay damages for incompetence, fraud and breach of contract is not an adequate deterrent from wrongful practices in the building trades is a valid statute applicable to painting contractors. Business and Professions Code, § 7026, 7028, Const. Cal. art. 1, §§ 1, 11, 21; U.S.C.A.Const. art. 1, § 10; Amend. 5.

◆

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Edward T. Bishop, Jess E. Stephens, Judges.

Action by Joseph Howard against the State and others to restrain defendants from prosecuting plaintiff for violations of the Business and Professions Code. A demurrer to plaintiff's complaint was sustained without leave to amend, and plaintiff appeals.

Affirmed.

William J. Clark and David Aaron, both of Los Angeles, for appellant.

Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., both of Los Angeles, for respondent Ray L. Chesebro, City Atty.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent Perry Thomas, Deputy City Atty.

Harold W. Kennedy, County Counsel, and Edward H. Gaylord, Deputy County Counsel, both of Los Angeles, for respondents William E. Simpson, Dist. Atty., and John F. Hopkins, Deputy Dist. Atty.

Fred N. Howser, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent Frank Cordano, State License Inspector.

SHINN, Acting Presiding Justice.

Plaintiff instituted this action against the state of California and various state and county officials, seeking to restrain them from prosecuting him for violations of the Business and Professions Code, by reason of his entering into contracts as a painter for considerations other than wages. From his complaint it appears that he is recognized as a master painter in the painting trade which is, and long has been, his only means of supporting himself and his family. His business is not one that is exempted from the operation of the code. Much contract work is available to him and if he is required to work for wages his opportunity for full employment will be greatly restricted. Although he is a qualified and skilled painter he does not possess a license issued under the code, and is unable to procure one. He has been convicted in the municipal court of carrying on his business without a license, and he alleges that unless the defendants are restrained they will continue to prosecute him to the extent of preventing him altogether from carrying on his trade, except for the consideration of wages, the effect of which will be to greatly impair his ability to support himself and his family. The individual defendants demurred and the matters were assigned to, and were heard by, three judges of the superior court who constitute the appellate department of the superior court. Plaintiff's attorney stated to the court that he waived his right to amend his amended complaint; the demurrers were sustained without leave to amend and judgment was entered for the defendants. Plaintiff appeals.

The grounds of appeal are, (1) the code does not apply to the business of painting buildings, or other structures, (2) the section defining contractors is void for uncertainty, and (3) that if the act be construed to have application to the business of painters, and is not void for uncertainty, it is violative of section 10, Article I, and of the Fifth Amendment to the Constitution of the United States, and of section 1, Article I and sections 11 and 21 of Article I of the State Constitution.

By section 7028 of the code it is made a misdemeanor for any person to engage in the business or act in the capacity of a contractor without having a license therefor, unless such person is particularly exempted from the provisions of the act. The term "contractor," as used in the act, is defined in section 7026, which reads: "The term contractor for the purposes of this chapter is synonymous with the term 'builder' and, within the meaning of this chapter, a contractor is any person, except an owner who contracts for a project with a licensed contractor or contractors or a licensed architect or a registered civil engineer acting solely in his professional capacity, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith."

[1, 2] Appellant's first and second propositions will be considered together. The first clause of the section states, "the term contractor for the purposes of this chapter is synonomous with the term 'builder'" etc. Appellant quotes the common definition of builder found in 17 C.J.S., Contracts, § 11, p. 333, "a builder is one who builds, or whose occupation is that of building; specifically, one who controls or directs the work of construction in any capacity," and he says that if only builders are contractors within the meaning of the act, "This of course, would exclude one whose occupation is that of spreading pigment on the surface of a building already erected; and it must be admitted

that such definition seems, at first, to be inconsistent with the further provision that a contractor is one who, for compensation other than wages, alters, repairs, or adds to a building or structure." But this inconsistency, he argues, would not furnish a reason for disregarding the definition of "contractor" found in the first clause. In other words, he would have us give controlling effect to the first clause, which would mean that those whose business is to "build" any building, etc., would be contractors, and those whose business is to "alter, repair, add to," etc., buildings and other structures, would not be contractors unless the alterations, repairs, or additions also constituted building. We go the other way around to arrive at our interpretation. If all contractors who engage in the described work are not builders, under the common definitions of those words, they are made so by the special definition in the act, and this definition is, of course, controlling. Therefore, one who undertakes to do, or does, "construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building" etc., is a contractor and, if you wish, also a builder. There is, therefore, only one definition of contractor in the section. We do not understand appellant's contention to be that painting a structure may not be a part of the construction of it or may not alter, repair, add to or improve it. It is sufficient, therefore, to say that each of these operations might involve painting the structure, and it necessarily follows that a painting contractor is a contractor under the statutory definition.

[3, 4] Plaintiff's third proposition is based upon the blunt assertion that regulation of the business of painting contractors is not within the legislative power of the state, in that such regulation has no reasonable tendency to promote the public health, morals, safety or welfare. We are asked to hold, as a matter of judicial knowledge, that there is no public interest to be served by the regulation of that business, and thus to substitute our opinion for the judgment of the legislature. We do not know it to be a fact, but upon the contrary believe that the regulation of the building trades meets a public need.

In Hunt v. Douglas Lumber Co., 41 Ariz. 276, 17 P.2d 815, the court had under consideration a regulatory act comparable in its main features to our own. The same arguments were made there as to the claimed unconstitutionality of the act. The court held it to be valid, quoting from and approving Alvarado v. Davis et al., 115 Cal.App.Supp. 782, 6 P.2d 121, in which it was held that "the entire object of the statute is that protection of the public against fraudulent and illegal practices which has always been recognized as a distinctive characteristic of statutes which are not mere revenue measures. Levinson v. Boas, 150 Cal. 185, 193, 88 P.825, 12 L.R.A.,N.S., 575, 11 Ann.Cas. 661; Payne v. De Vaughn, 77 Cal.App. 399, 403, 246 P. 1069; Van Wyke v. Burrows, 98 Cal. App. 415, 419, 277 P. 190." A similar statute requiring contractors to procure licenses was held to be a proper police measure for the protection of the public in Dow v. United States, 10 Cir., 154 F.2d 707. To the same effect were Ross-Frankel, Inc., v. State, 179 Tenn. 320, 165 S.W.2d 590, and State ex rel. Reynolds v. St. Petersburg, 133 Fla. 766, 183 So. 304, 118 A.L.R. 667. We do not agree that there is less reason for the regulation of the business of painting contractors than those of other contractors who employ means, other than painting, by which a structure is wholly fabricated, or is repaired, altered or improved, so as to effect a change in its condition to one substantially different. The purpose of the act is to guard the public against the consequences of incompetent workmanship, imposition and deception. In order to procure a license an applicant is required to make a showing of good character and of a degree of experience and general knowledge of the building, health, safety and lien laws of this state, and of the rudimentary administrative principles of the contracting business, as the board deems necessary for the safety and protection of the public. (Secs. 7068, 7069.) Willful breaches of contract and other willful and fraudulent acts, causing material injury to another, furnish grounds for suspension or revocation of a license. (Secs 7109–7119.) There is no less opportunity for dishonesty in the painting trade than in the other building trades. If there is no appreciable likelihood of it, or none at all, the legislature has not recognized either of those conditions. There is good reason, also, for distinguishing between painting by contract and by day labor, since in the former, control of the work is solely with the contractor, while in the latter the work is under the control of the employer, who may direct that it be done as he wishes to have it done.

Among the many cases cited by appellant we have found none that supports his position. He cites Howard v. Lebby, 197 Ky. 324, 246 S.W. 828, 30 A.L.R. 830, as directly in point. The court was considering the validity of a contract of a painting contractor who was unlicensed under a local ordinance. It was held that the ordinance was a revenue and not a regulatory measure and it was stated, arguendo, that the business was one that could not be regulated or prohibited under the police power. While broad language was used in the opinion the court did not decide what the legislative body could not lawfully have done but only what it had done. The conclusion was that non-compliance with a licensing ordinance intended solely as a revenue measure did not invalidate the plaintiff's contract. Nothing more was decided. The same court had previously upheld a licensing act regulating the occupation of plumbing in cities of the first class, upon the ground that "the purpose of the act was to protect the public generally from incapacity, ignorance, want of skill, or fraud" etc. (City of Louisville v. Coulter, 177 Ky. 242, 197 S.W. 819, 823, L.R.A.1918A 811.

[5, 6] Finally, appellant argues that the general law affords the public all the protection it needs against possible frauds in the business in which he is engaged; that damages both compensatory and exemplary, may be recovered for losses sustained through incompetency, deceit and unfair practices, and that regulatory legislation was uncalled for. This, however, was a matter for the legislature. The statute in question expresses the judgment of the legislature that the prospect of having to pay damages for incompetence, fraud and breach of contract, is not an adequate deterrent from wrongful practices in the building trades. It is a valid statute, and it applies to painting contractors.

The judgment is affirmed.

WOOD, J., and VALLÉE, J., pro tem., concur.

85 Cal.App.2d 290

PEOPLE v. FOOGERT.

Cr. 2056.

District Court of Appeal, Third District, California.

April 30, 1948.

Hearing Denied May 27, 1948.

1. Criminal law 🔑147

Where proof showed that on January 13, 1943 an automobile was stolen and that on November 27, 1946 the defendant was in possession of such automobile which he was concealing in a private garage, the act of concealment was a violation of the statute within the three-year period prior to the filing of indictment. Pen.Code, § 496bb.

2. Receiving stolen goods 🔑8(3)

Evidence sustained conviction of concealing in San Joaquin county of automobile knowing it to have been stolen. Pen. Code, § 496bb.

3. Criminal law 🔑881(1), 1186(4)

In prosecution for willfully concealing automobile in San Joaquin county knowing it to have been stolen where verdict of guilty was in substantially same language as second amended indictment filed at the conclusion of trial except that verdict failed to state date of commission of offense and place as charged in indictment and no objection was made to verdict when returned, verdict was sufficient and in any event, failure of verdict to be more specific, did not prejudice substantial rights of defendant. Pen.Code, § 496bb; Pen.Code, § 1161; Const. art. 6, § 4½.

4. Criminal law 🔑1186(4)

The purpose of art. 6, sect. 4½ of the constitution is to require a reviewing court to declare as a matter of law whether the error found to be present has prejudiced the substantial rights of the parties charging the error. Const. art. 6, § 4½.

5. Criminal law 🔑1040

An objection that verdict contained the phrase "and/or" between the phrase "did willfully unlawfully and feloniously conceal, withhold" and the phrase "aided in the concealment and withholding from the owner" etc., could not be raised for first time on appeal. Pen.Code, § 1161.

6. Receiving stolen goods 🔑9(2)

In prosecution for concealment of automobile knowing it to have been stolen, where there was no evidence that would support finding that defendant stole automobile and there was evidence which supported a contrary conclusion, an instruction that it was necessary for People to prove beyond a reasonable doubt and to a moral certainty that automobile had been stolen but that it was not necessary to prove who stole automobile, if in fact it was stolen, was proper, since it must be assumed that jury found in accordance with the only evidence before them. Pen. Code, § 496bb.

◆

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Phil Foogert was convicted of concealing an automobile knowing it to have been stolen, and from such conviction and an order denying his motion for a new trial he appeals.

Affirmed.

J. B. Freeman, of Stockton, for appellant.

Fred N. Howser, Atty.Gen., and Doris Maier, Deputy Atty.Gen., for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment pursuant to a verdict of the jury finding him guilty of a violation of section 496bb of the Penal Code, and from an order denying his motion for a new trial. The second amended indictment under which the defendant was convicted specifically charged that on or about November 27, 1946, he "did wilfully, unlawfully, and feloniously conceal, withhold, and/or aided in the concealment and withholding from the owner of one 1940 Chevrolet Automobile, which had previously been stolen, and said defendant knowing the said 1940 Chevrolet Automobile to have been stolen."

Defendant was tried upon three counts as charged originally in an indictment found by the Grand Jury of San Joaquin County as follows: The first, a violation of section 503 of the Vehicle Code, driving an automobile without the owner's consent, the second, a violation of section 496bb in that he received the car in San Joaquin county knowing it to have been stolen, and the third, the crime for which he was convicted, to wit: concealment. At the conclusion of the state's case an amended indictment was filed in which counts one and two of the indictment were dismissed leaving only the third. At the conclusion of the trial and apparently for technical reasons, as suggested by the court, the second amended indictment above quoted was filed charging but one count, that of concealment.

Defendant does not argue that the evidence is insufficient, except as it relates to the statute of limitations and venue. However, because of the rather unique factual background and in order that the question may be more readily understood we have chosen to summarize at some length the evidence as it appears in the transcript.

On January 13, 1943, a 1940 Chevrolet business coupe owned by one Joe Foreman was stolen from a parking lot located in Wilmington, California. The car was painted gray and had a spotlight mounted on the frame at the left side of the windshield. There was but one seat although there was space where an additional or rear seat could be installed if so desired. On November 27, 1946, nearly four years after the theft in Wilmington, a car was discovered in a private garage in Stockton. In January, 1947, when a member of the highway patrol called upon

Foreman to identify the car he could only state that it could be his, that because of the changes which had been made he could not identify it positively as such but that it was the same year and model. It was then painted a dark blue, the hole where the spotlight had been mounted was plugged and painted over and a rear seat had been placed in the car. Foreman further testified he had given no one permission to drive the car.

The owner of the private garage in Stockton testified that he knew the defendant and had rented the garage to him in August, 1946, at which time defendant stated he desired to rent it for a car belonging to his brother and which had been stored for two years. This witness further testified that for two and one-half months prior to the time the officers looked at it, the car had not been out of the garage but after their examination it had been moved.

Officer Kennedy of the highway patrol testified that during an examination of the car at the garage he had a conversation with defendant who stated the car was his and that the evidence of ownership was in his possession and that he had purchased it from a veteran.

Emma C. Thiebalt, supervisor of the Chevrolet Theft Bureau for General Moters testified that when Chevrolet automobiles are assembled a record is kept of the numbers placed on various parts of the car; that such numbers were sent to her and kept as a part of the permanent record of each car. She testified concerning the numbers assigned to certain parts of two 1940 Chevrolet business coupes, which cars, if properly assembled, would have had the parts as numbered.

W. A. Snare, an employee of the National Automobile Theft Bureau testified that he was familiar with the factory assembly records, which showed the various numbers on the units assembled to make a complete automobile; that the Chevrolet car he examined in Los Angeles in January 1947 was a combination of two cars—the motor of another car having been placed in and combined with the one examined, and that the serial number of the latter, which was located under the floor mat, had been tampered with.

A. H. Whitmore, an employee of the Department of Motor Vehicles of this state testified that the records of that department showed that in 1942 Joe Foreman was the owner of a Chevrolet coupe having a certain serial number; that the department records pertaining to a second Chevrolet coupe having a different serial number showed the same was registered to one Bert N. McGowen in 1941, the legal owner being Savage-Haldeman Co. of Los Angeles. On June 16, 1942, that company released its equity as legal owner, McGowen released as registered owner and Phil Foogert became the registered owner with Greene-Haldeman as legal owner. The vehicle was so registered in 1943 and a license issued, and was registered in 1944 in the same manner. This witness also testified that in 1942 both Greene-Haldeman Co. and Foogert released their respective equities but that the certificate was not received in the office of the Department of Motor Vehicles until February 10, 1947.

Sergeant Barron of the highway patrol testified that following officer Kennedy's investigation he went to the garage where the car had been stored but that it was not there. He then sought the defendant and was informed by him that the car had been taken to Los Angeles. The defendant also stated to him that in 1944 he sold the car to one Harwood for $550, $100 of which was still owing, and that when Harwood, who was in the army, went overseas he returned it to defendant for safe-keeping. Defendant further stated he had bought the car originally as a wreck and had purchased a motor from Greene-Haldeman Co., that the new motor did not have a number on it and that he stamped on the block of the motor the number taken from the pink slip of the salvaged McGowen car. At a subsequent conversation defendant told Sergeant Barron he did not understand why San Joaquin had jurisdiction when Los Angeles had agreed not to prosecute, and that no one had ever seen him operate the car.

Officer Henderson, also of the highway patrol, testified that he had investigated an accident near Palm Springs on February 5, 1943, involving a car registered to McGowen and that the damages to said car were irreparable.

Elvira Johnson testified that on February 4, 1942, she had charge of the claims department and records for the Dixie Fire Insurance Company; that she handled an insurance claim regarding the McGowen car; that the car was a total loss and was sold for salvage, the company paying off McGowen and obtaining the pink slip from him.

Captain Stilson of the Los Angeles Police Department testified that on December 10, 1946, the Foreman car was recovered, that it had no license plates and that a different motor was in the car than at the time of its theft.

The sole witness for defendant, one George Williams, testified he had known the defendant for some time and while defendant was operating the G. & P. Automobile Hospital in Los Angeles, which was a general automotive repair service employing approximately fifty people; that at the time the witness was loan manager of the Seaboard Finance Company, that during 1942 and 1943 the G. & P. Garage had purchased, on bids, some 25 or 30 wrecked automobiles from the finance company. The witness further testified that during the first two or three months of 1943 he had borrowed from the garage and drove for several days a car of the same year and model and general description but could not say it was the 1940 Chevrolet here in question. Upon such evidence the case was submitted to the jury which returned a verdict of guilty as previously mentioned.

Appellant predicates his appeal primarily upon the grounds that the evidence is insufficient to support the judgment for two reasons, first, because even if appellant had committed the crime as charged (concealment) the same is conclusively shown to have been committed more than three years before the finding of the indictment, and therefore the statute of limitations had run, and second, the crime, if committed by appellant, likewise is conclusively shown to have been committed in Los Angeles and not in San Joaquin county, and therefore the latter county was without jurisdiction to hear the case.

With reference to the first question defendant contends that the crime comes within the provisions of section 800 of the Penal Code; that the statute is jurisdictional (People v. McGee, 1 Cal.2d 611, 613, 36 P.2d 378) and that the burden is cast upon the state to show that the crime charged was committed within the period of limitations. (People v. James, 59 Cal. App.2d 121, 122, 138 P.2d 30). We are entirely in accord with such statement of the law but we cannot agree with appellant's contention that the evidence conclusively shows that the statute has run. It is his argument that as it is undisputed the car was stolen in January 1943, therefore the testimony of the witness Williams that he borrowed from the G. & P. Automobile Hospital a car of the same year and model during the first two or three months of 1943, is conclusive that some time prior to such use by Williams, and probably during the first two or three months of that year, the Foreman car had been changed in appearance and structure and the crime of concealment completed as of that date.

It must be noted that Williams did not testify that the car he borrowed and drove was the Foreman car. On cross-examination he specifically stated he did not know if it was that particular car and that he had no recollection of the license number or other identification. Additionally he testified he did not borrow the car from defendant personally but from the G. & P. Automobile Hospital, that approximately fifty people were employed there, and that when he returned to get his own car after its repairs were finished he merely left the borrowed car at the garage.

Such evidence does not necessarily establish the fact that defendant had either possession or knowledge that the car was stolen in 1943 or that the mechanical or structural changes were made prior to that date. At most this evidence would raise only a factual question for determination by the jury and which by its verdict it decided against defendant.

[1] The only dates which appear to be conclusively established are (1) the date

of the theft of the Foreman car and (2) the date charged in the amended indictment, to wit: November 27, 1946, when appellant was in possession of a stolen 1940 Chevrolet automobile which he was concealing in a private garage in Stockton, California. The latter act was clearly a violation of the statute and within the three year period to the filing of the indictment.

By reason of the conclusion we have reached in regard to the foregoing, particularly the validity of the date of November 27, 1946, as charged, it becomes unnecessary to consider the specific question raised by defendant as to whether or not concealment is or is not a continuing crime. The evidence here does not merely show a single act of concealment and a continued withholding of the car from the owner as a result thereof, but specific affirmative acts of concealment calculated to conceal the car from its owner at the time charged in the indictment.

[2] Defendant's next contention that there is no evidence that the crime was committed in San Joaquin county must of necessity fall for the same reason and that it also is contrary to the implied findings of the jury. There is ample evidence of the concealment of the car in San Joaquin county—its storage in a private garage in a camouflaged state, the failure to register the vehicle, contradictory statements by defendant regarding its ownership, and its disappearance immediately following its discovery by highway patrolmen were all acts or evidence of acts of concealment within that county (See People v. McGinnis, 55 Cal.App.2d 931, 132 P.2d 30; 53 C.J. 507) which gave the court jurisdiction. (Penal Code section 781.)

Defendant next attacks the verdict as being "insufficient, defective, illegal and ambiguous". Specifically the verdict states: "We, the Jury in the above entitled cause, find the defendant, Phil Foogert, guilty of a violation of Section 496bb of the Penal Code of the State of California, a felony, in this that the said Phil Foogert did willfully, unlawfully and feloniously conceal, withhold and/or aided in the concealment and withholding from the owner of one 1940 Chevrolet Automobile, which had previously been stolen, and said defendant, knowing the said 1940 Chevrolet Automobile to have been stolen, in violation of Section 496bb of the Penal Code of the State of California, a felony."

[3] It is his contention that by such verdict the jury did not find on two of the main issues presented: (1) when the crime was committed—that is, either on November 27, 1946 as contended by the prosecution or "as charged" in the amended indictment or during the first part of 1943 as contended by defendant and (2) where the crime was committed—in San Joaquin county, in accordance with the state's contention, or Los Angeles county, as contended by defendant. It is defendant's further argument in this regard that in either case, whether as to place or time, had the jury merely confined itself to a verdict of "guilty" or "guilty as charged" such difficulties might have been obviated. But, he says, having failed to follow either course and having gone into detail as to its findings but not completely enough to cover the essential elements of the issues of the offense as presented to it, the verdict and resulting judgment must be set aside upon the authority of People v. Tilley, 135 Cal. 61, 67 P. 42, and People v. Murray, 42 Cal.App.2d 209, 108 P.2d 748.

In the Tilley case a judgment based upon a verdict of "* * * Guilty of receiving stolen property" was reversed because of the insufficiency of the verdict. The court in giving the reason for its conclusion stated, 135 Cal. at pages 63, 64, 67 P. at page 43: "Under the laws of this state, there are two species of the crime of receiving stolen property, namely, that of receiving such property, knowing it to be stolen, for one's 'own gain,' as is charged in the information, and that of receiving it with intent 'to prevent the owner from again possessing his property.' And there is nothing in the verdict from which it can be determined of which of these crimes, if either, it was the intent of the jury to convict the defendant." Such a condition is not presented in the instant case. Although the later Murray case cited the Tilley case, the citation appears solely for the purpose of showing that the form of verdict returned, finding the defendant [42 Cal.App.2d 209, 108 P.2d 751] "guilty of * * * Receiving Stolen Property, as charged in the Information" is the form which the Supreme Court by dictum in the Tilley case, stated would have cured the otherwise invalid verdict.

In the more recent case of People v. McKinney, 71 Cal.App.2d 5, 161 P.2d 957, 961, the jury, by separate verdicts, found the defendants "* * * guilty of re-receiving stolen property" and "* * * guilty of conspiracy to receive stolen property." Upon appeal the defendants therein raised the precise issue presented by appellant herein and likewise cited and relied upon the Tilley and Murray cases, supra, arguing that such verdicts lacked the essential elements of the crime charged. The court in determining the questions thus raised observed that although such verdicts were not in the form approved by section 1151 of the Penal Code nevertheless under section 1404 of that code unless the form or error attacked actually prejudiced the defendant such error would not render the verdict invalid.

Here the second amended indictment which was filed at the conclusion of the trial distinctly charged defendant with the commission of the crime of concealment in substantially the same language as the verdict except that in the verdict the date of the commission thereof and the place of commission as charged in the indictment were omitted. And it has been held that if the verdict expresses an intent to convict for the crime charged, the form of the verdict is not material. (People v. Mercado, 59 Cal.App. 69-74, 209 P. 1035.)

Also it is to be noted that the court thoroughly instructed the jury on the nature and elements of the offense and such instructions coming after the elimination of all but one count, it is difficult to see wherein defendant was prejudiced. Substance is added to such conclusion by reason of the fact that no objection was taken by defendant to the form of the verdict when it was returned as provided in section 1161 of the Penal Code (see People v. Gayle, 202 Cal. 159, 163, 259 P. 750,) nor does the record show that the question was raised on the motion for a new trial. To the contrary it would appear that the question is raised for the first time on appeal, a practice likewise condemned in the McKinney case, supra. (See also Johnson v. Visher, 96 Cal. 310, 31 P. 106; People v. Morley, 8 Cal.App. 372, 376, 97 P. 84.)

[4] The case of People v. Tilley, supra, preceded section 4½ of Article VI of the Constitution, and therefore the court was bound by the rules of strict interpretation then prevailing and that injury is presumed from error. It should be noted further that the rule in that case has since been questioned on these grounds. (People v. Chavez, 11 Cal.App.2d 388, 53 P.2d 1020; People v. McKinney, supra.) The purpose of Article VI, section 4½ of the Constitution is to require a reviewing court to declare as a matter of law, whether the error found to be present has prejudiced the substantial rights of the party charging the error. (Tupman v. Haberkern, 208 Cal. 256, 280 P. 970.) It necessarily follows where as here mere technical error has been established only academically, and in addition there is a complete lack of any showing of prejudice, we must conclude that the contention so raised by defendant is not well taken.

Further error is charged by defendant in the use of the words "and/or" in the verdict, which it is alleged render the verdict ambiguous, and necessitates a reversal. In support thereof defendant has cited In re Bell, 19 Cal.2d 488, 122 P.2d 22. The defendants in the Bell case were charged with violation of a local anti-picketing ordinance, certain sections of which were found valid while certain other sections were found to be unconstitutional. It is true, as defendant contends, that the use of the phrase "and/or" was criticized in that case since it could not be ascertained whether defendants were tried and convicted of a violation of the valid or invalid portions of the ordinance. However, that proceeding being one in habeas corpus, the burden fell upon defendants therein to show that they were not tried and convicted of violating the valid part of the statute, and having failed to do so the writ was discharged and the petitioners remanded to custody. Obviously a like situation is not presented in the instant appeal, and therefore the portions of the Bell opinion relied upon by defendant herein are wholly inapplicable to the questions here presented.

[5] Here the phrase "and/or" is placed between two phrases in the indictment and verdict which are for all practical purposes synonymous and therefore there could be no ambiguity either in the verdict or the intent of the jury, and while an indictment in such form might possibly be demurrable (See People v. Tomlinson, 35 Cal. 503) that course was not followed by defendant nor was objection made to the form of the verdict in the trial court, hence such objection cannot be raised for the first time on appeal.

Defendant's final attack is directed at the following instruction given to the jury by the trial judge:

"It is necessary for the People to prove beyond a reasonable doubt and to a moral certainty that the automobile in this case was stolen.

"However, it is not necessary to prove who stole the automobile if in fact this automobile was stolen."

The cases cited by defendant on this question (People v. Jacobs, 73 Cal.App. 334, 238 P. 770 and People v. Bausell, 18 Cal.App.2d 15, 62 P.2d 774) dealt with the offense of receiving stolen property and not with the offense of concealment as charged in the present case. It must be noted further that in both of the cited cases the court enunciated the rule that there must be some evidence that the property was stolen by some person other than the defendant charged with illicitly receiving it—this for the reason that the accused could not be both the thief and the receiver.

In People v. Jacobs this requirement was said to have been sufficiently satisfied by the defendant's own statements. The court stated in this connection at page 341 of 73 Cal.App., at page 773 of 238 P.: "We are to inquire, then, what evidence there was in the present case to show that the car was not stolen by appellant. He himself accounted for his whereabouts on the evening of the theft in such a manner as to demonstrate, if the jury believed him, that he was not the thief. He, in effect, therefore denied that he was the thief."

Turning to the record herein we find evidence contained in statements by defendant to police officers that he purchased the motor from a Los Angeles dealer; that the car was his; that he bought it from a veteran, and his statement to the owner of the garage where it was stored that the car belonged to his brother, which more than satisfies the evidentiary requirement as stated in the cases cited by defendant.

While there is thus ample evidence upon which the jury could have concluded that the appellant did not steal the car, this fact does not obviate the objection raised by the appellant that a finding by the jury that the appellant did steal the car, would be consistent with the language of this instruction, which merely negatives the necessity of the prosecution identifying the thief.

The problem raised presents the question of whether it is necessary to show under a prosecution for violation of Penal Code section 496bb for concealing stolen property that the defendant was not the thief. Under the rule laid down in the receiving stolen property cases it is clearly not required that such fact if essential must be proved beyond a reasonable doubt, but only that there must be some evidence tending to show the fact.

[6] While in a proper case it might be held that the thief could also be guilty of a violation of section 496bb by reason of affirmative acts of concealment occurring subsequent to the theft and constituting a new and distinct offense on the analogy that a thief may be guilty of driving the car without the owner's consent as an offense separate from the theft (See People v. Cuevas, 18 Cal.App.2d 151, 63 P.2d 311), in view of the entire record here it is unnecessary to decide the point. There is no evidence in the record which would support a finding that the defendant stole the car. There is evidence, above referred to, which supports a contrary conclusion. Since the jury would not have justified in finding to the contrary, it must be assumed

that they found in accordance with the only evidence before them. It follows that the defendant was not prejudiced by the instruction given although it is not happily worded or as complete as it might have been.

For the foregoing reasons the judgment and order appealed from are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; SCHAUER, J., dissenting.

85 Cal.App.2d 109

LINN et ux. v. WEINRAUB et al.

Civ. 16155.

District Court of Appeal, Second District, Division 1, California.

April 20, 1948.

1. Appeal and error 🔑803

Dismissal of an appeal is in effect an "affirmance" of a judgment or order appealed from unless dismissal was expressly made without prejudice to another appeal. Code Civ.Proc. § 955.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmance".

2. Appeal and error 🔑14(1)

Following order of dismissal of an appeal from judgment of the District Court of Appeal, no second appeal from the same judgment would lie. Code Civ.Proc. § 955.

3. Appeal and error 🔑14(1)

Order denying plaintiff's motion to fix bond on appeal and granting defendant's motion for an order denying a stay of execution could not be considered on second appeal from the same judgment following an affirmance.

4. Appeal and error 🔑110

No appeal lies from an order denying motion for a new trial.

5. Attorney and client 🔑140

Unless attorney's fees are specifically provided by statute, the mode and method of compensation of attorneys is left to agreement of the parties. Code Civ.Proc. § 1021.

6. New trial 🔑9

Under lease providing that prevailing lessor should be allowed reasonable attorney's fees to be fixed by court and included in any judgment recovered, new trial as to attorney's fees for services rendered after judgment was improper as going beyond lease provisions and granting relief contrary to agreement of parties in absence of statute.

Appeal from Superior Court, Los Angeles County; Ben R. Ragain, Judge.

Action by Milton N. Linn and Esther Linn, his wife, a copartnership doing business as Angeles Apparel Company, against Aaron Weinraub, Murray Randolph, Murray Randolph & Company, agents, and others, upon a lease. From the judgment, and from orders denying plaintiff's motions to fix bond on appeal and for new trial granting defendants' motion for an order denying a stay of execution, and granting defendants' motion for a new trial for purpose of fixing attorney's fees, plaintiffs appeal.

Appeal from judgment and orders denying plaintiffs' motion for new trial, and motion to fix bond and denying stay of execution, dismissed. Order granting new trial for purpose of fixing attorney's fees reversed.

William H. Haupt and Ben T. Weinstein, both of Los Angeles, for appellants.

Marvin Wellins and Don L. Gilman, both of Los Angeles, for respondents.

BARTLETT, Justice pro tem.

The appeal in this action was taken from the following proceedings in the trial court:

1. A judgment entered in the action on December 23, 1946, in favor of the defendants and respondents and against the plaintiffs and appellants.

2. An order made on December 24, 1946, in which the court denied plaintiffs' motion to fix bond on appeal.

3. An order made on the 24th day of December, 1946, in which the court granted the motion of the defendants for an order denying a stay of execution.

4. A minute order made on the 11th of March, 1947, denying plaintiffs' motion for a new trial.

5. A written order made and filed March 12, 1946, denying plaintiffs' motion for a new trial and granting defendants' motion for a new trial on the ground of newly discovered evidence for the sole purpose of fixing and allowing to the defendants an additional sum for attorneys' fees.

This appeal which we are considering is the second appeal which appellants have filed from the same judgment of December 23, 1946. This court dismissed this prior appeal on March 24, 1947, Civil No. 15868, L.A. 20028. The order of dismissal was not made without prejudice to another appeal.

[1] Section 955 of the Code of Civil Procedure reads as follows: "The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal". See also Thomas v. Superior Court, 6 Cal.App. 629, 92 P. 739; Howard v. Howard, 87 Cal. App. 20, 261 P. 714; Title Ins. & Trust Co. v. Wilson, 87 Cal.App. 143, 261 P. 767; Smith v. Superior Court, 21 Cal.App.2d 160, 69 P.2d 176.

[2] As the effect of the order of dismissal herein was affirmance of the judgment, no second appeal from the same judgment can be maintained.

[3, 4] It is manifest that the matters involved in the orders of December 24, 1946, have now become moot and also that no appeal lies from an order denying a motion for a new trial.

This leaves before us for determination the sole question of the order granting respondents' motion for a new trial on the issue of attorneys' fees. The court's order was that respondents' motion for a new trial "be and the same is hereby granted for the sole purpose of fixing and awarding to the defendants an additional sum for the reasonable value of legal services rendered by the attorneys for the defendants herein". An examination of the affidavits upon which the motion was based, and also an examination of the recital of the services rendered set forth in respondents' brief, from page 20 to page 23, inclusive, shows that all of the services for which additional fees were asked were rendered after the date of the judgment. The judgment had awarded respondents the sum of $250.00 as attorneys' fees, which award was made by virtue of the following provisions of the lease which was the subject of the action: "18th. In case the lessor prevails in any suit under this lease, there shall be allowed to the lessor to be included in any judgment recovered, reasonable attorneys' fees to be fixed by the court". In the case before us the lessor prevailed, and in the judgment recovered he was awarded attorneys' fees. That judgment is now final.

[5] It is the holding in Bank of America v. Moore, 18 Cal.App.2d 522, 64 P.2d 460; Los Angeles Trust & Savings Bank v. Ward, 197 Cal. 103, 239 P. 847; and Farmers' & Merchants' Nat. Bank v. Bailie, 138 Cal.App. 143, 32 P.2d 157, that unless attorneys' fees are specifically provided for by statute the mode and method of compensation of attorneys is left to the agreement of the parties. Such also is the express provision of section 1021 of the Code of Civil Procedure.

As there is no statutory support for an award of attorneys' fees in this case, the quoted provisions of the lease govern the court in the matter. Respondent makes the statement: "It has been established that attorneys' fees may be allowed after entry of judgment in the trial court" and cites four cases. None of these cases is applicable here. Schallert-Ganahl Lumber Co. v. Neal, 94 Cal. 192, 29 P. 622 was an action to foreclose a mechanic's lien and the question of attorney's fees in such cases is governed by a special statute, section 1195, Code of Civil Procedure. The matter of the allowance of attorney's fees for services rendered after judgment was not involved at all in Thrasher v. Moran, 146 Cal. 683, 81 P. 32, or in Beckman v. Skaggs, 61 Cal. 362. Harron v. Harron, 128 Cal. 303, 60 P. 932, was a divorce case where attorney's fees were allowed in accordance with the provisions of section 137 of the Civil Code, for services to be rendered for the wife in the future.

[6] Respondents themselves cite Viner v. Untrecht, 26 Cal.2d 261, 158 P.2d 3, as authority for the proposition that by reason of the provisions of the lease, attorneys' fees are recoverable. However, the court, in granting a new trial as to attorneys' fees for services rendered subsequent to the judgment, erred in going beyond the provisions of the lease and granting relief contrary to the agreement of the parties as therein expressed.

For the foregoing reasons, it is ordered that the appeal from the judgment be dismissed; and that the appeals from those certain orders made on the 24th of December, 1946, be dismissed; and that the attempted appeal from the orders denying plaintiffs' motion for a new trial be dismissed. The order granting defendants' motion for a new trial for the sole purpose of fixing and allowing defendants additional sums for attorneys' fees is reversed.

DORAN, Acting P. J., and WHITE, J., concur.

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85 Cal.App.2d 348

PEOPLE v. PUTER.

Cr. 4195.

District Court of Appeal, Second District,
Division 2, California.

May 4, 1948.

1. Jury 🔑29(6)

Where defendant, his attorney, and deputy district attorney who was prosecuting case, joined in a stipulation that a jury was waived on plea of not guilty and on plea of not guilty by reason of insanity, trial by jury was properly waived by defendant in manner prescribed by the Constitution. Const. art. 1, § 7.

2. Criminal law 🔑625

The existence of a "doubt" as to a defendant's sanity within meaning of provision of Penal Code respecting inquiry into defendant's sanity, means a doubt created in the trial judge's mind from a consideration of all facts and circumstances which may be disclosed. Pen.Code, § 1368.

See Words and Phrases, Permanent Edition, for all other definitions of "Doubt".

3. Criminal law 🔑570(3), 625

Order committing defendant to hospital for insane prior to time when he committed alleged forgeries and uttered fictitious checks, was not conclusive on question of defendant's criminal responsibility in prosecutions for forgery and uttering fictitious checks, wherein defendant had interposed defense of not guilty by reason of insanity, nor was it conclusive on question of defendant's ability to conduct his defense in a rational manner, though defendant had never thereafter been judicially declared sane. Pen.Code, §§ 1367, 1368.

4. Criminal law 🔑625

In prosecution of one who had once been committed to state hospital for the insane, section of the Penal Code dealing with trial of question of insanity and applying only to cases where person confined in a state hospital has been found not guilty of the offense charged by reason of insanity, was not applicable. Pen.Code, § 1026.

5. Criminal law 🔑625

In prosecution of one who had previously been committed to state hospital for the insane, sections of the Penal Code dealing with inquiry into insanity of a defendant before trial or after conviction, were not applicable. Pen.Code, §§ 1367–1372.

6. Criminal law 🔑981(2)

If any person has been convicted of a crime and after conviction has been committed to a state hospital, he is not entitled to a judicial determination of his restoration to sanity following certification by superintendent of hospital that he is sane.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Robert Chelsea Puter was convicted of forgery and uttering fictitious checks after two prior felony convictions, and he appeals.

Judgment affirmed.

Robert C. Puter, in pro. per.

Fred N. Howser, Atty. Gen., and James A. Doherty, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant was charged in three informations with a total of eleven counts of felony, four of forgery and seven of violating section 476a of the Penal Code, uttering fictitious checks. In each information he was charged with two prior felony convictions,—one of forgery, the other of violating section 476a of the Penal Code. The three informations were consolidated and tried together.

Appellant entered a plea of not guilty to each count and a plea of not guilty by reason of insanity and denied the prior convictions. Three alienists were appointed by the court to examine the defendant and report as to his sanity. Trial by jury was waived by the defendant, his attorney and the district attorney as to all issues. By stipulation the cause was submitted on the evidence received at the preliminary examination and it was further stipulated that the reports of the alienists should be considered as evidence on the question of appellant's sanity. The cause was tried, the reports of the alienists were presented and filed, the court found appellant guilty on all counts, found the allegations of prior convictions to be true and found that defendant was sane when each of the several offenses was committed and sane at the time of trial. A motion for new trial was made and denied and judgment and sentence were pronounced against appellant. He appeals from the judgment only.

Appellant was represented by counsel throughout the proceedings in the superior court to and including the pronouncement of judgment. He prosecutes this appeal on his own behalf. He does not question the sufficiency of the evidence. It need only be said that it sustains his conviction on each count and the truth of the allegations of his prior convictions.

[1] Appellant contends that his waiver of a trial by jury was irregular and ineffective for the reason that a paper signed by him in which he authorized his attorney to inform the district attorney and the court that he would consent to a trial without a jury was filed out of his presence on the day before the case was called for trial. The paper did not purport to be a waiver but was filed only for the information of the district attorney and the court in order that a jury would not be in attendance at the trial when the case was called. A trial by jury was waived in the manner provided in section 7 of Article I of the Constitution. Appellant, his attorney and the deputy district attorney who was prosecuting the case joined in a stipulation that a jury was waived on the plea of not guilty and on the plea of not guilty by reason of insanity. A waiver by all parties is clearly expressed in the transcript and no irregularity appears.

There is nothing in the record to indicate that appellant was induced to waive a jury by any promise or understanding that the question of his sanity would be investigated prior to the trial.

[2] Insofar as the determination of appellant's sanity is concerned we find from the record that the proceedings were had as required by law. Since appellant had once been declared insane by a judicial proceeding he contends that because he had never thereafter been judicially declared sane he should not have been prosecuted nor convicted on the charges contained in the information. He relies on sections 1367 and 1368 of the Penal Code. Section 1368 of the Penal Code provides that if at any time during the pendency of the action and prior to judgment a doubt arises as to the sanity of the defendant the court must order the question of sanity to be determined by a trial by the court without a jury, or with a jury if one be demanded. The existence of a doubt as to defendant's sanity means a doubt created in the mind of the trial judge arising from a consideration of all the facts and

circumstances which may be disclosed. (People v. Gilberg, 197 Cal. 306, 310, 240 P. 1000; People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 124 A.L.R. 1123; People v. Lindley, 26 Cal.2d 780, 789, 161 P.2d 227.) The court had before it the fact that appellant at one time had been committed to the Mendocino State Hospital, the fact that in the instant case he entered his plea of not guilty by reason of insanity, and the facts and opinions set forth in the reports of the alienists. The court also observed appellant during the trial, listened to his evidence which covers several pages of the transcript, and examined several documents written by appellant in support of his claim of insanity. From the evidence and from observation of appellant and his conduct during the trial the court was able to form an opinion as to appellant's mental condition. The court stated that appellant was "sane, clear and logical" and that his explanations of the forgeries were "not the wanderings of an insane mind." At another point the court stated "* * * inasmuch as the question has been raised, I cannot say that at this time any doubt has arisen in my mind as to the present sanity of the defendant."

[3] The order committing appellant to Mendocino is not conclusive on the question of criminal responsibility or on his ability to conduct his defense in a rational manner. (People v. Gilberg, 197 Cal. 306, 320, 240 P. 1000; People v. Willard, 150 Cal. 543, 554, 89 P. 124.)

[4] Section 1026 of the Penal Code is not applicable since it applies only to cases where the person confined in a state hospital has been found not guilty of the offense charged by reason of insanity. Appellant was not committed to Mendocino upon a finding of not guilty by reason of insanity but upon a determination made during a trial in San Francisco to the effect that he was insane.

[5, 6] Nor are sections 1367 to 1372 of the Penal Code applicable to this case. If, pursuant to those sections, defendant is received into a state hospital he is required by section 1372 to be detained until he becomes sane, and when that event occurs the superintendent must certify that fact to the sheriff and the district attorney of the county. The sheriff is required to bring the defendant without delay from the state hospital and place him in custody until he is brought to trial or judgment or is legally discharged. This appears from the record to have been the procedure followed upon appellant's release from Mendocino. In such a case the statute does not require that the certificate of sanity "be in any particular form or that it be produced in court as a prerequisite to the right to proceed to trial." (People v. Lindley, 26 Cal. 2d 780, 788, 161 P.2d 227, 231.) If any person has been convicted of a crime and after conviction has been committed to a state hospital he is not entitled to a judicial determination of his restoration to sanity following certification by the superintendent of the hospital that he is sane. (In re Phyle, 30 Cal.2d 838, 842, 186 P.2d 134.)

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

85 Cal.App.2d 327

SCOTT v. CITY OF LOS ANGELES et al.

VERNAND v. SAME.

Civ. 16229, 16230.

District Court of Appeal, Second District, Division 1, California.

May 4, 1948.

Rehearing Denied May 25, 1948.

Hearing Denied July 1, 1948.

1. Officers 🔑99

Waivers by public officers and employees of full amount of salary as fixed by statute or ordinance may be upheld.

2. Appeal and error 🔑989

Where record discloses substantial evidence in support of trial court's finding of fact, appellate court may not attempt a further review of the evidence, and finding must be sustained regardless of fact that record also contains conflicting evidence which if believed would support appellants' contentions.

3. Municipal corporations ⚷186(6)

Evidence supported finding that city policemen and firemen were not induced to accepting cut in salary during years 1932 to 1936 as result of fraudulent representations by city authorities that city did not have sufficient revenue to enable it to retain force and pay them full salaries fixed by initiative ordinance, so as to authorize recovery of wages withheld.

4. Limitation of actions ⚷12(2)
Municipal corporations ⚷186(6)

If city policemen and firemen possessed any cause of action against city on ground that they had been induced to accept a cut in salary during years 1932 to 1936 as result of fraudulent representations by city authorities that it did not have sufficient revenue to enable it to retain force and pay them full salaries fixed by initiative ordinance, actions for equitable accounting filed in 1944 were barred by limitation and laches.

WHITE, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Consolidated actions by Ralph J. Scott and Charles Vernand against City of Los Angeles and others for an accounting in equity. From adverse judgment, the plaintiffs appeal.

Affirmed.

George E. Cryer, James A. Starritt and R. Alston Jones, all of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., and Bourke Jones, Asst. City Atty., both of Los Angeles (Robert J. Stahl, of Los Angeles, of counsel), for respondents.

DORAN, Justice.

The companion actions involved herein are designated as complaints "For Accounting in Equity", and were instituted, respectively, by appellant Scott, a city fireman, and appellant Vernand, a city policeman. According to the findings of the trial court as set forth in appellant's brief, the respondent city, during the years 1932-1933, 1933–1934, 1934–1935, and 1935–1936, "represented to its police and firemen that it did not have sufficient revenue to enable it to retain the entire force and pay them their full salaries as fixed by Initiative Ordinance, and that they must accept a cut, in salary amounting to ten percent in 1932-1933, and to nine per cent thereafter, or submit to such reduction in personnel as would result in an equal reduction in the outlay for salaries". The proposed cut in salary was accepted by the personnel "in full and complete discharge and acquittance of all claims and demands for the services rendered * * * solely by reason of said representations", according to the findings. The trial court also found that the representations so made, were true.

The appellants' briefs are largely devoted to the proposition that the City of Los Angeles was guilty of fraud; that at the close of each fiscal year involved herein, "respondent city had, in its various operating funds, *surplus money* * * * transferred to its reserve fund". Appellants also insist that during the period in question, "respondent city was accumulating a huge back-log of revenue in the form of delinquent taxes amounting to more than seven million dollars", which, according to appellants' theory, constitute "trust funds" for the payment of policemen's and firemen's rightful wages withheld by way of the aforementioned deductions. Relying on these averments, it is alleged that "Telling its police and firemen *year after year,* that its revenues were insufficient to enable the city to retain the entire personnel and pay them the full amount of their salaries as fixed by law, *while piling up a huge back log* of revenue during each of said years *constituted fraud in a most aggravated* form." (Appellants' italics.)

The respondents' brief submits "that appellants are not entitled to an accounting or any other relief for the reason that the City is not and never has been indebted to appellants for the salaries voluntarily waived by them and no funds in the hands of the City are impressed with any trust for the payment of salaries so waived, because": (1) the voluntary waiver of salary was not induced by any fraud; "(2) by virtue of Section 186½ of the City Charter, appellants accepted their payroll checks in full satisfaction of claims for services"; (3) appellants are in fact seeking recovery of money, which actions are barred by laches, the statute of limitations, and appellants' failure to file claims in compliance with the City Charter; (4) that delinquent taxes subsequently collected, do not constitute a trust fund for appellants' benefit.

[1] Whatever may be the rule in other jurisdictions, the courts of California have apparently upheld the validity of waivers by public officers and employees of the full amount of salary as fixed by statute or ordinance. In Gamble v. City of Sacramento, 1941, 43 Cal.App.2d 200, 110 P.2d 530, a police officer sought a writ of mandate to compel payment of salary for days worked without pay pursuant to an agreement to donate a designated number of days of service, made in order to avoid a reduction in force personnel. The appellate court, reviewing previous cases on the subject, held that such an agreement was not void as against public policy; also that a claim for unpaid salary is not a book or credit account within the meaning of the statute of limitations, but a cash transaction governed by a charter provision requiring presentation within six months.

Appellants' brief seeks to distinguish the present case, based upon a trust theory, from actions of debt or assumpsit to directly recover unpaid salary. Indeed, appellants submit that the theory here adopted is "A new approach to an old problem * * * an entirely new method by which a long standing wrong, flagrantly fraudulent in its nature, may be righted in entire accord with established principles of law and equity". But, obviously, calling something by a different name, does not change its inherent nature, nor can mere terminology create so-called legal rights where no such rights exist. Such appears to be the situation in the instant litigation.

[2, 3] In respect to the issue of fraud, upon which appellants' case must, in the final analysis, stand or fall, the record discloses substantial evidence in support of the trial court's finding that no fraudulent representations were made. In such a situation the well established rule prevents an appellate court from attempting a further review of the evidence, and the finding must be sustained regardless of the fact that the record also contains conflicting evidence which if believed, would support appellants' contentions.

In the instant case, respondents' brief, commenting on the testimony of the Chief Engineer of the Fire Department points out that the tentative budget prepared by the Chief and approved by the Board of Fire Commissioners, was duly considered by the Budget Committee in the Mayor's office, and both the Mayor and the Director of the Bureau of Budget and Efficiency stated that there would have to be a reduction in the amount of salaries. Thereafter the men in the Fire Department were so notified. A similar procedure was adopted in reference to the Police Department. As stated by respondent, "the preparation and adoption of the annual budget is no 'star chamber' affair but is attended by ample publicity and participation by the executive, legislative and administrative departments of the city government". Nor do appellants' briefs suggest any logical reason why the City of Los Angeles or its officials should entertain any wrongful intent to deprive the firemen and policemen of compensation.

There is evidence indicating that the tax delinquency situation existing in those years of economic upset, required and rightfully received the most careful consideration. Neither such consideration, nor the fact that a large amount of delinquent taxes was later collected by the city, can lend support to appellants' claim of fraud. The same may be said of the city's transference of certain money to its reserve fund at the close of the fiscal years, which reserve fund, it may be noted, materially decreased during the years in question. Careful consideration of the appellants' claim of fraud indicates that this contention is based largely, if not entirely, upon matters which have occurred since the making of the alleged false representations to policemen and firemen. In this connection it may be mentioned, in passing, that even if the city authorities had been guilty of using poor judgment in requesting the ten per cent reduction in salaries, such fact would by no means indicate fraud, but rather a possible excess of caution hardly censurable in view of the financial situation existing during the depression years. The appellants' position also seems to ignore the fact that the city had many departments and needs to provide for, other than those of the police and fire departments.

[4] The trial court also found that appellants' causes of action were barred by the statutes of limitations, laches, and failure to file claims in compliance with the city charter. The salary waivers involved herein, encompassed the period between 1932 and 1936; appellants' complaints were filed in 1944; it is not alleged that the charter provisions in reference to filing claims were complied with. As hereinbefore indicated appellants insist that the present actions are not for money, but "are actions in equity to establish fiscal year funds", alleging that "respondent city is a trustee of the huge balances of revenue resulting from the collection of" delinquent taxes. However, it is true, as said in respondents' brief, that "No matter what appellants denominate their respective actions, or the theory on which they rely, the fact is obvious that what is sought is recovery of a sum of money representing the difference between their salaries at rates fixed by ordinance and what they actually received". Although perhaps ingenious in concept, the trust theory here advanced is, so far as the present controversy is concerned, without basis either in law or in fact. If appellants possessed any cause of action, the same is, as found by the trial court, long since barred by limitation and laches. Any other conclusion than that here reached, would, in the language of the findings, result in "serious detriment * * * to the City of Los Angeles due to the confusion that would be caused in the annual financing of the city government". And, in view of the state of the record, disclosing as it does, amply sufficient evidence in support of the findings and judgment, no interference with that judgment is warranted.

The judgment is affirmed.

YORK, P. J., concurs.

WHITE, Justice.

I dissent. I cannot agree with that portion of the majority opinion wherein it is said: "In respect to the issue of fraud, upon which appellants' case must, in the final analysis, stand or fall, the record discloses substantial evidence in support of the trial court's finding that no fraudulent representations were made."

The gist of appellants' case is that they were induced to sign waivers of a portion of their monthly salaries as fixed by law, on the representations that during the years in question the city's revenues were insufficient to enable it to pay policemen and firemen in full for their services and at the same time retain the entire force. Appellants challenged the truth of these representations, and as I view the record, showed that the city's revenues were amply sufficient to have enabled it to pay the employees in full.

That the alleged representations were made is conceded. Therefore, the truth or falsity of such representations concerning the sufficiency of the city's revenues becomes the crux of the cases now before us.

The evidence established and the court found:

"That it is also true that in each of the following fiscal years money was received by the City of Los Angeles in payment of delinquent taxes for prior fiscal years and that at the close of each of said following fiscal years there was surplus money in various funds over and above the amount of outstanding demands and liabilities payable out of such various funds which was transferred to the reserve fund in accordance with Section 382 of the Charter of the City of Los Angeles, as follows:

"1932–33	$ 27,351.22
1933–34	512,185.19
1934–35	1,249,296.79
1935–36	1,256,859.29

"That it is further true that the amount of taxes uncollected at the close of each of said fiscal years was as follows:

"1932–33	$2,678,794.65
1933–34	2,101,634.58
1934–35	1,631,913.80
1935–36	1,156,233.06

and that more than 95 per cent of the foregoing amounts of delinquent taxes for each of the aforesaid fiscal years, except 1935–36, have since been collected with penalties for delinquency, and as to the fiscal year 1935-36 more than 94 per cent has been collected, and that of the taxes levied for and remaining uncollected at the close of said fiscal years more than 60 per cent were allocated in the annual budget to the support of the budgetary departments of the city government, including the Police Department."

Section 382 of the City Charter referred to in the foregoing findings of the court, insofar as here pertinent, provides that: "At the close of each fiscal year the Controller and Treasurer shall transfer all surplus money remaining in each fund over and above the amount of outstanding demands and liabilities payable out of such fund to the 'reserve fund', * * * except such surplus money as is in the several bond funds, interest and sinking funds, trust funds, the fire and police pension fund, the harbor revenue fund, the library fund, the park fund, the permanent improvement fund, the playground and recreation fund, the power revenue fund and the water revenue fund, but the Council may by ordinance direct that any or all such surplus money in either the harbor revenue fund, the power revenue fund or the water revenue fund be transferred to such reserve fund with the consent of the board in charge of such fund, but not otherwise."

It is to be noted that as a prerequisite to its transfer to the "reserve fund", under the charter provisions such money must be "surplus moneys remaining in each fund over and above the amount of outstanding demands and liabilities payable out of such fund."

The evidence shows and the findings establish that the foregoing total amount of "surplus moneys" thus transferred to the "reserve fund" during the years in question was $3,045,692.49, or more than enough to have paid to all police and firemen their full salaries as fixed by initiative ordinance, without any reduction whatever.

The fact that collection of delinquent taxes was deferred by reason of delayed redemption of property from tax sale, does not alter the fact that the avails, when received into the city treasury become a part of the fiscal year fund for the year for which the tax was levied. Newton v. Brodie, 107 Cal.App. 512, 518, 290 P. 1058; City of New Orleans v. Fisher, 180 U.S. 185, 21 S.Ct. 347, 45 L.Ed. 485, 492.

I have no quarrel with the holding in the majority opinion that public officers and employees may validly waive the full amount of their salary as fixed by statute or ordinance. But certainly no validity can attach to such waivers if they are obtained by false representations on the part of representatives of the employer political subdivision.

Respondent's contention that the causes of action now engaging our attention are barred by the Statute of Limitations is, in my opinion, without merit. The applicable statute is Subdivision 4 of Section 338, Code of Civil Procedure, which provides for a three-year period of limitation. Without conflict, the evidence establishes that appellants did not discover the facts constituting the alleged fraud until some three or four months before the instant actions were instituted.

Law and good morals should be one and inseparable. To me it seems unconscionable that the police and firemen should be required to waive ten per cent and later nine per cent of their salaries on the representation that the city's revenues were insufficient to pay them the salaries provided by initiative ordinance, when in truth and in fact the city during all of said years was transferring to the "reserve fund" "surplus moneys" remaining in various funds, over and above the amount of outstanding demands and liabilities payable out of such funds. And when the collections of delinquent taxes, properly allocated to the liabilities of the fiscal year for which they were levied, were more than sufficient to pay the city's police and firemen the full amount of salaries authorized by ordinance.

In my opinion, the judgment should be reversed and the causes remanded with directions to the court below to take appropriate steps, in the exercise of its equity jurisdiction, to compel payment to officers and members of the police and fire departments of the full amount of salary withheld from them during the fiscal years 1932-1933 to 1935-1936 together with the interest thereon.

* * *

85 Cal.App.2d 310

PEOPLE v. WELLINGTON.

Cr. 4166.

District Court of Appeal, Second District, Division 1, California.

May 3, 1948.

1. Criminal law 🔑1131(4)

Where no motion for a new trial was interposed, attempted appeal from a denial thereof was dismissed.

2. False pretenses 🔑4

The essential elements of offense of issuing a check without sufficient funds or credit are intent to defraud, drawing of a check upon a bank, a lack of sufficient funds or credit with drawee at time check is made, and knowledge by accused of such lack of funds. Pen.Code, § 476a.

3. False pretenses 🔑49(1)

Evidence authorized conviction of issuing a check without sufficient funds or credit with intent to defraud as against defense that corpus delicti was not proven. Pen.Code, § 476a.

4. Criminal law 🔑260(11)

Where there is a conflict in evidence, or even where circumstances are sufficient to as reasonably justify an inference of innocence, if circumstances proven, contradicted, or uncontradicted reasonably justify inference of guilt, an appellate tribunal will not disturb conclusion arrived at by trier of fact.

5. Criminal law 🔑260(11)

The appellate court will not attempt to determine weight of evidence, but will decide only whether on face of evidence sufficient facts could not have been found by trier of fact to warrant inference of guilt.

6. Criminal law 🔑260(11), 741(1), 1160

It is function of jury in first instance and of trial court after verdict to determine what facts are established by evidence, and, before verdict of jury which has been approved by trial court or finding of trial court can be set aside on appeal on ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in trial court.

7. Criminal law 🔑562

The determination of charge in criminal case requires proof that offense charged was committed and that offense was perpetrated by person or persons accused thereof.

8. Criminal law 🔑260(11), 1144(13)

On appeal in criminal case, appellate court must assume in favor of verdict or finding the existence of every fact which could reasonably have been deduced from evidence, and then determine whether such facts are sufficient to support the verdict or finding.

9. Criminal law 🔑260(11)

If circumstances reasonably justify finding of trier of fact, opinion of reviewing court that those circumstances might also reasonably be reconciled with innocence of defendant will not warrant interference with determination of trier of fact.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Edward P. Wellington was convicted of issuing a check without sufficient funds or credit with intent to defraud and of grand theft, and he appeals.

Affirmed.

Edward P. Wellington, in pro per.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

WHITE, Justice.

[1] In an information filed by the District Attorney of Los Angeles County defendant was accused in Count I of the offense of issuing a check without sufficient funds or credit, with intent to defraud (Penal Code, sec. 476a), and in Count 2 he was charged with the crime of grand theft. Trial by jury was duly waived and the cause was submitted to the court on the transcript of the testimony adduced at the preliminary examination with the right reserved by both the people and the defendant to present additional testimony, and of which right both availed themselves.

At the conclusion of the trial the court found the defendant guilty as charged in both counts. Defendant appeals from the judgment and "denial of motion for new trial." Because no motion for a new trial was interposed, the attempted appeal from a denial thereof must be dismissed.

Epitomizing the evidence as reflected by the record, it appears that Fridolf W. Torstenson was the owner of a 1942 Cadillac sedanette automobile. His wife had told a taxi driver that her husband desired to sell the vehicle in question. On October 25, 1946 defendant came to her home concerning the purchase of the automobile. Very little conversation was had and she took defendant to the rear of the house to view the vehicle while her husband remained inside the house. They were unable to start the automobile and the sales price was not then discussed. Defendant stated that he would return later. Mrs. Torstenson testified that her husband had been a patient at the Camarillo State Hospital from October 3, to October 23, 1946. On October 27 Mrs. Torstenson went to Point Arguello where she remained until the night of October 29.

On the afternoon of October 28, defendant returned to the residence where he met Mr. Torstenson. It is conceded that upon this occasion Mr. Torstenson sold the Cadillac automobile to defendant, delivered to him the pink slip therefor, received a check for $3,400, and that at the time said check was issued as well as when it was presented for payment defendant did not have sufficient funds in or credit with the bank upon which it was drawn, his balance being $22.74.

As to the circumstances surrounding the issuance of the check the testimony is in direct conflict. Mr. Torstenson testified that when he received the check in payment for the automobile the defendant represented to him that the same "was good." That nothing whatever was said to the effect that Mr. Torstenson "would hold the check or that it would not be good when it was presented."

The defendant testified that he agreed to and did purchase the automobile from Mr. Torstenson; that the agreed price was $3,450; that Mr. Torstenson agreed to and did accept $50 in cash and a post-dated check for $3,400; that he told Mr. Torstenson that he would be compelled to finance the vehicle before he could deposit sufficient money in the bank out of which the check could be paid; that he would deposit the sum of $3,400 in the bank to cover the post-dated check on or before 2 p. m. of October 29. That Mr. Torstenson informed him that the O.P.A. ceiling price on the automobile was in excess of $3,800.

Defendant further testified that on October 29, he went to the office of a finance company where he obtained a loan of $1,451.60 on the vehicle. That he was informed by the finance company that he was paying too much for the automobile and was advised to take the matter up with the O.P.A. That when he contacted the O.P.A. he was advised that the ceiling price on said vehicle was $1,571.65. He thereupon filed a complaint against Mr. Torstenson with the O.P.A. That being unable to locate Mr. Torstenson he wired him by Western Union a telegraphic money order in the sum of $1,521.65, which, plus the sum of $50 paid the preceding day, constituted the legal sales price of the automobile under existing O.P.A. regulations.

Mr. Torstenson denied the receipt by him of any cash payment and also denied that any discussion was had regarding the O.P.A. ceiling price on the vehicle.

It was conceded at the trial that on October 29 defendant sent Mr. Torstenson the foregoing telegraphic money order, that the latter refused to accept the same, and the amount thereof was refunded to defendant. That simultaneously with the telegraphic money order, defendant sent a telegram to Mr. Torstenson reading in part as follows:

"The money order paid you here is from Edward P. Wellington at Glendale, California * * *. The price, $3450.00, for your Cadillac, is over the ceiling, the same being $1571.65. You overcharged me $1875.35. The check for $3400.00, will not be honored. $1521.65 is the balance due you, $50.00 being paid by cash. Any other information you desire may be obtained from my attorney, Bert Rhine, MIchigan 0841, or the O.P.A. office in Glendale, where I have filed a complaint against you."

It was also established at the trial that on December 4, 1946, after the ceiling price had been lifted, defendant sold the automobile in question to one Paul Benson for $2,550.

An investigator for the O.P.A. testified that on October 29, 1946, when the transaction between Mr. Torstenson and the defendant was consummated, the ceiling price for the automobile involved was $1,562.82.

It was stipulated at the trial that at no time did defendant make any effort to restore the automobile to Mr. Torstenson and rescind the transaction.

Bertrand Rhine, who was the attorney to whom defendant referred Mr. Torstenson in his telegram of October 29, testified that following his conversation with Mr. Torstenson he advised defendant that "Mr. Torstenson wanted the money or wanted his car back".

Although defendant was represented by an attorney at his trial, he appears on this appeal without benefit of counsel.

He first urges that neither at the preliminary examination nor at the trial was the corpus delicti proven.

[2] As to the essential elements of the offense denounced by section 476a charged in Count I, they are: (1) The intent to defraud, (2) the drawing, (3) of a check, (4) upon a bank, (5) a lack of sufficient funds or credit with the drawee at the time the check is made, and (6) knowledge on the part of the accused of such lack of funds or credit.

[3] That the prosecution proved the last five of the foregoing elements is conceded. The intent to defraud, which is the gist of the offense, must in most, if not in all cases, be proven by the circumstances surrounding the transaction in question. While in the case at bar the facts concerning the elements of intent to defraud are in sharp conflict, we are persuaded that the record contains sufficient proof thereof, not only to establish the corpus delicti but to support the decision of the court.

There is testimony that nothing whatever was said about the O.P.A. ceiling price or that appellant did not have sufficient funds in or credit with the bank at the time he issued the check. Mr. Torstenson testified directly and unequivocally that appellant, in reference to the check, "stated that it was good"; that nothing was said about the appellant financing the vehicle in order to obtain funds with which to meet the check. Mr. Torstenson testified further that he had no knowledge the check was post-dated until advised thereof by his father-in-law on the day following its issuance. That the reason he accepted the check was because appellant stated to him that he "owned this plastic company", and "was connected with this Orange Cab Company, either as owner or part-owner." When asked by the court, "When he gave you the check he told you, you say, at that time the money was in the bank?" Mr. Torstenson answered, "Yes, absolutely. He stated that if it had not been past banking hours we could have run down and got the money."

Added to the foregoing is the conduct of appellant subsequent to the issuance of the check. When he applied for a loan on the automobile he obtained only $1,400, which was some $2,000 less than the amount of the check. He then sent Mr. Torstenson a telegraphic money order for $1,521.65 which the latter refused, and which was thereafter returned to appellant, who made no further effort to contact Mr. Torstenson, was not at the address which he gave Mr. Torstenson, and could not be located after a diligent search by the latter and his wife. A little more than a month later, appellant sold the automobile for $2,550. At no time did appellant make any effort to rescind the transaction or restore the automobile to Mr. Torstenson. This testimony was entitled to be considered by the trial judge as indicating the guilty knowledge of appellant, and as affecting the question of his good intent in passing the check.

From all the evidence adduced in the case, the court was justified in drawing a reasonable inference that appellant was aware of the amount of the O.P.A. ceiling on Cadillac automobiles, that he gave his check for $3,400 in order to obtain title to the automobile, financed the same, and then forwarded to Mr. Torstenson the O.P.A. ceiling price of $1,521.65 rather than $3,400, the price he had agreed to pay for the automobile, and for which he had given his check. His further conduct in concealing himself from the Torstensons and failing to return the automobile tends to fortify the inference and conclusion that his actions were all part of a scheme to obtain the automobile by contracting to pay one price, issuing a ficticious check in payment thereof, and then tendering another amount, which he knew at all times was the O.P.A. ceiling price. The foregoing facts were ample to justify an inference by the trial court of appellant's guilt under Count 1 of the information. As to Count 2, the foregoing recital of the evidence fully justifies the trial court's conclusion that appellant obtained the automobile in question by false pretenses and was, therefore, guilty of the crime of grand theft.

Appellant earnestly urges that there is a failure of proof to sustain the convictions in the case now engaging our attention because all of the circumstances relied upon as incriminating are equally compatible with innocence. To reach such a conclusion, however, the testimony must be viewed in the light of the testimony given by appellant which simply raised a conflict with that given by the witnesses for the prosecution.

[4-9] Ordinarily, we would dismiss this contention with the mere statement that under the long established and familiar rule, where there is a conflict in the evidence, or even where the circumstances are sufficient to as reasonably justify an inference of innocence, if the circumstances proven, contradicted or uncontradicted, reasonably justify the inference of guilt, an appellate tribunal will not disturb the conclusion arrived at by the constitutionally established arbiters of the facts—in this case the trial judge. However, since appellant appears on this appeal in propria persona we are disposed to quote the rule, many times reiterated by the reviewing courts of this state, and set forth in People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779, reading as follows: "The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The determination of a charge in a criminal case involves proof of two distinct propositions: First, that the offense charged was committed; and, second, that it was perpetrated by the person or persons accused thereof. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances

might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. People v. Perkins, 8 Cal.2d 502, 66 P.2d 631, 635; People **v.** Tom Woo, 181 Cal. 315, 184 P. 389; also, People v. Green, 13 Cal.2d 37, 87 P.2d 821; People v. Latona, 2 Cal.2d 714, 43 P.2d 260; People v. Tedesco, 1 Cal.2d 211, 34 P.2d 467; People v. Bresh, 33 Cal.App.2d 161, 91 P.2d 193; People v. Wilson, 33 Cal.App.2d 194, 91 P.2d 207."

For the foregoing reasons the attempted appeal from "the denial of motion for new trial" is dismissed. The judgment is affirmed.

DORAN, Acting P. J., and BARTLETT, Justice pro tem., concur.

85 Cal.App.2d 366

SCHLETEWITZ v. SCHLETEWITZ.

Civ. 3720.

District Court of Appeal, Fourth District, California.

May 4, 1948.

1. Divorce 🔑161

Evidence justified denial of husband's motion to set aside default interlocutory divorce decree for wife on ground that it was entered through husband's excusable neglect.

2. Husband and wife 🔑3

Married persons' "conjugal rights" include enjoyment of association, sympathy, confidence, domestic happiness, comforts of dwelling together in same habitation, eating meals at same table, and profiting by joint property rights, as well as intimacies of domestic relations.

See Words and Phrases, Permanent Edition, for all other definitions of "Conjugal Rights".

3. Divorce 🔑49(1)

Wife's restoration of husband to all marital rights is required to consummate "condonation" barring her right to divorce on ground of extreme cruelty.

See Words and Phrases, Permanent Edition, for all other definitions of "Condonation".

4. Divorce 🔑49(5)

A wife's "condonation" of husband's acts of extreme cruelty, because of which she seeks divorce, is not accomplished by sexual intercourse alone without showing of husband's restoration to all marital rights.

5. Divorce 🔑49(1)

Reconciliation between spouses, remission of husband's matrimonial offenses, and express agreement by wife to condone them are required to constitute "condonation" barring wife's right to divorce. Civ. Code, § 118.

6. Divorce 🔑184(6)

Whether wife submitted to her husband's sexual demands after filing divorce suit because she was afraid he might carry out threat to do her great bodily injury, and hence did not thereby condone his cruelty, was fact question for trial court.

7. Divorce 🔑184(10)

On husband's motion to set aside default interlocutory decree granting wife divorce on ground of husband's extreme cruelty, trial court did not clearly abuse his discretion in finding on conflicting evidence that wife submitted to husband's sexual demands after filing divorce suit because of her fear of great bodily injury and did not deceive court by withholding information as to such relations when decree was granted.

◆

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action for divorce by Marie Schletewitz against Carl Schletewitz. From an order denying defendant's motion to set aside a default interlocutory decree for plaintiff, defendant appeals.

Affirmed.

Lawrence W. Young and John Said, both of Fresno, for appellant.

Stutsman, Hackett & Nagel, of Fresno, for respondent.

GRIFFIN, Justice.

On April 3, 1947, plaintiff and respondent, Marie Schletewitz, commenced an action for divorce against defendant and appellant, Carl Schletewitz, aged 73, alleging extreme cruelty, and on that same day defendant was served with a copy of complaint and summons. He failed to appear, and on May 29, 1947, his default was entered and the action was tried as a default matter. On June 3, 1947, the interlocutory decree was granted. Plaintiff was awarded certain real and personal property and $75 per month support money. On June 11, 1947, defendant gave notice of motion to set aside the decree on the ground that it was entered through mistake, inadvertence, surprise and excusable neglect.

In this connection it is now argued on appeal, as it was in the trial court, that the plaintiff did not advise the court, on the hearing of her case, that she was then and had been living and cohabiting with defendant as husband and wife ever since the action was filed and up to the date of the interlocutory decree, and that therefore she committed a fraud upon the court. On August 27, the motion was heard and on September 2 the court denied it. Defendant concedes the general rule that it is usually a discretionary matter whether such a decree, based upon excusable neglect, should be set aside, but contends that since the evidence conclusively shows that plaintiff committed an act of fraud upon the court by not divulging the true facts in regard to her relationship with her husband at the time she obtained the decree, the court abused its discretion in the matter and the decree, as a matter of law, should have been set aside.

Defendant's evidence shows that plaintiff and defendant were married on December 18, 1937; that after he was served with process on April 3, 1947, plaintiff and defendant continued to live together until May 5, 1947; that she quit sleeping with him because she was told by her attorney that such conduct might affect her divorce proceedings; that her attorney did not inform the court of these facts at the hearing; that on May 29, when she obtained her decree she told defendant she was going to town with a friend to buy some shoes but did not inform him about going to obtain the decree; that she thereafter returned home and got his meals and had frequent prayer meetings together with him until June 12, 1947; that after the service of the complaint plaintiff advised defendant and led him to believe that she did not desire any divorce and that they had become reconciled, and for that reason he obtained no attorney and did not appear in the action.

Plaintiff recites in her affidavit that she did not cohabit with defendant after May 5, 1947; that she told him she was in ill health and ever since May 29, 1947, she had locked herself in her own room and slept separate and apart from him; that the reason she occupied the bed with defendant from the date of service of the complaint until May 5, 1947, was because she was fearful of defendant's threats to do her grave bodily injury and to take her life if she did not cohabit with him; that she never advised defendant she did not want a divorce but at all times expressed to him her desire to live separate and apart from him and to continue with the divorce proceedings. She denied generally his allegations as to her going out in public with him and appearing as "happily married persons" after April 3, 1947. She then alleges that defendant did seek the advice of his attorney in the matter; that said attorney was given a community property settlement agreement purporting to settle the property rights of the parties; that defendant consulted with said attorney as to the property settlement agreement and in reference to the divorce proceedings; that defendant was repeatedly told by plaintiff's attorney to consult with his own attorney; that defendant stated he did not need an attorney; that plaintiff did not obtain the interlocutory decree without the knowledge or consent of defendant but on the contrary defendant was informed both orally and in writing by plaintiff's attorney that the interlocutory decree was going to be taken and that he should consult his attorney; that she was still living at the home, awarded to her in the decree, and that defendant refused to move therefrom; that she never voluntarily had her meals with defendant; that she never cooked for him since the filing of the complaint, never washed his clothes or bed linen; that she had obtained an order to show cause why defendant should not be removed from the premises.

Plaintiff's attorney alleged, in his affidavit, that on April 15, 1947, he prepared a property settlement agreement for the parties; that defendant instructed him to take the agreement to his named attorney; that he did so and that attorney scrutinized it and made several changes therein; that the changes were made and as made were shown to defendant with instructions to take them to his attorney for examination. It is then alleged that on April 9, 1947, plaintiff's attorney addressed a letter to defendant at his home address, and a copy was forwarded to his attorney reciting:

"Dear Sir;

"Your wife, Mrs. Schletewitz, has consulted us in reference to her action filed against you on April 2, 1947. She has informed us that due to the fact that you are unwilling to come to a mutual agreement regarding settlement of the property rights involved, and due to the fact that you refuse to see your attorney, Mr. Aynesworth, she is desirous of our continuing her action for divorce.

"Please be advised that we shall give you a period of five days in which time we shall expect to hear from you. Should you fail to communicate with us within that time we will be compelled to pursue this action against yourself, per the instructions of Mrs. Schletewitz."

Defendant denied the receipt of this letter. There was no showing made by defendant's attorney, Mr. Aynesworth, that the transactions thus alleged did not actually take place.

Upon this evidence the trial court refused to set aside the default and decree. Defendant appealed and cites several cases such as Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020; Smith v. Smith, 64 Cal.App.2d 415, 148 P.2d 868; Hambrick v. Hambrick, 77 Cal.App.2d 372, 175 P.2d 269; Aldrich v. Aldrich, 203 Cal. 433, 264 P. 754; Katz v. Karlsson, 84 Cal.App.2d 390, 190 P.2d 956; and Raps v. Raps, 20 Cal.2d 382, 387, 125 P.2d 826; holding that a very slight showing is required for a court to set aside a default decree in a divorce action and that it is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds of matrimony which bind them together, and that a court should listen more readily to an appeal from an order denying relief than to one granting relief.

As stated before, the main question is whether or not, by the suppression of the that plaintiff and defendant were sleeping together as husband and wife, and having sexual relations on occasions, from the time of the filing of the complaint up to and on the day of the hearing, plaintiff was guilty of a fraud practiced upon the court compelling this court to reverse the order of the trial court denying relief. In this connection defendant cites Chiarodit v. Chiarodit, 218 Cal. 147, 21 P.2d 562, which case cites McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110.

[1-4] The denial of the motion to set aside the decree by reason of defendant's *excusable neglect* seems justified under the evidence for it clearly appears that there was substantial evidence to show that defendant was served with process; that he took those papers to his own attorney; that he participated in attempting to reach a property settlement and was notified by letter that plaintiff intended to proceed with the default judgment. Can it be said, notwithstanding these facts, that plaintiff was, as a matter of law guilty of a fraud in not revealing to the trial court the undisputed facts in relation to her cohabitation with her husband until May 5, 1947? It would be understandable for a wife to bring an action against her husband for divorce and still continue to live in the same house, but in different rooms, where she had no other place to go and her husband refused to move out. Such a method of claimed cohabitation may not, in itself, constitute any fraud on the court nor would

such a wife necessarily be compelled to disclose such arrangement to the court or could she be charged with fraudulently concealing facts. Having sexual relations with her husband during such a period, without the benefit of other marital or conjugal rights, would not necessarily be a controlling circumstance. See Hawkins v. Hawkins, 104 Cal.App. 608, 216, 286 P. 747, in which case the court held, quoting from the syllabus:

> "The conjugal rights of married persons include the enjoyment of association, sympathy, confidence, domestic happiness, the comforts of dwelling together in the same habitation, eating meals at the same table, and profiting by the joint property rights as well as the intimacies of domestic relations; and in this action, there was no restoration to all marital rights as is required to constitute a consummation of condonation, where there was no claim of a restoration to any marital rights, except the right of cohabitation on a single occasion. * * *
>
> "Condonation of acts of extreme cruelty is not accomplished by sexual intercourse alone, there being no showing of a restoration to all marital rights."

[5] The case of Morton v. Morton, 117 Cal. 443, 49 P. 557, 558, is not dissimilar to the facts in the instant case. There plaintiff wife instituted an action for divorce against her husband. The complaint was filed on September 25, and summons served on him on October 14. He failed to appear and on November 14, judgment of divorce was granted. Defendant later moved to set aside the decree on the same grounds here claimed alleging that after the commencement of the action plaintiff and defendant cohabited together as husband and wife until October 14, at which time he left for San Francisco. Plaintiff testified that she lived at the home with the defendant because she "had no place to go" and did not want to leave her personal effects to his mercy because he had threatened to destroy them if she ever left him; that she never agreed to condone his matrimonial offenses nor to forgive him; that she endured defendant because she could not help herself, until she had an opportunity of safely taking other action. The court denied defendant's motion. The order was affirmed on appeal. The court said:

> "The point that plaintiff must be held to have condoned defendant's offenses, because she lived and cohabited with him after the action was commenced and until the summons was served, cannot be sustained. In an action for divorce on the ground of cruelty there can be no condonation unless there is a reconciliation between the parties, a remission of the matrimonial offenses, and an express agreement to condone. * * * 'Where the cause of divorce consists of a course of offensive conduct, or arises, in cases of cruelty, from successive acts of ill-treatment which may, aggregately, constitute the offense, cohabitation, or passive endurance, or conjugal kindness shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone.'" Citing Civ.Code Sec. 118.

[6, 7] In Gump v. Gump, 42 Cal.App.2d 64, 108 P.2d 21, and McGuinness v. Superior Court, supra, relied upon by defendant, upon conflicting evidence as to whether or not there was a reconciliation, the trial courts found that there was, as a matter of fact, a reconciliation. On appeal it was held that the evidence supported such a finding and that an appellate court could not hold to the contrary, as a matter of law. In the instant case, had the trial court found that a reconciliation had been effected and that the procurement of the interlocutory decree was in accordance with defendant's claim, we would have no difficulty. Here we have an opposite finding with which to contend. It is plaintiff's claim that, by her actions, she never intended to effect a reconciliation or to lull defendant into a false sense of security, but that she did not move out of the house and did not refuse his marital demands for the reason that she feared him and was afraid that he might carry out his threat to do her great bodily injury; that her actions in this respect were not "voluntary"; that as soon as the decree was granted she locked herself in her own room and abided

the former advice of her attorneys to desist from such marital relationship, even though involuntary.

Although her statement pertaining to the reasons she submitted to this relationship may be questioned, it still remained a question of fact for the trial court to determine. A full hearing of that question, and whether or not the court had been deceived by her witholding such information at the time the interlocutory decree was granted, were presented to and determined by the trial court. That court was confronted with the conflict in the evidence, the demeanor of the parties on the witness stand, and it had a right to believe plaintiff's testimony. A clear abuse of discretion does not appear. McDonald v. McDonald, 173 Cal. 175, 177, 159 P. 426; Morton v. Morton, 117 Cal. 443, 49 P. 557; Keller v. Keller, 122 Cal.App. 712, 10 P.2d 541; Bohnert v. Bohnert, 95 Cal. 444, 30 P. 590; Dean v. Dean, 77 Cal.App.2d 98, 174 P.2d 705.

Order affirmed.

BARNARD, P. J., and MARKS, J., concur.

Wilton R. MORRISON, Plaintiff and Respondent, v. George STYLIANO and Genell Styliano, Defendants and Appellants.

Civ. 3923.

District Court of Appeal, Fourth District, California.

May 12, 1948.

Motion to dismiss appeal from judgment of the Superior Court of San Diego County.

Sylvan Y. Allen, of Los Angeles, for appellants.

Monroe & McInnis and Renwick Thompson, all of San Diego, for respondent.

PER CURIAM.

For the reasons given in Heatly v. Heatly, Cal.App., 189 P.2d 748, and for the further reason that appearance or showing in opposition to the motion to dismiss was not made as required by Rule 41 of the Rules on Appeal, the motion is granted and the appeal is dismissed.

Genell STYLIANO et al., Plaintiff and Appellant, George Styliano, Plaintiff in Intervention and Appellant, v. Wilton M. MORRISON et al., Defendants and Respondents, Wilton M. Morrison, Cross-Complainant and Respondent.

Civ. 3924.

District Court of Appeal, Fourth District, California.

May 12, 1948.

Motion to dismiss appeal from judgment of the Superior Court of San Diego County.

Sylvan Y. Allen, of Los Angeles, for appellants.

Monroe & McInnis and Renwick Thompson, all of San Diego, for respondents.

PER CURIAM.

For the reasons given in Heatly v. Heatly, Cal.App., 189 P.2d 748, and for the further reason that appearance or showing in opposition to the motion to dismiss was not made as required by Rule 41 of the Rules on Appeal, the motion is granted and the appeal is dismissed.

85 Cal.App.2d 270

In re RUDMAN'S ESTATE.

RENARD v. BREESE.

Civ. 16347.

District Court of Appeal, Second District, Division 1, California.

April 30, 1948.

1. Descent and distribution ⟹61

Where intestate's brother paid for property which was deeded to such brother, intestate and intestate's husband as joint tenants with right of survivorship, and brother, husband, and intestate died in that order, intestate received no "separate property" of her previously deceased spouse within Probate Code providing for the descent of property in such cases, and property went to the heirs at law of intestate. Probate Code, § 229.

See Words and Phrases, Permanent Edition, for all other definitions of "Separate Property".

2. Descent and distribution ⟹61

Where Probate Code section providing that "if the decedent leaves neither spouse nor issue and the estate or any portion thereof was separate property of a previously deceased spouse and came to the decedent from such spouse by gift, descent, devise or bequest", the property should descend as therein provided, was amended by adding "or became vested in decedent on death of such spouse by right of survivorship * * * in a joint tenancy between such spouse and the decedent", amendment was still subject to prior provision that estate or some portion thereof must be separate property of a previously deceased spouse. Probate Code, § 229.

◆

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Proceeding in the matter of the estate of Lottie C. Rudman on petition of Grace V. Renard for decree of partial distribution which was opposed by Hallie Breese. From the decree rendered, Hallie Breese appeals.

Affirmed.

Redmond C. Staats, of Berkeley, and Redmond C. Staats, Jr., of Oakland, for appellant.

Ray W. Bruce, of Los Angeles, for respondent.

BARTLETT, Justice pro tem.

This is an appeal from a decree of partial distribution rendered in the estate of Lottie C. Rudman, deceased. Upon the hearing had in connection with the petition for partial distribution and the objections thereto, the parties stipulated as to all of the facts. From that stipulation we learn the following: The property ordered distributed by this decree consisted of cash derived from the sale of real estate described in the inventory on file. This real estate was bought by one Jacob Wickstrom, a widower, on November 8, 1933. He caused the property to be conveyed to himself, his sister Lottie C. Rudman, and his sister's husband, Emil R. L. Rudman, as joint tenants, with the right of survivorship. Of the three joint tenants, Jacob Wickstrom died first, without making any conveyance of his interest in the property; the second to die was Emil R. L. Rudman, who also made no conveyance of his interest. We are concerned here with the estate of Lottie C. Rudman, who also died without having made any distribution of the property by will or conveying any interest in it during her lifetime.

The court ordered the property distributed to the heirs at law of Lottie C. Rudman, of whom the respondent, Grace V. Renard, is one. Hallie Breese, Hanna Heden and Hilda Olsson are nieces and the next of kin of Emil R. L. Rudman. Hallie Breese, who is the appellant herein, holds the interest of the other nieces of Emil R. L. Rudman by assignment. Appellant's contention is that by reason of the provisions of Section 229 of the Probate Code the court erred in not distributing one-half of the property to the next of kin of Emil R. L. Rudman.

Section 229 of the Probate Code reads as follows:

"If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead or in a joint tenancy between such spouse and the decedent, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation, and if none, then to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the deceased spouse and to their descendants by right of representation."

The question then is simply this: By the death of Emil R. L. Rudman and the consequent vesting in Lottie C. Rudman of the entire title to the property, did any of the separate property of her predeceased husband become vested in Lottie C. Rudman?

In considering this matter we must bear in mind that the entire consideration for the property which was in joint tenancy was paid by the brother of Lottie C. Rudman and that being the case, no part of the consideration could have or did come from the deceased husband or his family or the community property of Emil R. L. Rudman and Lottie C. Rudman.

Appellant, in her opening brief, refers to three cases. The first of these is In re Estate of Putnam, 219 Cal. 608, 28 P.2d 27. That case held that where a decedent had inherited property from a prior husband and from the proceeds of its sale bought corporate stock issued to herself and her present husband in joint tenancy with right of survivorship, and thereafter they conveyed it back to the decedent, Section 229 of the Probate Code does not apply to the case, and the stock was properly distributed to the surviving heir of the decedent who died intestate. In the course of its decision the court stated, on page 611 of 219 Cal., on page 28 of 28 P.2d:

"The reason and purpose of section 229 of the Probate Code is, in the absence of testamentary disposition, to turn the property back to the family from which it came, rather than to permit it to descend to the wife's family. In other words, the section was designed to benefit the natural objects of the bounty of the former owner."

The partial decree of distribution in this case before us turned the property back to the family from which it came.

The second case to which appellant refers us is In re Estate of Harris, 9 Cal.2d 649, 72 P.2d 873, in which the property which was the subject of the joint tenancy was a bank account created by the deceased and her predeceased husband. The following paragraph of the syllabus sets forth the holding of the court in respect to the question which concerns us here:

"The creation of a joint bank account is a gift inter vivos, and under section 229 of the Probate Code, as amended in 1931, the insertion of the word 'gift' in said section, conferred upon the relatives of the predeceased spouse, specified in said section, the right to take as heirs of the surviving spouse such separate property as by the creation of a joint tenancy ownership therein had been given by the predeceased spouse to the surviving spouse."

It differs from the case before us in that none of the separate property of Emil R. L. Rudman went into the creation of the joint tenancy involved.

The third case appellant cites is Sears v. Rule, 45 Cal.App.2d 374, 114 P.2d 57, 63, wherein the court stated that under the provisions of Section 229 of the Probate Code the property should revert to the predeceased husband "for the reason that it was given to her by her husband in joint tenancy * * *."

[1] In all of these cases the property which became vested in the decedent was separate property of her predeceased husband without doubt. This does not bear on the problem involved here which is: Did any of the separate property of the predeceased husband become vested in Lottie C. Rudman? As the property came to her from the original grant the property was her separate property, and no property came to her as a transferee of her deceased husband. A long line of California decisions so holds. These decisions are all reviewed in a decision of the United States Circuit Court of Appeals of the Ninth Cir-

cuit in Tooley v. Commissioner of Internal Revenue, 121 F.2d 350, 354. In that case the husband died leaving an unpaid income tax of $16,507. During his lifetime he and his wife held property in joint tenancy which terminated on his death. The Commissioner attempted to hold this property liable for his income tax, claiming that the widow was a transferee of the property from her husband. After a careful consideration of all the cases on the subject the court makes this flat declaration: "In California the survivor of a joint tenancy holds the full estate by virtue of the original grant of the joint tenancy and not as a transferee from the deceased co-tenant."

We cannot follow the contention made in appellant's closing brief that to adopt the trial court's interpretation would be to nullify the effect of the 1939 amendment to Section 229 of the Probate Code, which added the words, "or became vested in the decedent on the death of such spouse by right of survivorship * * * in a joint tenancy between such spouse and the decedent."

[2] Reading the section as thus amended we see that the qualifying phrase in this section, "and the estate or any portion thereof was separate property of a previously deceased spouse," still governs. This is well illustrated by In re Estate of Taitmeyer, 60 Cal.App.2d 699, 141 P.2d 504, cited by appellant in his closing brief. In that case property was purchased with community funds and was placed in joint tenancy in the name of the husband and the wife. The husband died and the property vested in the surviving wife, who remarried and subsequently died. The court there held that the property should be distributed to the heirs of the predeceased spouse in accordance with Sections 228 and 229 of the Probate Code. At page 711 of 60 Cal.App.2d, at page 511 of 141 P.2d, the court says:

"So far as the facts of this case are concerned, the use of the words 'vested in' in the two sections in question may be treated as surplusage or, if construed, must be interpreted as meaning 'came to' as those words are used in the same sections. When the sections are read together it appears that in amending the act it was the intention to make certain that all property (In re Estate of Rattray, supra [13 Cal.2d 702, 91 P.2d 1042]) which 'came to' decedent as a gift, by descent, devise or bequest or by right of survivorship in a joint tenancy or homestead, which had been community property of decedent and a previously deceased spouse, sec. 228, or had been the separate property of the predeceased spouse should go first to the child or children of the deceased spouse and, if none, then as the sections direct."

Let us consider the decision of the Supreme Court in the In re Estate of Abdale, 28 Cal.2d 587, 170 P.2d 918, 920. In that case the property was originally separate property of the intestate, he having acquired it before his marriage. Thereafter he placed the property in joint tenancy with his wife and on her death re-acquired it as surviving joint tenant. The husband died intestate and the heirs of the wife claimed that half of the property should be distributed to her under the provisions of Section 229 of the Probate Code. The contentions of the parties are set forth in the decision as follows:

"The contestants contend that this section is not applicable and that the estate is distributable to them under section 225 of the Probate Code, on the grounds that the governing principle of sections 228 and 229 is that the origin or source of the property determines its distribution and that the property in question did not have its origin or source as separate property of the predeceased spouse, since it was originally the separate property of the decedent and any interest therein of the predeceased spouse came to her as a gift from the decedent.

"The petitioner contends that even though the property was originally the separate property of the decedent, the predeceased spouse held her interest in the joint tenancy as her separate property * * * which therefore became vested in the decedent within the meaning of section 229 upon her death."

It will be noted that the petitioner made the same contention in that case that appellant so strenuously urged here, that regardless of the origin of the property in the joint tenancy "the predeceased spouse held her interest in the joint tenancy as her separate property." The court held adversely to the petitioner and in favor of the contestants. This decision and the reasoning of the court in arriving at its decisions should govern here. The court said:

"Petitioner's contention that the character of the property at the time of the death of the predeceased spouse is controlling would render sections 228 and 229 inconsistent with each other. Section 228 applies when '* * * the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and * * * became vested in the decedent on the death of such spouse by right of survivorship * * * in a joint tenancy between such spouse and the decedent.' (Stats. 1939, p. 2992.) Section 229 likewise applies when '* * * the estate or any portion thereof was separate property of a previously deceased spouse, and * * * became vested in the decedent on the death of such spouse by right of survivorship * * * in a joint tenancy between such spouse and the decedent.' The phrase 'was community property' in section 228 necessarily refers to the character of the property before it was placed in joint tenancy. Accordingly, it is held that 'the Legislature intended to ignore the fact that a vested one-half interest as separate property may be created, and viewed the property in its original form as community property.' In re Estate of Taitmeyer, supra, 60 Cal.App.2d 699, 703, 711, 712, 141 P.2d 504, 507; In re Estate of Nielsen, 65 Cal.App.2d 60, 62, 149 P.2d 737. Since the two sections must be 'read and construed together' (In re Estate of Rattray, 13 Cal.2d 702, 708, 91 P.2d 1042, 1046), consistency requires that the phrase 'was separate property' in section 229 also be interpreted as referring to the character of the property before it was placed in joint tenancy. A distribution under section 228 of property that was community property before it was placed in joint tenancy, on the theory that the two spouses are deemed to have contributed equally to its acquisition can find a consistent counterpart in section 229 only if property originally acquired by one of the spouses before it was placed in joint tenancy is distributed in recognition of the fact that this spouse alone contributed to its acquisition."

In the case of In re Hobart's Estate, 82 Cal.App.2d 502, 187 P.2d 105, 108, it is stated that:

"The origin or source of the property determines its distribution (In re Estate of Abdale, 28 Cal.2d 587, 170 P.2d 918; In re Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042; In re Estate of Taitmeyer, 60 Cal.App.2d 699, 141 P.2d 504) if section 229 is applicable as the basis of the order. * * * "

Such being the case, the trial court in the instance before us made a proper distribution of the property.

The decree of partial distribution is affirmed.

DORAN, Acting P. J., and WHITE, J., concur.

85 Cal.App.2d 339

RODGERS v. HORN et al.

Civ. 16254.

District Court of Appeal, Second District, Division 2, California.

May 4, 1948.

As Amended May 5, 1948.

1. Costs 🔑137

Where counsel for nonresident plaintiff, immediately after receiving demand for security for costs, attempted to obtain security from plaintiff who was away from home, but delayed further action for more than thirty days in reliance on statement by deputy clerk that proceedings would merely be suspended and not dismissed except on notice, and subsequently deposited cash in lieu of undertaking without knowledge that order of dismissal had been signed and filed, facts justified setting aside the dismissal. Code Civ.Proc. § 1030.

2. **Judgment** ⚿386(1)
Motions ⚿59(3)

The statute permitting relief from judgment or order taken against party through "his" mistake, inadvertence, surprise or excusable neglect, upon request made within six months does not establish a limitation upon relief from order taken through mistake, inadvertence, or neglect of opposite party or through error of court. Code Civ.Proc. § 473.

3. **Costs** ⚿137

Where order of dismissal for failure to file security for costs was not entered in minutes or in judgment book, and judgment of dismissal was not entered, such error or inadvertence was not chargeable to plaintiff who did not know of the order, but to court or to defendant, so that order of dismissal could be set aside on application filed more than six months later. Code Civ.Proc. § 473.

4. **Judgment** ⚿386(1)
Motions ⚿59(3)

Where error or inadvertence in order or judgment is that of court or of court and opposite party, as distinguished from one chargeable to one seeking relief therefrom, statute requiring request for such relief within six months is inapplicable, and court retains jurisdiction of the cause and may set aside the order. Code Civ.Proc. § 473.

5. **Costs** ⚿137

An order dismissing action for failure to file security for costs should be as formal as one made under sections 581, 581a, and 581b, and should be entered in minutes. Code Civ.Proc. §§ 473, 581, 581a, 581b, 1030.

6. **Costs** ⚿137

The filing of cost bond by nonresident plaintiff is not a jurisdictional act. Code Civ.Proc. § 1030.

7. **Action** ⚿66

Policy of law is to insure trial on merits where possible.

◆

Appeal from Superior Court Los Angeles County; A. W. Ashburn, Judge.

Action by Ray J. Rodgers against L. Horn and another for negligence in extracting plaintiff's tooth. From an order granting plaintiff's motion to set aside an order dismissing the action and to restore the cause to the trial calendar, defendant Daniel Loney Horn appeals.

Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles, for appellant.

Samuel P. Young, of Los Angeles, for respondent.

WILSON, Justice.

This appeal is from an order granting plaintiff's motion to set aside an order dismissing the action and to restore the cause to the trial calendar.

The action is to recover damages for alleged negligence and carelessness on the part of defendant in extracting one of plaintiff's teeth. The complaint was filed on July 23, 1946. On August 15 defendant filed a demand requiring security for costs, pursuant to section 1030 of the Code of Civil Procedure, on the ground that plaintiff was a nonresident of California. On September 17 an affidavit of one of defendant's counsel was filed on his behalf reciting that more than 30 days had elapsed since the service of the demand and that no undertaking for costs had been filed, and praying that the cause be dismissed. Following the signature and jurat to the affidavit appears the following order: "It is so ordered this 17th day of September, 1946, Dudley S. Valentine, Presiding Judge." This order was not entered in the minutes of the court and no judgment of dismissal was entered. A minute order was entered on September 18 reading: "Good cause appearing therefor setting of April 14, 1947 is ordered vacated." This was the only minute entry following the signing of the order of dismissal. On October 10 plaintiff deposited $300 with the clerk of the court as a cash bond for costs and served a notice of the deposit on counsel for defendant.

Plaintiff's counsel, on or about May 1, 1947, for the first time received knowledge that the order of dismissal had been signed. On May 6, 1947, he filed a notice of motion to relieve plaintiff from and to vacate the order of September 17, 1946, dismissing the action and to restore the action to the trial calendar. The motion was heard by the court on May 16 and was granted on June 11, 1947. The appeal comes from that order.

The motion to set aside the order of dismissal was accompanied by an affidavit of plaintiff's counsel reciting that the undertaking for costs was not given within the period provided by section 1030 of the Code of Civil Procedure due to inadvertence, mistake and excusable neglect (1) because plaintiff's counsel was under the impression and honestly believed that the action would not and could not be dismissed for failure of plaintiff to post a bond until after a motion to dismiss had been made and the court had ruled thereon; (2) that no notice was given by defendant's counsel of the motion to dismiss and no notice of dismissal was given to plaintiff or his counsel. The affidavit recites that on August 16, 1946, immediately after receiving demand for security for costs, plaintiff's counsel sent a letter to his client notifying him of the demand and of the necessity for furnishing an undertaking to secure costs; that plaintiff was then in the State of Oregon and had been away from home; plaintiff's counsel did not receive a reply from his client until September 23; as soon as cash could be obtained he deposited $300 with the clerk on October 10, 1946, and on the same day served on defendant's counsel and filed a notice that the deposit had been made. Affiant states that prior to the expiration of the 30-day period within which plaintiff was required to give security he consulted with the chief civil deputy in the county clerk's office and inquired the procedure for obtaining additional time for filing the security; that the deputy informed him that proceedings in the case would be suspended until security for costs was given, that no other proceedings would be taken without notice to plaintiff, that any proceedings for a dismissal of the action could only be had on notice to plaintiff or his attorney, and that plaintiff would be permitted to file his security prior to the hearing for motion to dismiss. Resting on this assurance plaintiff's counsel noted on his office calendar that security for costs was due on or before September 15 and was prepared to advance the costs on behalf of his client if it should become necessary in order to prevent a dismissal of the action. Affiant states that on October 10, 1946, as above noted, he deposited cash in lieu of an undertaking and at that time he was without knowledge that an order of dismissal of the action had been signed and filed and did not discover that fact until about May 1, 1947, when in reviewing the files of cases in his office he discovered that the action had not been set for trial. By reason of such examination of the files in the action he discovered for the first time that the order of dismissal had been signed.

[1] Insofar as the facts are concerned they amply justify the order setting aside the order of dismissal, but defendant maintains that the court was without jurisdiction to disturb the order because the motion to be relieved therefrom was made too late.

The motion to vacate the ex parte order of dismissal was made more than six months after it had been signed and filed. Since it had never been entered in the minutes of the court or in the judgment book and no judgment of dismissal had been entered, one of the questions to be determined is whether the order had become final prior to the filing of the application to set it aside. If the order had become final the motion to vacate it came too late and the court was without power to interfere with it on plaintiff's motion. If the order cannot be considered as a judgment or if it had not become final as an order the court had control over it and had jurisdiction to set it aside after the expiration of the six-month period.

With certain exceptions not applicable in this action the general rule is that a request for the setting aside of an order or a judgment must be made within six months "after such judgment, order or proceeding was taken." (Code Civ.Proc. sec. 473.) The cases relied on by appellant are those in which the application to vacate a judgment or an order was not made within the six-month period, such as Bowman v. Bowman, 29 Cal.2d 808, 813; 178 P.2d 751, 170 A.L.R. 246; Phillips v. Trusheim, 25 Cal. 2d 913, 917, 156 P.2d 25, and other like cases. For reasons presently appearing this is not the determinative point on this appeal.

[2] Section 473 of the Code of Civil Procedure permits relief to a party from a judgment or order taken against him "through *his* mistake, inadvertence, surprise or excusable neglect." That section does not establish any limitation upon the granting of relief to a party from an order taken aginst him through the mistake, inadvertence or neglect of the opposite party or through error of the court.

[3] Appellant contends that the error that gave rise to this appeal was that of respondent in failing to file his undertaking within 30 days after service of appellant's notice demanding security. That the burden may not be so easily shifted and that the error from which respondent sought relief was not his own but was one of appellant and the court will appear from the discussion to follow.

Section 1030 of the Code of Civil Procedure provides that when security for costs is demanded by a defendant in an action all proceedings are suspended until an undertaking therefor is filed with the clerk, and that any stay of proceedings granted under the provisions of that section shall extend to a period of ten days after service on defendant of a written notice of the filing of the undertaking. It is further provided that if such undertaking is not filed within 30 days from the service of notice demanding security the court may order the action to be dismissed.

[4] The neglect of respondent to file his undertaking within the time designated in section 1030 is not the error upon which this appeal arises. Respondent's motion is not directed to relief from his delay in posting his bond. He seeks relief from the order dismissing the action. The error of which respondent complains and the only one that will permit of the vacation of the order of dismissal upon motion made more than six months after its filing is the failure of the court either to enter the order in the minutes or in the judgment book or to make and enter a judgment of dismissal. This was not an error on the part of respondent. He had nothing to do with that order. Where the error or inadvertence is that of the court or of the court and the opposite party, as distinguished from one chargeable to the party seeking relief therefrom, section 473 of the Code of Civil Procedure has no application. The court retains jurisdiction of the cause and may set aside its order. Consolidated Const. Co. v. Pacific El. R. Co., 184 Cal. 244, 247, 193 P. 238; Egan v. McCray, 220 Cal. 546, 547, 31 P.2d 1041; Robson v. Superior Court, 171 Cal. 588, 590, 154 P. 8; Whitney v. Superior Court, 147 Cal. 536, 541, 82 P. 37; Bryant v. Superior Court, 16 Cal.App.2d 556, 558, 563, 61 P.2d 483.

Respondent sought and obtained relief in the lower court from the order of dismissal obtained by appellant, not from an order which he, respondent, procured. The error involved in this action is chargeable both to the court and to the opposite party, appellant,—to the court in failing to have its order or a judgment thereon properly entered, and to appellant in neglecting to see that such order or judgment was entered. The error cannot be imputed to respondent or to any act of commission or omission for which he was in any manner responsible.

[5] In Consolidated Construction Co. v. Pacific El. R. Co., supra, an order dismissing the action was inadvertently made at the instance of a party claiming an interest in the property involved adverse to the plaintiff. The court said that the error was not that of the plaintiff (the party seeking relief from the order) but was one of the court or of the court and the opposite party. It held that section 473 did not apply and that orders dismissing actions must "be at least entered in the minutes, in order that they be fully effective and constitute judgments." (pages 247–250 of 184 Cal., page 240 of 193 P.) The court referred to the fact that sections 581a and 581b of the Code of Civil Procedure do not provide how dismissals provided for therein are to be made and said that those sections should be analogized to section 581 which does provide the manner of dis-

missing actions thereunder and that dismissals made pursuant to the former sections should be made in the manner required by section 581 (page 250 of 184 Cal., page 240 of 193 P.) Correspondingly section 1030 of the Code of Civil Procedure does not provide the manner in which a dismissal shall be made upon failure of a plaintiff to provide a nonresident cost bond. There is no reasonable basis for permitting an order dismissing an action pursuant to section 1030 to be more informal than one made under sections 581, 581a and 581b or for excusing entry in the minutes in one case and requiring it in the others.

While the court in the Consolidated Construction case seems to deem a minute entry to be sufficient, other cases go further and hold that an order dismissing an action is not final and not beyond the jurisdiction of the court to vacate it unless a judgment of dismissal has been entered. In Egan v. McCray, 220 Cal. 546, 31 P.2d 1041, the court made an order dismissing the action which was entered only in the minutes. Later the court set it aside and restored the case to the calendar. The appellant contended that the order had become final and that the trial court was without jurisdiction to vacate it. The court held that "the order of dismissal had not become effective and final, for the reason that no judgment had been entered." Also in McCallum v. Stull, 59 Cal.App. 572, 211 P. 466, where the court had ordered the action dismissed but only a minute entry of the order had been made, it was held that since a judgment had not been entered the dismissal was ineffectual and the court retained jurisdiction of the action.

Appellant maintains that even though the motion here under consideration was not made under section 473, nevertheless the time limit specified in that section is applicable by analogy and that the court was without power to entertain respondent's motion, citing Smith v. Jones, 174 Cal. 513, 163 P. 890; People v. Temple, 103 Cal. 447, 37 P. 414; Richert v. Benson Lumber Co., 139 Cal.App. 671, 34 P.2d 840; Vaughn v. Pine Creek Tungsten Co., 89 Cal.App. 759, 265 P. 491. In these cases the motions were to set aside defaults and judgments on the ground that service of summons had not been made on the defendants. Since the defendants had not been served with process their failure to appear was not due to their "mistake, inadvertence, surprise or excusable neglect" but the court held that the motions to set aside the defaults and judgments should have been made "within a reasonable time." The periods provided in section 473 were applied as determining what was a reasonable time.

There is a vast difference between the circumstances of the cases relied on by appellant and those of the instant case. In those cases a remedy for the plight in which the defendants found themselves was not impossible. They had the privilege of seeking relief of a court of equity to set aside the judgments on which they were not liable if process had not been served, but in the case at bar respondent is without opportunity of obtaining any relief whatsoever. An order dismissing his action has been made and unless its revival through the vacating of the dismissal can be sustained on this appeal he is without remedy since the filing of a new action is now barred by the statute of limitations. Moreover, as we have pointed out, section 473 has no application where the error complained of was made by the court, or by the court and the opposite party. In none of the cases which we have cited in which the error was not that of the party seeking relief was it suggested that the time limit of section 473 should be applied by analogy. In Consolidated Construction Co. v. Pacific Electric Ry. Co., 184 Cal. 244, 193 P. 238, the order setting aside the dismissal was made ten months after the entry of the order, and in Bryant v. Superior Court, 16 Cal.App.2d 556, 61 P.2d 483, the vacating order was made more than two years after the date of the original order.

The case of Bried v. Superior Court, 11 Cal.2d 351, 79 P.2d 1091, an action for slander, presents a situation comparable with that in the instant case. The statute provides that in an action for libel or slander if the plaintiff fails to file a new undertaking as ordered after sustaining exceptions to sureties on the first undertaking the court "shall order the action to be dismissed." (Sec. 6, Stats. 1880, p. 81; 2 Deering's Gen. Laws, 1944 Ed., Act 4317, p. 1532.) Exceptions to sureties in the Bried case were sustained and the plaintiff filed a second bond with the same sureties and in substantially the same form as the first. Although a *new* bond was not filed as required by law and within the time allowed by the court dismissal of the action was denied. The opinion refers to the fact that a dismissal would result in the plaintiff's suffering the bar of the statute of limitations, that he had in good faith endeavored to comply with the statute, and that the object of the act was to protect a defendant in such an action and to secure his costs if the plaintiff did not procure a judgment. The court held that the giving of the bond was not jurisdictional and that the dismissal of the action for failing to comply strictly with the statute was not mandatory.

[6] The parallel between the Bried case and this case is complete. In good faith and endeavoring to comply with the law respondent gave his bond after the expiration of the 30-day period without knowledge that the order of dismissal had been signed; the object of section 1030 of the Code of Civil Procedure is to secure a defendant's costs in an action brought by a nonresident; by reason of the posting of the cash bond by respondent appellant has the security to which he is entitled by law; if the order of dismissal should be upheld respondent will be barred by the statute of limitations from commencing another action. Section 1030 does not make the filing of a cost bond a jurisdictional act. It merely provides that proceedings shall be suspended until ten days after service of notice of the filing of the undertaking. It provides that if the undertaking is not filed within 30 days after demand therefor the court *may* order the action to be dismissed. The libel and slander statute provides that the action *shall* be dismissed upon failure to file the required undertaking. The provision of that act requiring security is neither jurisdictional nor mandatory. Bried v. Superior Court, supra, 11 Cal.2d page 354, 79 P.2d 1091. By analogy the same rule must be applied to section 1030 and the court therefore had not lost jurisdiction to grant respondent's application for relief.

[7] It is the policy of the law to insure where possible the trial of an action on the merits. Burbank v. Continental Life Ins. Co., 2 Cal.App.2d 664, 667, 38 P.2d 451; Security-First Nat. Bank of Los Angeles v. Superior Court, 132 Cal.App. 683, 695, 23 P.2d 1055; Bried v. Superior Court, 11 Cal.2d 351, 355, 79 P.2d 1091. Appellant suffered nothing by the delay in providing the undertaking. Since the payment of the cash bond to the clerk was made only 25 days after the expiration of the 30-day period provided in section 1030 the delay will not permit the doctrine of laches to be interposed. Respondent acted in good faith in providing the bond as soon as possible after receiving notice from his attorney that it was required. He rested on the assurance of a deputy county clerk that the only penalty for failure to file the bond was the suspension of proceedings, and his assurance that the action could not be dismissed except on motion, notice of which would be required to be given by defendant to plaintiff. The granting of respondent's motion to vacate the dismissal rested in the sound discretion of the court. In view of the circumstances appearing in this record the court would have abused its discretion had it denied the motion.

Order vacating and setting aside the order dismissing the action is affirmed.

MOORE, P. J., and McCOMB, J., concur.

85 Cal.App.2d 302

AUTOMOBILE INS. CO. OF HARTFORD, CONN., et al. v. UNION OIL CO. OF CALIFORNIA.

Civ. 16185.

District Court of Appeal, Second District, Division 1, California.

May 3, 1948.

Hearing Denied July 1, 1948.

1. Insurance 🔑606(1)

The rights of an insurance company to recover loss paid by it pursuant to fire policy, which rights are claimed by subrogation to rights of insured against third party responsible for fire, includes the right to the same statute of limitations that applies to its insured. Code Civ.Proc. § 338, subds. 2, 3; § 339, subd. 1; Insurance Code, §§ 2070, 2071.

2. Subrogation 🔑41(3)

One who is subrogated to rights and remedies of another should be allowed the same time in which to enforce such rights that the law would have allowed to person whose rights and remedies he succeeds.

3. Insurance 🔑606(1)

The right of an insurer against a third-party wrongdoer to recover a loss paid by it to insured does not arise out of or depend upon any contractual relation or of privity between them, but emanates from nature of the contract of insurance as a contract of indemnity. Insurance Code, §§ 2070, 2071.

4. Action 🔑27(1)

In determining whether action is on contract or in tort, it is nature of the grievance rather than form of the pleading that determines its character.

5. Action 🔑27(1)

If a complaint states a cause of action in tort and it appears that such tort is gravamen of the complaint, nature of action is not changed by allegations in regard to existence of or breach of a contract.

6. Limitation of actions 🔑21(1)

When a person injured elects to sue either in contract or in tort and he sets up a contract merely as a matter of inducement in order to show that he was not a trespasser or that a definite legal duty was owing him, gravamen of the action is "ex delicto" and not "ex contractu", and period of limitation prescribed for suits upon contracts has no application.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Contractu" and "Ex Delicto".

7. Action 🔑27(1)

Where breach of duty and consequent injury to one of parties to contract are set forth in complaint, it is violation of its duty by defendant that is gravamen of the action, which accordingly sounds in tort and not in contract.

8. Limitation of actions 🔑32(1)

Where four insurance companies, who by reason of payment of fire policies issued by them on account of fire which damaged insured's plant became subrogated to cause of action with which insured was vested against manufacturer of floor cleaning compound on ground that fire was caused by breach of implied warranty that compound was non-inflammable, brought action against manufacturer for injuring real property and goods and chattels, action was in tort and not in contract, so that three and not two year statute of limitations controlled. Code Civ.Proc. § 338, subd. 2, 3; § 339, subd. 1; Insurance Code, §§ 2070, 2071.

9. Sales 🔑434

Complaint, seeking to recover from manufacturer of floor cleaning compound for damages to plant by fire on ground that fire was caused by breach of implied warranty did not establish as matter of law that janitor of cleaning plant was guilty of contributory negligence because of allegation that compound came in contact with lighted match which was being used by janitor, in absence of any allegation that janitor who lighted match knew that compound was inflammable.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by the Automobile Insurance Company of Hartford, Conn., and others, against Union Oil Company of California, to recover amounts which plaintiffs paid under their respective fire policies to their assured on account of a fire which damaged the plant of the assured, and for which fire plaintiffs contended that defendant was responsible. From judgment for defendant, the plaintiffs appeal.

Reversed and remanded.

Crider, Runkle & Tilson and Clarence B. Runkle, all of Los Angeles, for appellants.

L. A. Gibbons, Jerry H. Powell, Douglas C. Gregg, Jennings & Belcher, and Robert W. McIntyre, all of Los Angeles, for respondent.

WHITE, Justice.

This is an action by four insurance companies to recover the amounts which they paid under their respective insurance policies to their assured, Aero Tool Company, on account of a fire which damaged the plant of the assured, and for which fire plaintiffs contend that defendant was responsible.

The complaint contains twelve counts, three on behalf of each plaintiff. For purposes of consideration on this appeal, the three counts of each plaintiff may be regarded as being respectively the same, the charging allegations being identical.

The first counts allege that on or about April 3 and 28, 1942, defendant sold to Aero Tool Company a product manufactured and prepared by the former for cleaning greasy and oily floors. That at the times of said sales defendant "impliedly warranted * * * that the said products or material was non-inflammable and was fit and safe for said use." That said purchases were made in reliance upon such warranty. It is then alleged that the product was unfit and unsafe for use in cleaning greasy and oily floors in that the same was "highly inflammable and consequently dangerous." That "as a proximate result of said breach of said implied warranty, a fire occurred at the plant of said Aero Tool Company * * * on or about May 17, 1942, while the floors of said plant were being cleaned with said product or material by the regularly employed janitor of said Aero Tool Company and when said product came in contact with a lighted match which was being used by said janitor, who did not know of said inflammable nature of said product or material."

The second counts are the same as the first except that an express warranty of non-inflammability is alleged rather than an implied warranty.

The third counts allege the same facts as the first two, but set forth that defendant was guilty of negligence. The negligent acts complained of are: (1) Furnishing an inflammable grease and oil solvent in unmarked containers, and failure to warn Aero Tool Company of the inflammable character of the product; (2) representations made by defendant to Aero Tool Company that said material was non-inflammable and safe for use in cleaning greasy and oily floors when in fact said product was "highly inflammable and consequently highly dangerous for said use."

Defendant answered the foregoing complaint, setting up, among other defenses, the bar of Section 339, Subdivision 1 of the Code of Civil Procedure.

When the cause was called for trial, defendant objected to the introduction of any evidence on the ground that the entire complaint was barred on its face by the foregoing provisions of the Code of Civil Procedure. The objection was sustained and judgment entered for defendant.

The sole question presented on this appeal is whether the complaint and the causes of action therein set forth are barred by the statute of limitations. Or, stated in another way, all that is involved is the period within which an insurance carrier may assert its personal subrogation rights against an alleged wrongdoer.

[1, 2] We are convinced that among the rights of an insurance company to recover a loss paid by it, which rights are claimed by subrogation to the rights of an insured against a third party responsible for a fire, there is included the right to the same statute of limitations period that applies to its insured. When the claim which the insured allegedly had against defendant herein was satisfied by plaintiffs they were subrogated to the position of Aero Tool Company, the insured. Having been so subrogated to the rights of the insured in respect to its claim against defendant, the plaintiffs

herein are entitled to the benefit of every right, lien and security which existed in favor of the insured. Manifestly, whatever period of limitation was applicable to the insured herein passed by subrogation to the insurance carriers, who by reason of such subrogation are put in the place of the party to whose rights they are subrogated. Upon principles of reason as well as natural justice, it seems only fair, right, just and equitable that one who is subrogated to the rights and remedies of another should be allowed the same time in which to enforce such rights that the law would have allowed to the person to whose rights and remedies he succeeds. Pond v. Dougherty, 6 Cal.App. 686, 689, 92 P. 1035; 23 Cal. Jur. 930, secs. 11, 12; Watts v. Eufaula Nat. Bank, 76 Ala. 474, 479; Sparks v. Childers, 2 Ind.T. 187, 47 S.W. 316; McClure v. Johnson, 10 Okl. 663, 65 P. 103; Pomeroy's Equity Jurisprudence (2nd Ed.), sec. 2351, p. 5203; Smith v. Davis, 71 W. Va. 316, 76 S.E. 670, 672., 43 L.R.A.,N.S., 614.

While in the case at bar there were no contractual relations between any of the plaintiffs and the defendant, and consequently, a direct action for reimbursement is not available nevertheless, plaintiffs do have available the remedy of subrogation in the same manner that such a remedy could be resorted to by a surety. Pomeroy's Equity Jurisprudence, 2d Ed., p. 5187, and note 77. Sec. 2070 of the California Insurance Code provides that all fire insurance policies shall be on a standard form and that, except for certain named exceptions, shall not contain additions thereto or omissions therefrom. The prescribed standard form is set forth in Section 2071 of the Insurance Code, and near the end thereof such standard form includes the following provision:

"(Subrogation): * * * if this company shall claim that the fire was caused by the act or neglect of any person or corporation, this company shall, on payment of the loss be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such rights shall be assigned to this company by the insured on receiving such payment."

[3] The right of the insurer against a third party wrongdoer does not however, arise out of or depend upon any contractual relation or of privity between them, but emanates from the nature of the contract of insurance as a contract of indemnity. As was said in Offer v. Superior Court, 194 Cal. 114, 118, 228 P. 11, 13, "The right arises independent of a provision in the contract of insurance which gives the insurer the right to recover damages from the person responsible for the loss."

Respondent urges that upon appellants' own theory of the case it falls within the provisions of Section 339, Subdivision 1 of the Code of Civil Procedure, which provides a two-year period. That the limitation period within which Aero Tool Company, the insured company, could have maintained an action against respondent is two years for the reason that under appellants' complaint, as to the insured, if any right of action at all is shown, it was only a right of action for breach of contract, which contract is oral and not evidenced by an instrument in writing. That the action is one "ex contractu." Appellants, on the contrary, contend that the right of action on the part of the insured Aero Tool Company, to which appellants claim is to be subrogated is "ex delicto," for the tortious injury to property and is controlled by Subdivisions 2 and 3 of Section 338 of the Code of Civil Procedure which provide a three-year period within which such an action may be commenced.

[4, 5] In determining whether an action is on the contract or in tort, we deem it correct to say that it is the nature of the grievance rather than the form of the pleadings that determines the character of the action. If the complaint states a cause of action in tort, and it appears that this is the gravamen of the complaint, the nature of the action is not changed by allegations in regard to the existence of or breach of a contract. In other words, it is the object of the action, rather than the theory upon which recovery is sought that is controlling. Gosling v. Nichols, 59 Cal.App.2d 442, 444, 139 P.2d 86; Lowe v. Ozmun, 137 Cal. 257, 259, 70 P. 87; Krebenios v. Lin-

dauer, 175 Cal. 431, 433, 166 P. 17; Nathan v. Locke, 108 Cal.App. 158, 161, 162, 287 P. 550, 291 P. 286; Kings Laboratories v. Yucaipa Valley Fruit Co., 18 Cal.App.2d 47, 49, 62 P.2d 1054.

[6] In 16 Cal.Jur., page 471, section 74, it is said: "While in many instances a person injured may elect to sue either in contract or in tort, when he sets up a contract merely as a matter of inducement in order to show that he was not a trespasser *or that a definite legal duty was owing him,* the gravamen of the action is ex delicto and not ex contractu, and the period of limitation prescribed for suits upon contracts has no application." (Emphasis added.)

[7, 8] We are impressed that in the case now engaging our attention, the contract as pleaded had nothing whatever to do with the liability other than to create a duty on the part of respondent herein, and the action is grounded not upon the contract, but upon the duty springing from the relation created by it. While appellants might have elected to sue either in tort or in contract, it clearly appears to us that the instant action is based upon the injury done to property. It, therefore, comes under the provisions of Section 338 of the Code of Civil Procedure, which provides that the statutory period for commencing an action for injuring real property and goods and chattels is three years, and that, regardless of the theory upon which relief is sought, viz., whether on a negligence theory or a breach of warranty theory. In the case at bar the pleader was evidently following the commonly accepted practice of setting up the contract of warranty as a matter of inducement to show that a definite legal duty arose on the part of the respondent. Where, as here, the breach of duty and consequent injury to one of the parties to such contract are set forth, it is the violation of its duty by respondent that is the *gravamen* of the action, which accordingly sounds in tort and is not "ex contracto." Basler v. Sacramento, etc., Ry. Co., 166 Cal. 33, 35, 36, 134 P. 993. Whatever may be said as to counts 1 and 2, to us it is manifest that count 3 sounds in tort because it definitely charges that the fire and consequent damage to property was occasioned by the negligence of respondent wholly separate and apart from any obligation arising out of the contract or from the negligent performance thereof.

Respondent's argument concerning the rule that a manufacturer is not liable to the ultimate consumer of a product who has purchased through a middleman because of lack of privity is unavailing. The rule in question has no application to the case at bar because Aero Tool Company, the assured of appellants herein, and in whose shoes these appellants stand, purchased the products direct from respondent.

Strong reliance is placed by respondent upon the case of Phœnix Insurance Company v. Pacific Lumber Co., 1 Cal.App. 156, 81 P. 976, and that the trial judge placed equal reliance thereon is evidenced by his statement made at the time he ruled upon the objection to the introduction of any evidence, wherein he said: "The court rules that the objection to the introduction of any evidence made by the defendant is good and sustains the objection under the authority of the case that has been cited (Phœnix Insurance Co., v. Pacific Lumber Co., supra), and Section 339, Subdivision 1 of the Code of Civil Procedure. That covers it."

The cited case was one wherein plaintiff insurance company by its complaint alleged that certain property owned by one Hazelton was insured by it. That while said insurance was in force, defendant wilfully and carelessly kindled a fire on its own land and negligently suffered the said fire to extend beyond its own land, to and upon the land of Hazelton, destroying the insured property. It was then alleged that all of said negligent acts were "contrary to statutory provisions under Section 3344 of the Political Code of this state," which at that time read: "Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in *treble* damages."

Defendant demurred to the complaint on the ground, among others, that the causes of action set forth therein were barred by Sections 339 and 340 of the Code of Civil Procedure. The demurrer was sustained and plaintiff appealed.

It was appellant's contention that the stated causes of action rested upon the aforesaid Section 3344 of the Political Code which brought them within the purview of Section 338 of the Code of Civil Procedure, which provides that "An action upon a liability created by statute, *other than a penalty or forfeiture*" (emphasis added) must be brought within three years.

Respondent answered that if the action was based on Section 3344 of the Political Code, it was necessarily an action to recover a penalty, and was, therefore, subject to the one-year period provided in Section 340 of the Code of Civil Procedure. The major contention, however, was that Section 3344 did not create any statutory liability but was simply declarative of a preexisting common law liability, adding some penalty features thereto of which appellant did not attempt to avail itself.

No mention is made in the briefs or in the decision of Subdivisions 2 or 3 of Section 338 of the Code of Civil Procedure, nor of the applicability of these subdivisions to appellants' subrogation remedy. Apparently, it was assumed by all parties to the litigation and the court as well, that the cause of action against respondent rested upon the general "liability not founded upon an instrument in writing," referred to in Subdivision 1 of Section 339. And this assumption was indulged in notwithstanding that in the case of Lowe v. Ozmun, supra, 137 Cal. at page 259, 70 P. 87, it was squarely held that the general wording in Section 339 of the Code of Civil Procedure is not applicable to an action specifically covered by some other code section. Subdivision 3 of Section 338 of the Code of Civil Procedure expressly applies to "an action for taking, detaining, or injuring any goods, or chattels." As heretofore indicated, we are satisfied that the Aero Tool Company could have sued respondent upon a negligence theory or a warranty theory. Appellants herein were its insurers, and pursuant to their policies of insurance, they paid Aero Tool Company's loss. They therefore, became subrogated to the same causes of action with which the insured was vested. The instant action being for injuring real property and goods or chattels, it comes within the provisions of Section 338 of the Code of Civil Procedure. Although, in the cited case, the code provision just mentioned was ignored, we are constrained to hold that any language contained in the decision from which it can be inferred that the provisions of Section 338 of the Code of Civil Procedure are not applicable to a cause of action such as the one now before us is directly contrary to the authorities relied upon by us herein, as well as the reason and logic therein contained, and should not therefore, be followed.

[9] Finally, respondent asserts that, assuming for purposes of argument only, that the complaint states a cause of action in tort, the court's ruling rejecting all evidence was correct for the reason that the complaint alleges contributory negligence as a matter of law. With this contention we cannot agree. The complaint specifically alleges that the janitor who lighted the match did not know that the floor-cleaning compound was inflammable. Neither can we subscribe to respondent's claim that any reasonable or prudent person should know that a cleaning solvent is inflammable. We find nothing on the face of the complaint from which it can be inferred that Aero Tool Company or any of its employees was guilty of contributory negligence as a matter of law.

For the foregoing reasons, the judgment is reversed, and the cause remanded.

DORAN, Acting P. J., and BARTLETT, Justice pro tem., concur.

85 Cal.App.2d 265

SIMONINI v. JAY DEE LEATHER PRODUCTS CO.

No. 13638.

District Court of Appeal, First District, Division 1, California.

April 30, 1948.

1. Dismissal and nonsuit 🔑71

Where notice of motion for order dismissing action specified that motion would be based on all records filed and proceedings and provisions of section 583, the notice was not required to be accompanied by an affidavit. Code Civ.Proc. § 583.

2. Dismissal and nonsuit 🔑70

Where statute provided for dismissal, within court's discretion, for failure to bring action to trial in two years and for mandatory dismissal for failure to bring action to trial in five years, and action had been pending more than two but less than five years, notice of motion for order dismissing action under such statute sufficiently disclosed grounds on which motion would be made. Code Civ.Proc. §§ 583, 1010.

3. Dismissal and nonsuit 🔑72

Where no objection was made in trial court to form of notice of motion for order dismissing action or to court's proceeding to hear motion, objection that notice did not state ground on which motion would be made was waived. Code Civ. Proc. §§ 583, 1010.

4. Dismissal and nonsuit 🔑60(1)

The court's power to dismiss an action for failure of plaintiff to prosecute it with diligence is an inherent power, and statutory provision regarding dismissal must be read in the light of existence of such power. Code Civ.Proc. § 583.

5. Appeal and error 🔑948

Ruling dismissing an action for failure to prosecute diligently should not be disturbed except on a showing of a clear abuse of discretion, and appellant must establish affirmatively that there has been an abuse of discretion. Code Civ.Proc. § 583.

6. Dismissal and nonsuit 🔑60(3)

Where complaint was filed in June, 1944, was set for trial by jury for Nov. 21, was thereafter continued three times, the last being to April 18, 1945, on which date the trial was dropped from calendar, and thereafter trial was set for Dec. 1946, and was continued five times, the last continuance being from June 1947 to Sept. 3d, dismissal of action for failure to bring case to trial within two years was not an abuse of discretion in absence of any showing that continuances were at court's request, even though, at time of dismissal, case was set for trial the following month. Code Civ.Proc. § 583.

7. Appeal and error 🔑927(2)

In absence of any showing that continuances were at trial court's request, appellate court could not assume that trial court would be unfair enough to dismiss a case for lack of prosecution, where failure to get case to trial was due, not to plaintiff's lack of diligence, but to pressure of business in court or to court's own action. Code Civ.Proc. § 583.

8. Appeal and error 🔑934(1)

An appellate court will never indulge in presumption to defeat a judgment, but every intendment and presumption must be indulged in favor of judgment.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Personal injury action by Angelo Simonini against Jay Dee Leather Products Company. From an order dismissing the action, the plaintiff appeals.

Affirmed.

John F. O'Sullivan, of San Francisco, for appellant.

F. E. Hoffmann, of San Mateo, for respondent.

BRAY, Justice.

The principal question involved in this appeal is whether the trial court abused its discretion in dismissing a personal injury action on the ground that plaintiff, in failing to bring the matter to trial within two years after action filed, did not exercise due diligence.

The history of the case follows: The complaint was filed June 10, 1944. A demurrer thereafter filed was overruled, and on September 7 the answer of defendant was filed. Pursuant to memorandum of motion to set, the cause was set for trial by jury for November 21. Thereafter the trial was continued three times, the last time being to April 18, 1945. On that date appears a minute order to the effect that the trial is dropped from the calendar. Plaintiff having substituted attorneys, a new memorandum to set was filed and the trial set for December, 1946. Thereafter the trial was continued five times, the last continuance being from June, 1947, to September 3. On July 28, defendant filed a "Notice of Motion For Order Dismissing Action" which was heard on August 4 and the order dismissing the action was filed on August 7.

On the hearing of the motion all that was before the court was the record itself, as neither side filed any affidavits or offered any other evidence.

The Notice of Motion.

[1] Plaintiff's first contention is that the notice of motion was insufficient (a) because not accompanied by any affidavit, and (b) because it did not state the grounds upon which the motion was to be made. As to the first ground, it was not necessary that any affidavit accompany the notice. It specified that the motion would be based upon "* * * all the records, files and proceedings * * * and the provisions of section 583 of the Code of Civil Procedure." Thus, defendant was relying on the record to show that the case had not been brought to trial within the statutory two-year period, and the record itself is the best evidence of that fact. There is no statutory requirement that the notice of motion be accompanied by an affidavit. 18 Cal.Jur. 656.

[2] As to the second point, plaintiff contends that under section 1010 of the Code of Civil Procedure the notice of motion must set forth the grounds upon which the motion is to be made. In Shields v. Shields, 55 Cal.App.2d 579, 130 P.2d 982, 984, a notice of motion stated that the motion was to be made upon section 685 of the Code of Civil Procedure (the section providing for the issuance of execution after five years). The court held that in failing to state the grounds of the motion more explicitly, the notice was faulty, but the fault was not a fatal one, as it was apparent that the "obvious ground of the motion was that a judgment remained unsatisfied in whole or in part." So here, while section 583 of the Code of Civil Procedure provides two different grounds for dismissal, one for failure to bring the action to trial in two years, in which event the dismissal is within the discretion of the court, the other for failure to bring it to trial in five years, in which event the dismissal is mandatory, it is obvious from the fact that the notice states that the motion is to be made and based upon section 583, and the action had been pending less than five years, that it was to be made upon the two-year ground. There could be no mistake as to the ground upon which the motion was to be made.

[3] Moreover, the record fails to show that any objection was made in the trial court to the form of the notice or to the court's proceeding to hear the motion. In Hecq v. Conner, 203 Cal. 504, 265 P. 180, the appellant contended that the notice of motion (to set aside a judgment of dismissal) did not comply with section 1010 of the Code of Civil Procedure in that it did not state the grounds upon which the motion would be made. The court stated that section 1010 "is for the benefit of the party upon whom the notice is served. Being for his benefit, he can, of course, waive its requirement. By failing to object to the hearing of the motion at the time which it was noticed to be heard, the appellants impliedly waived this defect in the notice itself. [Citing cases.]" Page 506 of 203 Cal., page 181 of 265 P.

No Abuse of Discretion Shown.

[4, 5] "It seems well settled that the power of a trial court to dismiss an action for failure on the part of plaintiff to prosecute it with diligence is an inherent power

which exists without the aid of statutory authority and that the provisions of section 583 of the Code of Civil Procedure and of other related sections must be read in the light of the existence of such inherent power." Hibernia Savings & Loan Soc. v. Lauffer, 41 Cal.App.2d 725, 728, 107 P.2d 494, 495. Section 583 of the Code of Civil Procedure provides: "The court may *in its discretion* dismiss any action for want of prosecution * * * whenever plaintiff has failed for two years after action is filed to bring such action to trial." (Emphasis added.) It is well settled that the action of a trial court in dismissing an action for failure to prosecute diligently should not be disturbed except upon a showing of clear abuse of discretion. Hibernia Savings & Loan Soc. v. Lauffer, supra; Inderbitzen v. Lane Hospital, 17 Cal.App.2d 103, 61 P.2d 514. "* * * it is incumbent upon the appellant to establish affirmatively that there has been an abuse of discretion." St. Clair v. Brix, 89 Cal.App. 94, 99, 264 P. 307, 309; Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213.

[**6-8**] Plaintiff at no time offered any evidence to show that his failure to bring the case to trial was not because of lack of diligence. No explanation of the many continuances (eight in number) is given. On this point plaintiff contents himself with the very negative suggestion that as the minute orders entered by the clerk fail to show anything other than the fact that the trial each time was continued, they do not show that the continuances were at plaintiff's request. He intimates that they might have been for the convenience of the court. The peculiar language used by him might indicate that the continuances were at his request. However, that is immaterial. "* * * the duty rests upon the plaintiff at every stage of the proceedings to use due diligence to expedite his case to a final determination." St. Clair v. Brix, supra, 89 Cal.App. page 99, 264 P. page 309; Raggio v. Southern Pacific Co., 181 Cal. 472, 185 P. 171. In the absence of any showing that the continuances were at the request of the court, we cannot assume that the court would be unfair enough to dismiss a case for lack of prosecution where the failure to get the case to trial was due, not to plaintiff's lack of diligence, but to pressure of business in the court or to the court's own action. "An appellate court will never indulge in presumptions to defeat a judgment. It will never presume that an error was committed, or that something was done or omitted to be done which constitutes error. On the contrary, every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the orders and judgments of superior courts. It is the duty of a litigant complaining of errors committed by a trial court to produce a duly authenticated record affirmatively showing the alleged error." 2 Cal.Jur. p. 852.

While it is true that at the time of the dismissal the case was set for trial the following month, we cannot say that that fact compels a holding that the court abused its discretion in dismissing the action. Particularly is this so where, as here, plaintiff offered no evidence whatever in the trial court to excuse his delay in bringing the case to trial.

Moreover, the court had knowledge of its own of the reasons for the continuances, and as said in Hibernia Savings & Loan Soc. v. Lauffer, supra, 41 Cal.App.2d page 729, 107 P.2d page 496: "It would therefore appear immaterial whether the trial court was acting under its inherent power or under the power which said section [583, Code Civ.Proc.] purports to confer upon it for, in either case, it is settled that the order of the trial court dismissing said action should not be disturbed except upon a showing of a clear abuse of discretion."

We cannot say that the record itself, in showing an unexplained delay of over three years in bringing the case to trial, was not sufficient justification of the action of the court in dismissing the case.

The order appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

85 Cal.App.2d 428

SMITH v. SMITH.

Civ. 16083, 16140.

District Court of Appeal, Second District. Division 2, California.

May 11, 1948.

Rehearing Denied May 27, 1948.

1. Divorce ⚷303(3)

Evidence of a change of circumstances arising after entry of divorce decree is generally necessary to warrant modification of order for custody of minor children.

2. Divorce ⚷303(3)

Evidence that after entry of divorce decree awarding custody of minor children to mother with right of visitation by father, change in business required father's absence from city for extended periods of time and that father and second wife were proper persons to have custody of children sustained implied finding of such change of circumstances as to justify modification of decree so as to permit father to have custody of children during half of summer vacation and portion of Christmas vacation.

3. Divorce ⚷312

On appeal from order modifying provisions of divorce decree relating to custody of minor children, appellate court must disregard evidence in opposition to modification.

4. Divorce ⚷303(3)

In proceeding for modification of provisions of divorce decree relating to custody of minor children, failure to make written findings of fact as to moral fitness of mother and father to have custody of children was not error, since generally written findings of fact are not essential to sustain such an order.

5. Divorce ⚷312

In proceeding by father to modify provisions of divorce decree relating to custody of minor children, excluding from evidence a letter written to father by second wife before mother of children commenced action for divorce and a fantasy which accompanied letter was not prejudicial error, since in such proceeding generally only proper, relevant and material evidence arising after entry of divorce decree and bearing on the interest of the children is admissible.

6. Divorce ⚷303(3)

Order modifying provisions of divorce decree relative to custody of minor children was not erroneous in ordering parents to encourage relationships and contacts between children and their blood relatives, regardless of the practicability of enforcing such provision.

7. Divorce ⚷298(1)

In determining custody of minor children of divorced parents, the ultimate aim of court is the best interest and welfare of the children and personal feelings and desires of parents should not be permitted to prevent a full and complete consummation of such objective.

8. Divorce ⚷227(1)

Awarding mother only $250 for counsel fees and costs in proceeding by father to modify provisions of divorce decree relating to custody of minor children was not abuse of discretion in view of evidence that mother had an income of her own and that amount awarded was sufficient to enable her properly to defend and preserve her rights. Civ.Code, § 137.5.

9. Divorce ⚷223, 286

Amount of allowance to mother for attorney's fees in proceeding by father for modification of provisions of divorce decree relating to custody of minor children is discretionary with trial court whose decision in such respect will not be disturbed on appeal in absence of showing of a plain abuse of such discretion. Civ.Code, § 137.5.

10. Divorce ⚷312

Allowance of $500 to mother for attorney's fees to appeal from order modifying provisions of divorce decree relating to custody of minor children and costs of preparing record and briefs was not so excessive as to constitute abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake and Paul Vallee, Judges.

Action for divorce by Evelyn Smith against Hampton Smith. From orders modifying provisions of final decree of divorce relating to custody of minor children, fixing amount of plaintiff's attorneys' fees, costs, and expenses in opposing proceeding for modification order and allowing plaintiff additional attorneys' fees, costs, and expenses in aid of appeal, both plaintiff and defendant appeal.

Orders affirmed.

Olaf G. Hoegstedt, John J. Craig, and Olaf G. Hoegstedt, all of Los Angeles, for plaintiff-appellant-respondent.

Alfred C. Ackerson, of Los Angeles, for defendant-respondent-appellant.

McCOMB, Justice.

These appeals are from: (1) an order modifying the provisions of a final decree of divorce relating to the custody of children (2nd Civil No. 16140), (2) an order fixing the sum of $250.00 as the amount of plaintiff's attorneys' fees, costs, and expenses in opposing the order to show cause which initiated the above mentioned modification order (2nd Civil No. 16140), and (3) an order allowing plaintiff (appellant) $500.00 as attorneys' fees, court costs, and expenses in aid of her appeal from the foregoing orders (2nd Civil No. 16083).

The record sustains the following implied findings of fact of the trial court: On August 30, 1937, plaintiff and defendant were married, and as issue of the marriage are two daughters. On January 15, 1945, plaintiff filed an action for divorce. On February 28, 1945, an interlocutory decree of divorce was granted to plaintiff, which decree awarded custody of the minor children to her with the right of reasonable visitation by defendant. This reasonable visitation was defined in the decree as meaning that defendant should have the right to see his minor children at the home of plaintiff at reasonable hours, and also the right to take his children with him on alternate weekends.

At the time of the divorce litigation between the parties, defendant was regularly employed in the city of Los Angeles, and his work required him to be absent from the city only occasionally. Subsequent thereto his business required his absence from the city for extended periods, e. g. in 1945 he was absent from California a total of eight months, and at the time of the hearing of the order to show cause he anticipated being absent from the city a considerable portion of his time in the future. When in Los Angeles he maintains a regular residence where his children have their own bedroom, furniture, clothes, etc. In addition to defendant's testimony, a neighbor, Mrs. Helen Maxson, wife of Dr. John Maxson, assistant professor of Geology at the California Institute of Technology, testified that she and her husband were neighbors of defendant and his wife; that they visited each other frequently; that their children played together; that she was intimately acquainted with defendant; and that in her opinion his household was above criticism. Other witnesses also testified as to the fitness of defendant and his present wife to have the custody of defendant's children.

The trial judge ordered a modification in the provisions for custody in the final divorce decree by directing that:

"The defendant Hampton Smith shall have the right to visit said minor children at the home of the plaintiff, Evelyn Smith, at all reasonable hours and shall have physical custody of the children on alternate weekends, from Friday afternoon until 7:00 p. m. Sunday evening.

"That said Hampton Smith shall have physical custody of said minor children for the first one-half of each summer vacation beginning the first day after the termination of the regular school term.

"That the said defendant Hampton Smith shall have physical custody of said minor children for at least one full week of each Christmas vacation or for one-half of each Christmas vacation whichever be the longer period; that said period shall be a continuous period, excepting only that the children shall be at the home of the plaintiff, Evelyn Smith, from the day before Christmas to Christmas night, at which latter time said children may be visited by the defendant, Hampton Smith;

"That the rights of each of the parties under the foregoing modified custody order is conditioned and dependent upon which said party complying with and adhering to the directions, prescriptions, medication, diet, advice and treatment pertaining to the physical welfare and physical necessities of the minor children herein, as given by Dr. Ralph Netzley or his successor or successors."

The trial judge also made the following orders:

(1) "That the plaintiff and defendant shall at all future times permit, foster and encourage relationships and contacts between said children, Cheryl Suzanne Smith and Stephanie Smith and their blood relatives, and that neither party to this action shall attempt, by any act, deed or otherwise, to prejudice, bias or influence adversely said children, or either of them, so as to prevent or influence adversely their normal and natural feelings and relations to the parties hereto, or to their blood relatives."

(2) "That the defendant, Hampton Smith, shall pay within 90 days to Olof G. Hoegstedt and Victor S. Cogen, the attorneys for plaintiff, the sum of $250.00 as and for attorneys' fees, costs and disbursements in these proceedings."

Thereafter on April 9, 1947, the trial court made an order (a) allowing plaintiff $500.00 as attorneys' fees for the purpose of appealing from the previous orders, and (b) ordering defendant to pay the costs for the preparation of the record on appeal, and the costs of printing plaintiff's briefs on appeal.

Appeal from the First Order

Four questions are presented for determination in connection with this order which will be stated and answered hereunder consecutively.

First: *Was there substantial evidence to sustain the trial court's implied finding that there had been a change in conditions subsequent to the time of the entry of the final decree of divorce, March 15, 1946, in which the custody of the minor children of the parties was fixed?*

[1] This question must be answered in the affirmative. It is the general rule, subject to certain exceptions not necessary for us to consider here, that to warrant a modification of an order for custody of minor children there must be evidence of a change of circumstances arising after the entry of the original decree. (Foster v. Foster, 8 Cal.2d 719, 728, 68 P.2d 719; Johnson v. Johnson, 72 Cal.App.2d 721, 723, 165 P.2d 552; Peterson v. Peterson, 64 Cal.App.2d 631, 632, 633, 149 P.2d 206.

[2, 3] In the present case the evidence sustains the implied finding of the trial court that at the time the original order for custody of the children was made their father, defendant, was employed in the city of Los Angeles and would have the opportunity of visiting with them at frequent intervals, but that subsequent to the entry of such order his business had changed and it became necessary for him to be absent from the city for extended periods of time. The conditions had therefore changed making it advisable for the trial court to enter an order permitting defendant to have custody of his children for (a) half of the summer vacations, and (b) one full week each Christmas vacation or for one half of each Christmas vacation whichever period should be the longer. This evidence accompanied by evidence that defendant and his wife were fit and proper persons to have the custody of the children and maintained a proper home for them was substantial evidence to sustain the trial court's implied finding to this effect, and to support the order of modification. We, of course, must disregard any evidence introduced by plaintiff tending to a different conclusion. This rule is so well established that it is unnecessary to give authorities in support thereof even though plaintiff has failed to observe the rule in presenting her case to this court.

Second: *Did the court err in not making written findings of fact as to the moral fitness of plaintiff and defendant to have the custody of their children?*

[4] This question must be answered in the negative for the reason that it is the general rule that written findings of fact are not essential to sustain an order modi-

fying a decree of divorce by changing the order relative to the custody of minor children. (Gavel v. Gavel, 123 Cal.App. 589, 591, 11 P.2d 654; see also Simmons v. Simmons, 22 Cal.App. 448, 456, 134 P. 791.)

Third: *Did the trial court commit prejudicial error in excluding from evidence a letter written by defendant's present wife to him on July 4, 1944, together with a fantasy which accompanied the letter entitled, "A Dream"?*

[5] This question must also be answered in the negative. It is the general rule that in a proceeding for an order modifying a divorce decree's provision relative to the custody of minor children only such evidence is admissible as bears on the interest of the children, and generally this evidence must be limited to such proper, relevant and material evidence as has arisen subsequent to the entry of the divorce decree. (Washburn v. Washburn, 49 Cal.App.2d 581, 588, 122 P.2d 96.)

In the instant case the evidence which was excluded had reference to facts that had occurred prior to the entry of the decree for divorce and which had no bearing upon the question of the moral fitness of defendant's wife at the time of the hearing which preceded the present order from which the appeal is taken. Therefore such evidence was properly excluded under the foregoing rule.

Fourth: *Did the trial court err in ordering that plaintiff and defendant at all future times foster and encourage relationships and contacts between the minor children and their blood relatives?*

[6, 7] This question must also be answered in the negative. Clearly there is nothing erroneous in the questioned order. There may be some doubt as to the practicability of trying to enforce it. However, it is self-evident that the best interests of the children require that both parents should encourage them to have a proper respect and admiration for their mother and father and their other blood relatives. It has been repeatedly announced by decisions in this state that in considering an order of the type here involved, the ultimate aim of the court is the best interest and welfare of the minor children, and the personal feelings and desires of the parents should not be permitted to prevent a full and complete consummation of this objective.

Appeal from the Second Order

The single question presented on the appeal from this order is:

Did the trial court abuse its discretion in awarding plaintiff only $250.00 for counsel fees and costs?

[8, 9] This question must also be answered in the negative. The trial court is vested with discretion as to the amount of money the wife is to be allowed for her attorney, and in the absence of a showing of a plain abuse of the exercise of such discretion, the amount allowed by the trial judge will not be disturbed on appeal. (Section 137.5, Civil Code; Peyre v. Peyre, 79 Cal. 336, 339 et seq., 21 P. 838.)

Disregarding contrary evidence, evidence was received which would support a finding that plaintiff had an income of her own and that the only sum necessary to be awarded to her to properly defend and preserve her rights was the sum of $250.00. Therefore the order will not be disturbed on appeal.

Appeal from the Third Order

Did the trial court award plaintiff an excessive amount in allowing her $500.00 for attorneys' fees on appeal and the costs of preparing the record and briefs?

[10] This question must be answered in the negative. The rule is here applicable which is stated in discussing the appeal from the second order. In the absence of a showing of abuse of the trial court's discretion the order should be affirmed. We are of the opinion that there is no showing of an abuse of discretion. Again, disregarding contrary evidence there is evidence to support the implied finding of the trial court that defendant had the ability to pay the amount fixed, and from the trial judge's knowledge of the time and research necessary to properly present the material to the appellate court, together with his knowledge of the nature of the

questions involved, we cannot say that there is a clear showing of an abuse of discretion, and the order should be affirmed.

For the foregoing reasons each of the orders from which an appeal is taken is affirmed.

MOORE, P. J., and WILSON, J., concur.

85 Cal.App.2d 473

WALDER et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 16385.

District Court of Appeal, Second District, Division 2, California.

May 14, 1948.

1. Workmen's compensation 🔑1709

Whether essential employer-employee relationship exists between parties to workmen's compensation proceeding is ordinarily fact question for Industrial Accident Commission to determine from evidence adduced.

2. Workmen's compensation 🔑1939

The Industrial Accident Commission's findings, supported by evidence, as to whether employer-employee relationship existed between parties to workmen's compensation proceeding, will not be disturbed.

3. Workmen's compensation 🔑1710

Whether injured workman was employee or independent contractor is question of law, where only one inference and one conclusion may be drawn from all facts in evidence. Labor Code, § 3353.

4. Workmen's compensation 🔑322

A carpenter repairman, furnishing his own tools, keeping his own time, and charging accordingly for his services in adjusting stuck food market doors at request of market owners, who did not exercise or reserve right of control over his work, was not their "employee," but "independent contractor," not entitled to compensation under Workmen's Compensation Act for injuries sustained when doors fell on him. Labor Code, § 3353.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

Proceeding for a writ of review by David Walder and another, doing business as the Penny-Save Food Market, to annul an order of the Industrial Accident Commission directing petitioners to pay compensation benefits under the Workmen's Compensation Act to Horace Fish for injuries received during the course and as a result of his alleged employment by petitioners.

Award annulled.

Wm. A. Wittman and Charles S. Buck, both of South Gate, for petitioners.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondents.

MOORE, Presiding Justice.

Petitioners seek to annul an order of respondent commission directing it to pay compensation benefits to applicant Horace Fish for injuries he is alleged to have received during the course and as a result of his employment by petitioners. A review of the evidence and authorities readily discloses the error of the order.

Petitioners are the owners of the Penny-Save Food Market in South Gate. Parts of its premises are leased to others but petitioners operate the grocery and market departments. Applicant was approximately seventy-three years of age on the day he received his injuries and had been a carpenter most of his life. He had been engaged by the former owners of the market on several occasions to do little repair jobs for them. When petitioners purchased the market in 1945 they continued the practice. On various occasions prior to his accident applicant had repaired the roof where burglars had broken through, had repaired the cold water cooler on the roof, and had put a new roof on the shed for petitioners. Another half dozen times or more he had worked on the doors. The manner of engaging the carpenter's services seldom varied from that followed on the date of the accident. On that day one of the petitioners telephoned him that the doors at the market were stuck and requested him to make the necessary adjustment. He responded and while working on the doors they fell upon him causing grave injury.

Applicant always furnished his own tools except the stepladder which he borrowed from petitioners. He furnished no materials for his jobs and if he ordered any they were paid for by petitioners. The jobs were all small and applicant was always paid in cash in each instance after he had finished his task. No time limit was ever set by petitioners for the completion of a repair. Their custom was to tell him what repair was needed and he performed in such manner as he chose. He testified: "They would tell me what they wanted me to do and leave it up to me to fix it." Applicant also did odd jobs for other people.

[1-3] Ordinarily it is a question of fact to be determined by the commission from the evidence adduced whether the essential relationship of employer-employee exists (Riskin v. Industrial Accident Comm., 23 Cal.2d 248, 254, 144 P.2d 16), and the commission's finding if supported by the evidence will not be disturbed. Gerard Co. v. Industrial Accident Comm., 17 Cal.2d 411, 414, 110 P.2d 377. But "if from all the facts only a single inference and one conclusion may be drawn, whether one be an employee or an independent contractor is a question of law." Baugh v. Rogers, 24 Cal.2d 200, 206, 148 P.2d 633, 637, 152 A.L.R. 1043; Yucaipa Farmers Co-op. Ass'n v. Industrial Accident Comm., 55 Cal.App.2d 234, 238, 130 P.2d 146; Burlingham v. Gray, 22 Cal.2d 87, 100, 137 P.2d 9. As defined by Labor Code section 3353, "'Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the results of his work only and not as to the means by which such result is accomplished."

[4] Under such rules it is apparent that applicant at the time he was injured was not an employee of petitioners but was an independent contractor. He was a carpenter repairman who furnished his own tools, kept his own time, and charged petitioners accordingly. This was his business or occupation. Petitioners did not at any time exercise or reserve the right to exercise any shadow of control over his work. They were grocerymen who knew nothing about carpentry and could not have controlled Fish's operations if they had had the right to do so. It was probably because of their want of knowledge and experience that they called in a carpenter, just as one would summon a plumber, an auto mechanic or an electrician to repair machinery upon his own time and in the exercise of his own knowledge and skill.

Under the admitted facts of the case it follows that respondent commission was without jurisdiction to make the award complained of.

The award is annulled.

McCOMB and WILSON, JJ., concur.

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85 Cal.App.2d 435

CALIFORNIA SHIPBUILDING CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 16338.

District Court of Appeal, Second District, Division 2, California.
May 11, 1948.

Rehearing Denied May 26, 1948.

Hearing Denied July 8, 1948.

1. Workmen's compensation 🔑1733

Generally, the Industrial Accident Commission should make specific findings on all material issues presented in a claim for workmen's compensation.

2. Administrative law and procedure 🔑486
Workmen's compensation 🔑1743

A finding of the Industrial Accident Commission is rendered indefinite, uncertain and unintelligible by the use of the words "and/or".

3. Workmen's compensation 🔑1743

Finding of Industrial Accident Commission that employee's injury was caused by the serious and willful misconduct of employer "and/or" his managing representative, was too indefinite, uncertain and unintelligible to sustain award of workmen's compensation.

4. Workmen's compensation ⚷1674

Evidence that condition which caused accident resulting in injury to a shipwright was created by instructions of a journeyman shipfitter, who had no supervisory authority, would not support finding that injury was proximately caused by serious and willful misconduct of managing representative of employer.

◆

Proceeding by the California Shipbuilding Corporation for a writ of review to annul an order of the Industrial Accident Commission of the State of California awarding compensation to William Sharp, employee.

Award annulled.

Thelen, Marrin, Johnson & Bridges, Gardiner Johnson and Samuel C. Shenk, all of San Francisco, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for Industrial Accident Commission.

McCOMB, Justice.

Petitioner seeks to annul an order of the Industrial Accident Commission awarding compensation to an injured employee predicated upon the theory that the employee's injury was proximately caused by the serious and wilful misconduct of the employer.

The essential facts are these:

On October 16, 1943, William Sharp, while employed as a shipwright by the California Shipbuilding Corporation, sustained an injury arising out of and occurring during the course of his employment. Respondent commission made an award in favor of the employee predicated on a finding that: "Said injury was proximately caused by the serious and wilful misconduct of the employer and/or his managing representative * * *."

This is the single question presented for our determination:

*Was the commission's finding that the employee's injury was "proximately caused by the serious and wilful misconduct of the employer and/or his managing representative * * *" sufficiently definite and certain to sustain the award?*

This question must be answered in the negative and is governed by these rules:

[1] 1. It is the general rule that the Industrial Accident Commission should make specific findings on all material issues presented in a claim for compensation. (California Shipbuilding Corp. v. Industrial Acc. Comm., 31 Cal.2d 278, 188 P.2d 32; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 705, 151 P. 398.)

[2] 2. A finding is rendered indefinite, uncertain and unintelligible by use of the words "and/or". (Putnam v. Industrial Commission, 80 Utah 187, 14 P.2d 973, 982 et seq. See also, California Corrugated Culvert Co. v. Stewart, 215 Cal. 120, 123, 8 P.2d 1013; Underhill v. Alameda Elementary School Dist., 133 Cal.App. 733, 736, 24 P.2d 849.)

[3] Applying the foregoing rules to the facts of the instant case the petitioner, under rule 1, supra, was entitled to a direct finding as to whether it was guilty of serious and wilful misconduct. The only finding upon the issue is that set forth above, which says that the employee's injury was caused by the serious and wilful misconduct of the employer "and/or" his managing representative. Such a finding, under rule 2, supra, is indefinite, uncertain and unintelligible. From the finding there is not any way of determining whether the injury was caused by the serious and wilful misconduct (1) of the employer, (2) of the managing representative, or (3) of the employer and the managing representative working together.

[4] An examination of the record fails to disclose any evidence of serious and wilful misconduct of the employer. The condition which caused the accident was created by the instructions of a journeyman shipfitter, who had no supervisory authority. Such evidence would not support a finding that the injury was proximately caused by

the serious and wilful misconduct of "the managing representative of the employer."

There was a total absence of any evidence in the record that any foreman or managing representative of petitioner was present at the scene of the accident; knew of the condition which caused it before it happened; or had any notice or knowledge of the facts which created the dangerous condition that resulted in the employee's injury.

The award is annulled.

MOORE, P. J., and WILSON, J., concur.

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85 Cal.App.2d 389

JOHNSON et al. v. BESOYAN et al.

Civ. 3713.

District Court of Appeal, Fourth District, California.

May 7, 1948.

Hearing Denied July 1, 1948.

1. Sales 🔑199

Where buyers paid by check nearly half of purchase price and agreed to pay balance by note before hauling away the melons which buyers were to harvest and remove, with sellers required only to irrigate during harvesting season, and buyers harvested part of crop, present sale of melons was intended and title passed when contract was entered into. Civ.Code, §§ 1738, 1739, rule 1, 1783(1).

2. Sales 🔑342

In seller's action for price of watermelons sold before harvest, recovery was governed by statute permitting seller to bring action for price against buyer who neglects to pay when title has passed and statute stating detriment caused by breach of obligation to pay money to be the amount due by terms of obligation with interest, and not by statute authorizing recovery of damages for nonacceptance of goods by buyer. Civ.Code, §§ 1783(1), 1784, 3302.

3. Appeal and error 🔑930(1)

Where trial court found for plaintiffs and plaintiffs' evidence was not inherently improbable, District Court of Appeal would accept as true plaintiffs' evidence in action for purchase price of melons sold before harvest that not more than the customary ten per cent were unfit for market as against defendants' contention that 50 per cent were not fit for market. Civ.Code, §§ 1783(1), 3302.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by E. H. Johnson and Florence Johnson against Roy Besoyan and Ed Besoyan for the agreed purchase price of a crop of watermelons. From an adverse judgment, defendants appeal.

Judgment affirmed.

Nathan Newby, Jr., of Los Angeles, for appellants.

M. C. Chase, of Dinuba, and J. A. Chase, of Visalia, for respondents.

MARKS, Justice.

This is an action brought to recover the agreed purchase price of a crop of watermelons which plaintiffs allege were sold to defendants for $2200.00 and for which defendants failed and refused to pay. Plaintiffs had judgment for $1712.90, which is $2200.00 less $487.10, the net amount received by plaintiffs for the sale of part of the melons after defendants had refused to harvest them. Plaintiffs also recovered their accrued interest and costs.

Plaintiffs owned nine acres of watermelons in Tulare County. On July 11, 1945, while E. H. Johnson was watering his cotton, which adjoined the watermelons, defendants approached him about the sale of the melons. Defendants looked over the melon patch twice and then learned that plaintiffs' lowest price for the crop was $2200.00. They asked time to consider the purchase, left, and returned in about an hour. They went through the patch again and agreed to pay $2200.00 for the crop. Roy Besoyan gave Mr. Johnson a check on a Los Angeles bank for $1000.00, on the face of which was written, "For 9 acre mellon patch. Balance due $1200.00." It was understood that before any melons were picked and removed Ed Besoyan would execute a promissory note for $1200.00, the balance of the purchase price. Mr. Johnson understood that he was to irrigate the melons during the harvesting period. There was nothing else left for him to do under the agreement of sale.

On July 14th, defendants started picking the crop and picked between ten and thirteen tons. Roy Besoyan had a promissory note for $1000.00 payable to E. H. Johnson, signed by Ed Besoyan. He told Johnson that Ed had made a mistake and had made the note for $1000.00 instead of $1200.00 and that Ed would make another for the proper amount. Johnson again insisted that he must have the note before any melons were hauled away. Johnson returned to his home and defendants continued picking melons. A further conversation occurred later in the same day which Mr. Johnson detailed as follows:

"A. And Ed says, 'You know', he says, 'We've decided we don't want that melon patch.' He said, 'We want to pay you for the damage we've done.'

"Q. What answer, if any, did you make? A. I says, 'Well, Ed, I don't want that melon patch', I says, 'I've no way to take care of it. I haven't got help. I wouldn't have sold it in the first place if I had means of taking care of it.' I said, 'As far as I'm concerned that's just your melon patch.' 'Well', he says, 'I'll give you a hundred dollars for what damage we've done.' I says, 'No, I won't take it.' I said, 'That's your melons, not mine.' Ed said, 'Well, only way you'll ever get it is by law.' I said, 'If that's the way I'll have to get it, that's how I'll get it.' They walked off. Then along—it was either that same afternoon or the next morning, Monday morning, that they went somewheres and brought some colored boys back in there and they just cut those melons all the way through."

After defendants had refused to proceed with the harvesting of the crop plaintiffs picked and sold about eighteen tons of melons for which they received $670.88 with an expense of $183.78 in harvesting. Payment of the $1000.00 check was stopped and this action followed.

There are two questions to be considered on this appeal: (1) Was there a sale of the crop of melons from plaintiffs to defendants so that title passed to them, and (2) the proper measure of damages.

The trial judge found that the oral contract of sale of July 11, 1945, was consummated on July 14, 1945, by defendants entering into possession of and receiving and accepting all of the melons.

Section 1738 of the Civil Code provides as follows:

"(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case."

Section 1739 of the same code contains the following:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

"Rule 1. (Goods in deliverable state.) Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed."

In Gianelli v. Globe Grain & Milling Co., 48 Cal.App. 103, 191 P. 720, 722, it is said:

"It is not at all likely that, had the contract been intended or understood to be merely executory and its consummation dependent upon delivery of the hay by the sellers to the purchaser, the defendant would have bound itself to pay three-quarters of the purchase price within so short a time after the transaction and before (as we shall later see was true) the place of delivery was designated by the defendant. Referring to the circumstance of the payment down of a large amount of the purchase price of personal property as one shedding some light on the nature of the contract involving a transfer of such property—that is, upon the question whether the contract involves an absolute sale or is only executory, Williston, in his work on Sales, (1909 Ed.) page 368, says: 'If the buyer pays the price, or a large portion of it, it is evidence not so strong as delivery, but still entitled to great weight, that immediate transfer of the property is intended. * * *'" See, Aiello v. Sliskovich, 72 Cal.App.2d 39, 163 P.2d 768.

[1] In the instant case the trial judge was fully authorized by the evidence to conclude that a present sale of the crop of melons was intended. As in Breitengross v. Theodore Krumm, Inc., 35 Cal.App.2d 639, 96 P.2d 370, the purchasers were to come, harvest and remove the crop with nothing to be done by the sellers except to run irrigating water through existing ditches during the harvesting period.

In the instant case the buyers paid by check a considerable portion of the purchase price and agreed to pay the balance by giving a promissory note before any of the melons were hauled away. The most convincing evidence of an intention to pass immediate title is the uncontradicted evidence showing that defendants on July 14, 1945, entered the patch and harvested about thirteen tons of melons. If they did not then consider themselves the owners of the melons they have left unanswered the pertinent question of what they were doing on the property of others harvesting a crop that did not belong to them. They either believed they were the owners of the melons or they were guilty of an unwarranted trespass.

The conclusion that there was a present sale of the crop of melons to defendants rather than an executory contract of sale makes the answer to the other question argued by defendants simple.

Subdivision (1) of Section 1783 of the Civil Code permits the seller to bring an action for the price of the goods against a buyer who neglects to pay for them when title has passed. Section 3302 of the same code provides that "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon."

[2] The recovery in this action is governed by the foregoing sections, rather than by the provisions of Section 1784 of the Civil Code which defendants now urge are controlling. Breitengross v. Theodore Krumm, Inc., supra; Union Liquors, Inc., v. Finkel & Lasarow, Inc., 44 Cal.App.2d 706, 113 P.2d 19; Tillis v. Western Fruit Growers, Inc., 44 Cal.App.2d 826, 113 P.2d 267; Aiello v. Sliskovich, supra.

Defendants argue that under the evidence favorable to plaintiffs, which must be accepted as true, ninety per cent of the melons were good and merchantable; that uncontradicted evidence produced by defendants shows that the market during the season was good and the price satisfactory, so, if plaintiffs had completed the harvest of all of the crop instead of only eighteen tons, they would have had net receipts of over $3000.00 and would have suffered no damage from the failure of defendants to complete their contract but instead would have made a substantial profit. This argument overlooks the nature of the action which was for the unpaid contract price of the crop of melons which was delivered to and owned by defendants. The action is on the contract instead of for damages for its breach.

Defendants also argue that if ninety percent of the melons were merchantable it is beyond belief that they would have refused to market the crop, they being in the business of buying and selling watermelons in order to profit from such transactions. This argument is evidently made in support of defendants' contention that at least fifty percent of the melons were not merchantable and were unfit for market so that they were justified in refusing to accept them.

[3] Plaintiffs' evidence was to the effect that not more than ten per cent of the melons were unfit for market which is customary in the variety involved. The trial court accepted this evidence as true and we can find no inherent improbability in it so we must take it as true as conflicts in the evidence are settled in the trial court.

During the oral argument defendants cited the cases of Steelduct Company v. Henger-Seltzer Company, 26 Cal.2d 634, 160 P.2d 804, and Jegin v. Berger, 77 Cal.App.2d 1, 174 P.2d 489, maintaining that under them we must reverse the judgment. A study of those cases discloses such factual differences that they cannot be controlling here. Nothing in either of them conflicts with the conclusions we have reached.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

85 Cal.App.2d 284

Ex parte LAMEY.

Cr. 2051.

District Court of Appeal, Third District, California.

April 30, 1948.

1. Criminal law 🔑1202(6)

Where judgment was based on conviction of defendant on two robbery counts and two prior convictions of felony and decreed that defendant be imprisoned for life, but did not adjudge him to be an habitual criminal, defendant was properly held as an habitual criminal; a formal adjudication to that effect not being essential. Pen.Code, § 644.

2. Criminal law 🔑1202(1)

Crime of issuing checks with intent to defraud is not included within those enumerated in the habitual criminal statute. Pen.Code, § 644.

3. Forgery 🔑1

Gist of offense defined in the statute penalizing "forgery" of instruments is the signing or forging of the instrument, though the statute also includes the uttering, publishing or passing, of a false, altered, forged or counterfeited instrument, in contradistinction to the statute penalizing the making of fictitious bills or checks, the gist of which is the passing, uttering or publishing of a fictitious instrument. Pen. Code, §§ 470, 476.

See Words and Phrases, Permanent Edition, for all other definitions of "Forgery".

4. Criminal law 🔑1202(3)

When prior offenses are relied upon as rendering a party an habitual criminal, the assumption must be indulged that he was convicted of the least degree of offense enumerated in the statutes. Pen.Code, § 644.

5. Statutes 🔑241(1)

A defendant is entitled to the benefit of every reasonable doubt whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute.

6. Criminal law 🔑1202(1)

Statute penalizing the making or uttering of fictitious bills or checks describes a lesser offense than that described by the statute penalizing forgery of instruments, the second being named as a prior offense to be considered under the habitual criminal statute and the first not being so named. Pen.Code, §§ 470, 476, 644.

7. Criminal law 🔑1202(3)

In prosecution of a defendant on two counts of robbery and also charging him with two prior convictions, burden was on prosecution to charge and prove that prior convictions were among those set forth in the habitual criminal statute in order to permit defendant to be adjudged an habitual criminal. Pen.Code, § 644.

8. Criminal law 🔑1202(1)
Habeas corpus 🔑111(1)

Where proof in habeas corpus proceeding to secure release from custody showed that petitioner had been improperly imprisoned as an habitual criminal for being twice but not three times convicted of felonies enumerated in habitual criminal statute, presumption being that a conviction for falsely signing a check was for utterance of a fictitious instrument rather than forgery, petitioner was entitled to be dealt with other than as an habitual criminal though not entitled to discharge where record failed to show expiration of sentences for robberies of which he stood rightfully convicted. Pen.Code, § 644.

◆

Proceeding in the matter of the application of Harold Lamey, for a writ of habeas corpus.

Writ discharged, and prisoner remanded.

Thos. MacBride, of Sacramento, for petitioner.

Fred N. Howser, Atty. Gen., and Doris Maier, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

[1] Petitioner, in 1932, was charged in an information filed in Los Angeles County with two counts of robbery, and with two prior convictions for which he had served prison terms. He was convicted on the two robbery counts and admitted the two priors. The judgment which followed decreed that defendant be imprisoned for the term of his natural life, but did not adjudge him to be an habitual criminal; but it is conceded that he is being held as an habitual criminal, an adjudication to that effect not being essential. People v. Vaile, 2 Cal.2d 444, 42 P.2d 321; People v. Basuino, 22 Cal.2d 247, 138 P.2d 297.

He now claims that one of the alleged priors is not, and was not at the time of his conviction, one of the crimes enumerated in section 644 of the Penal Code, and that therefore to hold him as an habitual criminal is improper.

The allegation regarding the prior under attack, as set forth in the information upon which petitioner was prosecuted for robbery, was that he had been "convicted of the crime of Forgery, a felony," in California in 1918. But the information upon which said prior conviction was premised charged him and one Yake with the crime of "making, uttering, publishing and passing a fictitious check," committed as follows: "That the said D. H. Yake and Harold Lamey on or about the 24th day of December 1917, at, and in the County of Los Angeles, State of California, with intent then and there to cheat and defraud Sam Seelig Grocery Company, a corporation, and The Merchants National Bank of Los Angeles, a corporation, did then and there wilfully, unlawfully, fraudulently, falsely and feloniously make, utter, publish and pass a certain fictitious check and order in writing for the payment of money, the same then and there purporting upon its face to be signed by a certain person and individual named and called J. C. Moore, which said check and order in writing for the payment of money was and is in the words and figures as follows, to-wit:

"'The Merchants National Bank 16–5
of Los Angeles
Los Angeles, Cal. Dec 24 1917
Pay to Mr. H. R. Davis..or bearer..$12.60
Twelve-Sixty ....Dollars
J. C. Moore'

"And which said check and writing for the payment of money was and is endorsed on the back thereof as follows, to-wit: 'O.K. J. C. Moore, H. R. Davis, 1357 W 58 Place.'

"And the said D. H. Yake and Harold Lamey then and there having the said check and order in writing for the payment of money, as aforesaid, in their possession, did then and there wilfully, unlawfully, fraudulently and feloniously utter, publish and pass the same as true and genuine, with intent then and there to cheat, injure and defraud Sam Seelig Grocery Company, a corporation, as aforesaid, and The Merchants National Bank of Los Angeles, a corporation, as aforesaid, the said check and order in writing for the payment of money, as aforesaid, being then and there false, fraudulent and fictitious to the then knowledge of the said D. H. Yake and Harold Lamey, and there was not then and there or at all any such person or individual in existence as J. C. Moore, to the then knowledge of the said D. H. Yake and Harold Lamey."

When petitioner committed the robberies in 1932, section 644, supra, enumerated "forgery" as one of the priors to be considered in determining habitual criminality. Therefore, if conviction of said prior is to be deemed conviction for forgery, petitioner's status is that of an habitual criminal. However, his contention here is that he was not charged with "forgery".

In 1918, at the time of his said former conviction, section 470 of the Penal Code, which had been amended in 1905, provided and now provides as follows: "[*Forgery of conveyances, negotiable instruments, stock certificates, wills, and other instruments: Utterance of forged instrument with knowledge of falsity and intent to de-*

fraud: Falsification of records.] Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to, or falsely makes, alters, forges, or counterfeits, any * * * check, * * * or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person * * * is guilty of forgery."

Also, during all of said times section 476 of said Penal Code provided and still provides: *"Making or uttering, or possessing with intent to utter, fictitious bill, note or check: Punishment.*] Every person who makes, passes, utters, or publishes, with intention to defraud any other person, or who, with the like intention, attempts to pass, utter, or publish, or who has in his possession, with like intent to utter, pass, or publish any fictitious bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of some bank, corporation, copartnership, or individual, when, in fact, there is no such bank, corporation, copartnership, or individual in existence, knowing the bill, note, check, or instrument in writing to be fictitious, is punishable by imprisonment in the county jail for not more than one year, or in the State prison for not more than fourteen years."

[2] Petitioner's contention is that he was charged with and convicted of a violation of the latter section rather than for the former, and, therefore, was not convicted of forgery; and that the crime defined in said section 476 was not and is not one of those enumerated in section 644, supra. The latter contention is sustained by In re Rosencrantz, 211 Cal. 749, 751, 297 P. 15 which holds that the crime of issuing checks with intent to defraud is not one of those enumerated in section 644 of the Penal Code upon which a finding of habitual criminality can be based.

The allegations of the information charging the prior indicate that it was based upon section 476 rather than section 470. It does not allege that a violation of section 470 is being charged, nor recite that defendant had committed forgery, or that he had signed anything. Its allegations follow the language of said section 476. Also the minutes of the court of February 15, 1918, when defendant was sentenced on said prior, show that the charge against defendant was designated by the court as "passing a fictitious check."

[3] While these two code sections duplicate one another in some respects, the gist of the offense defined in section 470, supra, as the title to the section states and the language of same indicates, seems to be the "signing" or "forging" of the instrument, though the section also includes the uttering, publishing or passing of a false, altered, forged or counterfeited instrument. The gist of section 476, on the other hand, seems to be the passing, uttering or publishing of a fictitious instrument. In People v. Harben, 5 Cal.App. 29, 35, 91 P. 398, 401, defendant was charged with passing a fictitious bank note, the information apparently following the language of section 476. The court there said: "The amendment of section 470 of the Penal Code in 1905 did not affect section 476, and section 470 has no application here. That amendment applies only to the 'signing of the name of a fictitious person,' with the intent to defraud, while the crime here charged is the passing of a fictitious bank note of a bank having no existence." Also see People v. Carmona, 80 Cal.App. 159, 164, 251 P. 315.

[4, 5] In the case before us the defendant was not charged with forging or signing the name of any person to the check; and while the allegations of the information include a charge that defendant did "make" the fictitious check, and while section 470 includes the uttering publishing or passing of a false, altered, forged or counterfeited instrument with intent to defraud, it has been held in numerous instances that when prior offenses are relied upon as rendering a party an habitual criminal, the assumption must be indulged that he was convicted of the least

degree of offense enumerated in the statutes. This principle was applied in People v. Lohr, 28 Cal.App.2d 397, 399, 400, 82 P.2d 615; People v. McChesney, 39 Cal.App.2d 36, 41, 102 P.2d 455, and People v. McVickers, 29 Cal.2d 264, 278, 176 P.2d 40, 49. In the latter case the court said regarding this rule: "The conclusion above announced is in full accord with the decision of the District Court of Appeal (hearing in this court denied) in People v. Lohr, 1938, supra, 28 Cal.App.2d 397, 399, 400, 82 P.2d 615, 617 wherein it was expressly held that 'It was necessary for the prosecution to *charge and prove* that the prior convictions were among those set forth in section 644 in order to adjudge the defendant an habitual criminal' (italics added) and that where the 'charge in the information does not designate the section of the * * * Act upon which defendant was convicted and the record furnishes * * * no assistance in this regard' the reviewing (as well as the trial) court 'must therefore assume' that defendant suffered the prior conviction *for the least offense punishable under the statute.* To the same effect is People v. Morrison, 1938, 26 Cal.App.2d 616, 80 P.2d 94. The proposition declared is eminently correct. It is in accord with the often stated principle that 'the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words, or the construction of language used in a statute.' (People v. Ralph, 1944, 24 Cal.2d 575, 581, 150 P.2d 401, 404, and cases there cited.)"

[6, 7] While it might be urged that the crime defined by section 476 is not a lesser offense than that defined in section 470, the legislature has apparently considered the latter as a lesser offense, else it would have included it within section 644; and if the mere passing of a fictitious check is forgery in violation of section 470, then no reason appears why section 476 should have been retained since its codification in 1872, nor why the title to said sections should have differed as they do. The legislative history of the two sections dating back to 1850, indicates that the legislature intended that they should define different offenses. We therefore conclude that the principle set forth in the McVickers case and People v. Lohr, that it was necessary for the prosecution to charge and prove that the prior conviction was among those set forth in section 644, in order to adjudge a defendant an habitual criminal, applies in the instant case.

[8] We therefore hold that petitioner is entitled to be dealt with, not as an habitual criminal but as one who has been convicted of but one of the felonies enumerated in section 644 of the Penal Code. But as it does not appear in the record before us that he is eligible for discharge from imprisonment for the two robberies of which he stands convicted, the writ of habeas corpus heretofore issued is discharged, and the prisoner is remanded.

THOMPSON and PEEK, JJ., concur.

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85 Cal.App.2d 394

In re DYER.

DYER v. HILL.

Civ. 13597.

District Court of Appeal, First District,
Division 1, California.

May 10, 1948.

1. Judgment ⚷334

The writ of error "coram nobis" is issued to correct an error of law, but is based on some issue of fact and to correct an error of fact which was unrecognized prior to final disposition of proceeding.

See Words and Phrases, Permanent Edition, for all other definitions of "Coram Nobis".

2. Judgment ⚷334

The writ of error coram nobis was not intended as a means of revising findings based on known facts or facts which should have been known by exercise of ordinary and reasonable diligence.

3. Appeal and error ⊂=113(1)

An order denying motion for writ of error coram nobis is appealable.

4. Judgment ⊂=334

The writ of error coram nobis may be used following judgment in a civil proceeding.

5. Judgment ⊂=334

Writ of error coram nobis should not be used if some other remedy is available.

6. Judgment ⊂=334

Writ of error coram nobis is not generally used to retry issues of a case previously determined, but is available merely to declare as false a fact previously decided to be true.

7. Judgment ⊂=334

The writ of error coram nobis must be in writing, but application therefor may be by formal petition, in which case the usual pleadings are available to respondent to be followed by a hearing appropriate to the issues raised.

8. Judgment ⊂=334

Where affidavits are relied on to obtain issuance of writ of error coram nobis, reply affidavits if worthy of belief may be sufficient, unless court deems otherwise, upon which to base denial of application.

9. Divorce ⊂=312

Where petitioner filed notice of motion for writ of error coram nobis to set aside portions of interlocutory and final decrees of divorce ordering petitioner to pay for support of a child and application was supported by affidavits stating that because of petitioner's physical condition it would have been impossible for him to have impregnated a woman, but respondent's reply affidavit stated that pregnancy was caused by petitioner and that prior to conception she had never had sexual intercourse with any other man, and trial court denied application, it must be assumed that trial court found affidavits filed by petitioner to be untrue and appellate court could not reverse order.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Proceeding in the matter of the application of Carl Lee Dyer, also known as Bill Dyer, against Elfida Hill, formerly known as Elfida Dyer, for writ of coram nobis to set aside a portion of an interlocutory and final decree of divorce which ordered petitioner to pay for maintenance and support of a child. From an order denying the application, the petitioner appeals.

Affirmed.

Waldo F. Postel, of San Francisco, for appellant.

John L. Garaventa, of Concord, for respondent.

WARD, Justice.

This is an appeal from an order of the superior court denying appellant's motion for a "writ of coram nobis." The controversy grows out of a marriage and subsequent divorce. Chronologically the following facts appear: The petitioner married respondent, whose age at the time appears in the record to have been seventeen years, on August 5, 1936; they separated on August 8, 1936; as issue of the marriage there is one child; a divorce action was filed by respondent and served upon the husband on June 22, 1938; defendant defaulted. The court on July 20, 1938, granted an interlocutory decree of divorce to the wife on the ground of wilful desertion and ordered the husband to pay $20 per month for the support of their child, whose custody was awarded to the mother; August 2, 1939, the final decree was filed; December 20, 1941, the parties stipulated, with the approval of the court, that the order providing for payments for the child's support during such time as the father might remain in the armed forces of the United States, should be vacated; the record indicates that the father was released from the United States Navy in September, 1945. In an affidavit signed by the mother on June 3, 1947, it is averred that there is due and owing from the father for the support and maintenance of the minor child the sum of $870.

In the present proceeding an application for a "writ of coram nobis," dated April 10, 1947, is in the form of a notice that on a certain day and hour in the designated court the father would move said court for a "writ of coram nobis" to set aside that portion of the interlocutory and final decree which ordered him to pay for the maintenance and support of the child. The notice asserted as a ground for the motion that the father, petitioner herein, was not in fact the father of the child, and certain affidavits were filed in support of his "petition."

Portions of the father's affidavit, dealing with details not previously mentioned, set forth the following:

"Affiant alleges that he married the said plaintiff because at said time the said plaintiff was pregnant, and affiant herein was accused by said plaintiff and the District Attorney of the County of Alameda, State of California, of being the father of the said unborn child. Affiant alleges that he married the said plaintiff solely by reason of threats of criminal prosecution if he did not do so, and but for said threats he would not have married the said plaintiff.

"Affiant alleges that at the time of the said marriage said plaintiff was a minor, and plaintiff threatened to prosecute for rape if he did not marry her, and at said time informed affiant that the only reason she wanted the said marriage ceremony performed was to have a name for the child.

"Affiant alleges that prior to the said marriage affiant received a visit from the Sheriff of the County of Alameda, State California, who came to the home of affiant and threatened said affiant with arrest and informed affiant that he must go to the District Attorney's office in Oakland, Alameda County, California, to face criminal charges. At said time, plaintiff was eighteen (18) years of age.

"Affiant alleges that at the time of the marriage of the parties hereto, affiant was also a minor, and in that behalf alleges that he was born on the 28th day of July, 1916.

"Affiant alleges that at the time of the said marriage and during all of the time of the divorce proceedings and up to the physical examination of affiant by Dr. Lewis Michelson, as hereinafter set forth, affiant believed that he was the father of said child.

"Affiant alleges that after the said marriage neither of the parties hereto cohabited, and on or about the 8th day of August, 1936, separated and ever since said separation have lived separate and apart.

"Affiant alleges that prior to the commencement of said action for divorce, to-wit: on May 22, 1937, affiant was arrested for alleged failure to provide for the minor child of plaintiff, and affiant spent thirteen days in jail, and by reason of threats and fear entered a plea of guilty and subsequently and on the 4th day of June, 1937, affiant was given two years' probation and ordered to report to the probation officer and pay not less than $15.00 per month for the support of said child. * * *

"Affiant alleges that by reason of the threats made against affiant, his arrest, his being in jail, and all of the circumstances set forth herein, affiant did not contest the said action for divorce. * * *

"Affiant alleges that he did not contest or appear in said action because of his fear of criminal prosecution and jail, and for further reason that he was still on probation and believed that if he took any step contrary to the wish and will of said plaintiff, either in regard to said divorce proceedings or the support of said child, it would be held a violation of said probation, and that he would be forthwith thrown into jail. * * *

"Affiant alleges that at all the dates and times herein above mentioned he believed the accusation that he was the father of said child." The affiant thereupon reproduced certain averments contained in an affidavit of a duly licensed physician and surgeon. The appellant claims that he could not have been the father of the child, and that to compel him to support the said child is unconscionable.

The affidavit of the physician and surgeon contained the following:

"Affiant alleges that after a thorough physical examination of said Carl Lee Dyer, etc., and a microscopical examination of the semen, as well as the findings at operation he is of the opinion and therefore avers that said Carl Lee Dyer, etc., could never have impregnated a woman, for the reason that it would have been impossible, as most of the tube that provides the passageway for the transport of the spermatozoa from the testacles to the penis in the physical structure of said Carl Lee Dyer, etc., is congenitally absent and never developed. At operation this anomalous condition was found to be present on both sides.

"Affiant alleges that the said physical condition and said impossibility of impregnating a woman existed in said Carl Lee Dyer, etc., from birth and has been continuous up to the present time."

It was stipulated by the respective parties that the motion for "writ of coram nobis" be continued four weeks. At that time the mother filed an affidavit to the effect that she was born May 28, 1919; that the appellant was born July 28, 1914; that a marriage ceremony was performed; that a child was born; that a divorce complaint was filed by her; that an interlocutory decree was made and entered on the grounds of wilful desertion, which provided that the custody of the child be awarded to the mother and that the appellant pay $20 per month for the support of the child. A final decree was filed containing similar provisions. The dates of filing the various pleadings do not appear to be questioned.

There is an averment in the mother's affidavit that at the time she married the petitioner herein she was pregnant and that the pregnancy was caused by petitioner; that prior to such conception she had never had sexual intercourse with any man. Further, it is alleged that petitioner prior and subsequent to the birth of the child in question was physically capable of being the father of a child. The mother denied that the marriage was the result of threatened criminal proceedings, coercion or duress on her part or of any person, and that petitioner heretofore had "always admitted and acknowledged that he was the father of the [child]"; that for several months after the interlocutory decree petitioner had paid for the support and maintenance of the child, and that in any subsequent support proceedings petitioner was not threatened but merely directed to pay a stated amount for its support.

During all of the period, namely, from August 1936 until December 1946, no suggestion was made that petitioner herein was not the father of the child. Respondent's affidavit further sets forth that petitioner did not exercise "in due time all reasonable diligence" in ascertaining "whether he was physically capable of being the father of a child" and that petitioner "is not entitled to a writ of coram nobis at this late date."

The record shows that "Oral argument is presented by respective counsel and the petitioner's memo of additional points and authorities is entered and filed." Upon submission of the matter the court "orders that the motion for writ of coram nobis is denied."

[1, 2] The writ of error coram nobis is issued to correct an error of law that is based upon some issue of fact. People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; People v. Darcy, 79 Cal.App.2d 683, 180 P.2d 752; People v. Dale, 79 Cal.App. 2d 370, 179 P.2d 870. Whatever may be said about the inception of the writ, the recognized present purpose is to correct an error of fact which was unrecognized prior to the final disposition of the proceeding. It is not intended as a means of revising findings based on known facts, or facts that should have been known by the exercise of ordinary and reasonable diligence. People v. Reid, supra; People v. Mooney, 178 Cal. 525, 174 P. 325; People v. Cabrera, 7 Cal.2d 11, 59 P.2d 804; In re Paiva, 31 Cal.2d 503, 190 P.2d 604. To correct an error of fact it is often necessary to modify a legal ruling, order, judgment or decree, but it is the fact and not the law that is the subject of change.

[3] For many years reviewing courts of this state have assumed that a proceeding in the nature of coram nobis is appealable. In recent years it has been decided that an order made by a trial court for relief in the nature of the writ of error coram nobis is appealable. In People v. Gilbert, 25 Cal.2d 422, 154 P.2d 657, the plaintiff, the "People," appealed. In that

case it is said, 25 Cal.2d at page 444, 154 P.2d at page 668: "Defendants' contention that the People have no right of appeal from the order of the trial court setting aside or modifying its previous judgments of death is without merit. The question was before this court in People v. Lumbley, supra, 8 Cal.2d 752, 761, 68 P.2d 354, and was decided adversely to defendants' position. The effect of the order here appealed from was to modify substantially the judgments originally entered. Such an order, obviously, is one 'made after judgment, affecting the substantial rights of the people' and is within the purview of section 1238(5) of the Penal Code." The Gilbert case refers to the right of the people in a criminal case to appeal. In re Paiva, supra [31 Cal.2d 503, 190 P.2d 606], was "in the nature of a writ of error coram nobis," in which defendant appealed. Using People v. Gilbert, supra, and other cases as authority it was held that the defendant had the right of appeal. A defendant's right to appeal in a criminal case generally is based on Penal Code section 1237, subdivision 3, which provides that "An appeal may be taken by the defendant * * * From any order made after judgment, affecting the substantial rights of the party." This is based upon the assumption, so far as a writ of error coram nobis is concerned, that a lower court has changed or refused to change some order based upon facts not known at the time of trial.

People v. Gilbert, supra, involved an attempt to modify to life imprisonment a judgment imposing the death penalty. This was a legal question based upon facts. At page 439 of 25 Cal.2d, at page 666 of 154 P.2d, the court said: "The People, with more regard for established processes, classify the defendants' motions as constituting applications for relief in the nature of writs of error coram nobis. We are in accord with this classification." In re Paiva raised the question whether a party appealing from the denial of a writ of error coram nobis, heard approximately ten years or more after conviction, was entitled to be furnished a transcript and legal record. In the original Paiva decision the record shows that Paiva was convicted of two charges of murder and one charge of rape.

In the present case the purpose is to set aside that portion of the interlocutory and final decrees directing the father to pay a monthly sum for the support and maintenance of the child. The application is based upon a claim that a certain fact, assumed during the trial to exist, had in fact no such existence.

[4] The writ of error coram nobis may be used following judgment in a civil proceeding. In Phelan v. Tyler, 64 Cal. 80, 82, 83, 28 P. 114, 115, it is said: "'* * * and, while the court ought to cease to exercise its jurisdiction over a party when he dies, its failure to do so is an error to be corrected on appeal if the fact of the death appears upon the record, or by writ of error coram nobis if the fact must be shown aliunde.' Freeman, Judg. § 153." Hence a proceeding for writ of error coram nobis constitutes a novel means of attacking a judgment.

In King v. Superior Court, 12 Cal.App.2d 501, 511, 56 P.2d 268, 273, it is said: "The usual and ordinary ways in which a judgment may be set aside by a court rendering it are: (1) By motion for new trial; (2) by motion made in due time under section 473 of the Code of Civil Procedure; (3) by motion at any time when the judgment is void on its face; (4) by suit in equity where the judgment is regular in form but void for extrinsic fraud or other proper causes."

[5, 6] The writ of error coram nobis should not be used if some other remedy is available. It could become a hindrance to the disposition of problems of merit were trifling and frivolous questions only presented. In People v. Darcy, 79 Cal. App.2d 683, 691, 692, 693, 180 P.2d 752, 757, the court said: "Appellant cites fourteen California cases under the general heading 'The following citations support appellant's contention that he was entitled to the writ of error coram nobis and/or a new trial' without making any particular point, or showing how or in what manner they lend support to his position. None of them supports his contention. Ten of them were cases where petitions to set aside

judgments of conviction or for writs of error coram nobis were denied, and such denials were affirmed. People v. Mooney, 178 Cal. 525, 174 P. 325; People v. Davis, 187 Cal. 750, 203 P. 990; People v. Schwarz, 201 Cal. 309, 257 P. 71; People v. Mendez, 28 Cal.2d 686, 171 P.2d 425; People v. Black, 114 Cal.App. 468, 300 P. 43; People v. Deutsch, 16 Cal.App.2d 121, 60 P.2d 155; People v. Kretchmar, 23 Cal.App.2d 19, 72 P.2d 243; People v. Harincar, 49 Cal.App.2d 594, 121 P.2d 751; People v. Lewis, 64 Cal.App.2d 564, 149 P.2d 27; People v. Egan, 73 Cal.App.2d 894, 167 P.2d 766. One of them (In re Schenk, 61 Cal.App.2d 168, 142 P.2d 343) was habeas corpus not coram nobis, where the writ was discharged. One (People v. Egan, 135 Cal.App. 479, 27 P.2d 412) involved the dismissal of an appeal. One (Austin v. Lambert, 11 Cal.2d 73, 77 P.2d 849, 115 A.L.R. 849) involved the constitutionality of section 170.5, Code Civ. Proc. relating to 'peremptory challenges' of judges, and one (People v. Gilbert, 25 Cal. 2d 422, 154 P.2d 657) reversed an order which attempted to modify to life imprisonment judgments imposing the death penalty, which judgments had been affirmed on appeal. * * * All the cases point out that the scope of the writ is extremely narrow and that it is anything but a catch-all or omnibus remedy." See 97 Am.St. Rep., pp. 369, 370; 49 C.J.S., Judgments, § 313, p. 570; Williams v. Yelvington, 103 Fla. 145, 137 So. 156. Coram nobis is not generally used to retry issues of a case previously determined (People v. Reid, supra), but is available merely to declare as false a fact previously decided to be true.

The appellant father contends: "That the petition or motion for writ of coram nobis sets forth sufficient facts which if true entitled appellant to the granting of the writ and that in view of the fact that no demurrer or similar pleading was filed, a hearing should have been had upon the issues. The truth or falsity of the affidavits submitted has never been determined." It was held in People v. Block, 134 Cal. App. 217, 218, 25 P.2d 242: "It is contended by appellant that the various affidavits above mentioned had the effect merely, pro and con, of pleadings, as in a civil action, and that the trial court erred in making its order without taking evidence under the issues claimed to have been presented by them. We are referred, however, to no authority announcing such a doctrine. On the contrary, the opinion in People v. Perez, 9 Cal.App. 265, 98 P. 870, plainly shows that it is proper to hear such an application on affidavits."

Considering the circumstances of the marriage herein, the youth of the appellant and the period of his service in the army, this court does not find it necessary to support its conclusion by giving application to the defense of laches in order to sustain the trial court, though the affidavit of the mother is perhaps sufficient to present that issue.

[7] The writ, like other writs, must be in writing, but the application therefor may be by formal petition, in which case the usual pleadings are available to respondent to be followed by a hearing appropriate to the issues raised. 49 C.J.S., Judgments, § 313, p. 568. It appears that in many instances the application has been by notice to the parties interested that on a specified day and hour in a certain tribunal having jurisdiction of the subject matter the applicant will seek the relief by issuance of the writ to right the alleged wrong. The application may be based upon the record or supported by affidavits. In the present proceeding the appellant proceeded by notice of motion and affidavits.

[8] When affidavits are relied upon to obtain the issuance of a writ of error coram nobis, reply affidavits if worthy of belief may be sufficient, unless the court deems otherwise, upon which to base denial of the application. People v. Block, supra.

[9] It is not necessary to restate the substance of the mother's affidavit or to specifically relate all of the inferences that the trial court could draw from the record. The affidavits are all the evidence that may be considered on this appeal. By its order it must be assumed that the trial court found the affidavits filed by the appellant to be untrue. People v. Block, supra.

Under such conditions this court is not in a position to order a reversal. It is said in Brainard v. Brainard, 82 Cal.App.2d 478, 186 P.2d 990, 991: "In all matters in which an issue is tried upon affidavits it is the rule that those favoring the contentions of respondent establish not only the facts stated therein but also all facts which may be reasonably inferred therefrom. Doak v. Bruson, 152 Cal. 17, 19, 91 P. 1001; Kettelle v. Kettelle, 110 Cal.App. 310, 313, 294 P. 453."

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

85 Cal.App.2d 403

BLACKWELL v. BLACKWELL et al.

Civ. 16169, 16170.

District Court of Appeal, Second District, Division 1, California.
May 10, 1948.

1. Appeal and error 🔑1009(1)

Value and effect of evidence, unless declared by law to be conclusive, is for trial judge in equity.

2. Quieting title 🔑44(4)

In action to establish undivided one-half interest in real property, where plaintiff was sole witness at trial, evidence sustained finding that plaintiff was without half-interest in the property as claimed.

3. Appeal and error 🔑995

In absence of abuse of discretion, or showing that effect given testimony was arbitrary, value and effect of evidence as found by trial judge, if within reason, must be upheld on appeal.

4. Appeal and error 🔑1135

Where examination of proposed amendments to complaint, filed after evidence was concluded in light of record revealed no error in court's orders sustaining demurrers thereto, orders would be affirmed.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by John H. Blackwell against Amalia M. Blackwell and John Paul Artel to establish an undivided one-half interest in certain real property. From the judgment, and from orders sustaining demurrers to amendments to the complaint, plaintiff appeals.

Judgment and orders affirmed.

John J. McMahon, of Los Angeles, for appellant.

Morris C. Schrager, of Los Angeles, for respondents.

DORAN, Justice.

Plaintiff appeals from the judgment in an action in equity.

The action is based on an alleged agreement between appellant and respondent which arose, as recited in appellant's brief, from the following circumstances:

"This action was instituted by the plaintiff and appellant under a suit in equity to establish an undivided one-half interest in certain real property belonging to the defendant and respondent, located at 522 Kelso Street, Inglewood, California. The premises consisted of about one-half acre of land and a double three-room apartment building in the front of the property and a small dwelling and garage located in the rear of said premises.

"The action was filed on March 2, 1946, and at the time of the commencement of the action the Security First National Bank of Los Angeles, a corporation, was acting as the guardian of the estate of the respondent, Amalia M. Blackwell, who prior to said time and on or about February 13, 1945, was adjudged to be an incompetent person. That said bank appeared at the time of the trial of the action in conjunction with counsel representing said incompetent and her other co-defendant, John Paul Artel, a son of a former marriage, of about 35 years of age.

"The appellant and respondent first met on or about the 10th day of August, 1938 in Los Angeles City. For some years prior to their meeting Amalia M. Blackwell was a widow and lived in said premises which consisted of a six-room bungalow.

"The appellant was a carpenter and contractor by trade and working for the Department of Water and Power of Los Angeles City, and had been so employed by said City Department for about twenty years prior to the 10th day of August, 1938. It was the desire of the respondent, Amalia M. Blackwell, that said property be reconverted and reconstructed into a double apartment building in order that she have an income therefrom, and the appellant herein commenced on or about the month of November, 1938, to do work on said property to reconvert and reconstruct the same into a three-room double apartment building.

"Appellant devoted all his spare time, including Saturdays and Sundays and holidays, commencing the latter part of November, 1938, and up to June of 1941, to reconstructing and reconverting the said building.

"The building was completed by the appellant and the work and services were accepted by the respondent, Amalia M. Blackwell, and all of the work and services in connection with the reconstruction of said property was completed prior to the time of the marriage of appellant and respondent, which marriage took place on the 4th day of October, 1941.

"The agreement made between the appellant and the respondent, Amalia M. Blackwell, in consideration of the work and services rendered by appellant, was that he was to receive an undivided one-half interest in said property located at 522 Kelso Street, Inglewood, California."

The record further reveals, as recited in respondents' brief that, "On May 21, 1946, after a hearing before the Honorable John Gee Clark, Judge of the Superior Court, the respondent was restored to capacity and mental competency. This order was subsequently affirmed on appeal to this court. The respondent Amalia Blackwell and the appellant John Blackwell separated on or about May 10, 1945 and ever since said date have been living separate and apart. * * *

"While the appeals from these decrees have been pending, the respondent, Amalia Blackwell was restored to capacity, and the Security-First National Bank was discharged as Guardian of her estate and is therefore no longer an interested party to these proceedings.

"The respondent, John Paul Artel, is the son of the respondent, Amalia Blackwell, by her former marriage with John G. Artel. He has not claimed any interest in the property which is the subject of these actions."

As will be seen from the above, there was an appeal from the order restoring respondent to competency. Quoting from the opinion by the District Court of Appeal disposing of said appeal in "Guardianship of the person and estate of Amalia M. Blackwell" reported in 77 Cal.App.2d 282, 175 P.2d 44: "Pursuant to her own petition she was by order of the court entered on May 21, 1946, restored to capacity and mental competency. Her husband, John H. Blackwell, who objected to her petition, brings the matter here by appeal from the last mentioned order." The appeal in that matter was dismissed December 13, 1946; the respondent was therefore still an incompetent when the trial of the within action was commenced on June 28, 1946.

The court found for the defendant. It is contended on appeal in substance that the evidence does not support the findings and that the court erred in sustaining demurrers to the complaint and amended complaint.

From what is certified as a "partial transcript" by the shorthand reporter, the record reveals that the plaintiff, who was the only witness at the trial, testified extensively as recorded in 224 pages of the transcript. Many exhibits were offered and received including numerous receipts, signed by plaintiff. On cross-examination the following occurred:

"Q. By Mr. Schrager: I show you this document and ask you if that is in your handwriting. A. Yes, it is.

"Q. Mr. McMahon has a little difficulty reading it. So do I. Would you mind reading it to the court? A. 'Paid me in full as the work that I have performed for her in the past. That her and I agreed on that does not make any difference, the amount. John H. Blackwell, 2311 West 75th Street.'

"Q. You didn't read the beginning, did you? Read the date and the beginning. A. 'April 5, 1941. This statement verifies that Mrs. Amelia M. Blackwell, 522 East Kelso Street, Inglewood, has paid me in full for the work that I have performed for her in the past. That her and I agreed on that does not make any difference, the amount. John H. Blackwell, 2311 East 75th Street.'

"Mr. Schrager: I offer that in evidence."

[1-3] Although the sole witness at the trial, it does not follow that appellant's contention with regard to the findings as hereinbefore noted must be upheld. It is for the trial judge to determine the value and effect of evidence unless such evidence is declared by law to be conclusive; and the testimony of the plaintiff herein is not an example of such evidence. In the absence of a showing of an abuse of discretion or, that the effect given to the testimony was arbitrary, the value and effect of the evidence as found by the trial judge, if within reason, must be upheld on appeal. There is no such showing in the within appeal.

[4] As to the amendment to the original complaint and the first amended complaint to which demurrers were sustained, the record is not complete. However, inasmuch as the record does show that the trial comprised three days, viz., June 28, 29 and 30th, and that the amendment to the complaint was filed July 1st and the first amended complaint was filed July 11th, it is a reasonable inference that requests to file such amendments were made after the evidence was concluded. An examination of the proposed amendments in the light of the record reveals no error in the court's orders sustaining the demurrers thereto.

For the foregoing reasons, the judgment and the orders appealed from, are affirmed.

YORK, P. J., and WHITE, J., concur.

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85 Cal.App.2d 437

LYNCH v. LICHTENTHALER et al.

Civ. 16045.

District Court of Appeal, Second District, Division 3, California.

May 11, 1948.

1. Wills ⚷67

In action against beneficiaries and executor under will of plaintiff's deceased stepfather to establish a trust as to one-half of distributable estate, on ground that stepfather and plaintiff's mother had executed reciprocal wills naming plaintiff as a beneficiary and allegedly agreed orally not to revoke such wills, but that stepfather revoked his will after mother's death and executed new will leaving nothing to plaintiff, evidence that plaintiff's mother and stepfather had not been friendly toward plaintiff's brother who was beneficiary under stepfather's new will, was immaterial.

2. Wills ⚷58(2)

One seeking to establish alleged oral agreement between her mother and stepfather to make reciprocal and irrevocable wills favoring claimant as beneficiary had burden of establishing the alleged agreement by clear and convincing evidence. Probate Code, § 23.

3. Wills ⚷64

The mere concurrent execution of mutual wills with full knowledge of their contents by both testators is not enough to prove a legal obligation to forbear revocation, in absence of a valid contract. Probate Code, § 23.

4. Wills ⚷58(2)

Mere fact that wills are reciprocal or contain similar or identical provisions, or were executed at same time and before same witnesses, is not of itself sufficient evidence of alleged oral agreement. Probate Code, § 23.

5. Wills ⚷58(1), 59

An oral agreement to execute reciprocal and irrevocable wills must be certain and definite, founded on an adequate consideration, and be established by the clearest and most convincing evidence. Probate Code, § 23.

6. Wills ⚷58(2)

Evidence was insufficiently clear and convincing to establish alleged oral agreement by husband and wife to execute irrevocable reciprocal wills favoring plaintiff as beneficiary. Probate Code, § 23.

7. Evidence ⚷317(18)

In action against beneficiaries and executor under will of plaintiff's deceased stepfather to establish a trust as to one-half of distributable estate, on ground that stepfather and plaintiff's mother had executed reciprocal wills naming plaintiff as a beneficiary and allegedly agreed orally not to revoke such wills, but that stepfather revoked his will after mother's death and executed new will leaving nothing to plaintiff, testimony of witness that plaintiff's mother had told witness that mother and stepfather had agreed to make reciprocal wills for certain specified purposes, was not admissible, where mother's statements were not made in stepfather's presence.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Pauline Lynch, formerly Pauline Golles Boadway, against Frederick W. Lichtenthaler and others to establish a trust as to one-half of the distributable estate of the plaintiff's deceased stepfather, and to quiet title to an undivided one-half of the distributable estate. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Cosgrove, Clayton, Cramer & Diether, of Los Angeles, for appellant.

Harvey W. Guthrie, of Los Angeles, for respondents.

WOOD, Justice.

Plaintiff, in this action against the beneficiaries and the executor under the will of her stepfather Herman Golles, seeks, by her first cause of action, to establish a trust as to one-half of the distributable estate, and, by her second cause of action, to quiet title to an undivided one-half of said distributable estate. Judgment was for defendants, and plaintiff appeals from the judgment.

The alleged basis of the action is that plaintiff's mother, Annie Golles, and plaintiff's stepfather, Herman Golles, had entered into a purported oral agreement to make reciprocal wills and not to revoke such wills. On November 15, 1934, Annie Golles made a will, and on November 16, 1934, Herman Golles made a will. The wills were practically identical. Under the wills each testator appointed the other testator as executor, and, in the event such appointee did not survive the testator, appointed plaintiff as executrix. Also under the wills, each testator gave all of his property to the surviving spouse for the period of his life, with the right to consume and use the principal, and each testator gave, upon the death of the survivor, one-half the remainder to plaintiff herein and one-half to the children of plaintiff's brother, the defendant Frederick W. Lichtenthaler (who will be referred to herein as Frederick). Differences in the wills were as follows: Mrs. Golles stated that she had two children, and Mr. Golles stated that he had no children; she referred to her "heirs hereinafter named" and to "my daughter" and "my son" ; he referred to his "legatees and devisees hereinafter named" and to "the daughter of my wife" and "the son of my wife" ; she stated that she made no provision for her son Frederick, and he stated that he made no provision for his blood relatives and stated reasons why his property "should go" to his wife and to his wife's daughter and grandchildren. The plaintiff and Frederick were the only children of Mrs. Golles, and they were the issue of a previous marriage. Mr. Golles had no children. Mrs. Golles died July 19, 1943. Her will was admitted to probate and the estate was distributed according to the terms of the will. On November 5, 1943, Mr. Golles revoked his will and made another will in which he gave all of the property, except that in which he held a life estate under his wife's will, to Frederick, Frederick's wife, and Frederick's three children, and he stated therein that he was leaving nothing to plaintiff for the reason that she had forced him, by threats on his life, to give her $1500 "right after" the death of Mrs. Golles, receipt for which money was in his safe deposit box. Mr.

Golles died on July 26, 1945, and the will last mentioned was admitted to probate. Frederick, as guardian of his minor children, filed a petition to terminate the life estate of Mr. Golles in the property which had been distributed to Mr. Golles for life under the will of Mrs. Golles. The court decreed, in the matter of that petition, that the life estate had terminated, and that plaintiff is the owner of an undivided one-half interest in the property which was the subject of the life estate, and that Frederick's children are the owners of the other undivided one-half interest therein.

The principal issue before the trial court was whether Mr. and Mrs. Golles had entered into an oral agreement to make reciprocal wills and not to revoke them. The trial court found that it was not true that they had agreed to execute mutual or reciprocal wills, and that it was not true that they further agreed that said wills should not be revoked. Appellant contends that there was substantial evidence that such an agreement had been made.

Plaintiff and her husband testified that, after the death of Mrs. Golles, plaintiff's husband, at the request of Mr. Golles and in his presence, read the will of Mr. Golles. Plaintiff testified that Mr. Golles then stated that "You know, it is just like mother's will. We drew these wills up" and they are duplicate wills and "I want to know what you think of it." She also testified that "that is the way it is that everything was fixed up, and he was most satisfied." Plaintiff's husband testified that after he had read the will Mr. Golles asked him if he did not think it was a fair will, and stated that he and his wife "wanted to do the right thing"; that Mr. Golles stated that he and his wife had made "two wills," and had she survived him "it would have been the same way—that that was the way they had arranged things."

A sister of Mrs. Golles, called as a witness on behalf of plaintiff, testified that during the married life of Mr. and Mrs. Golles she "was very intimate with them"; that she heard Mrs. Golles speak to Mr. Golles many times about making wills; that after they had made the wills it was "brought out" in the presence of the witness many times "that they were so well satisfied with these mutual or reciprocal wills they had made"; that upon one occasion when Mrs. Golles was ill she told the witness that "when she left, everything was going to be fine—that Pauline [plaintiff] would be taken care of, and that the boys [Frederick's sons] would" be taken care of; and that she said "we can't leave the money to Fred because he would not know how to take care of it"; and that Mr. Golles was present at that time, and he replied "Yes, I would rather throw it in the ocean because I know what would become of it."

A physician called on behalf of plaintiff testified that he had known both Mr. and Mrs. Golles; that he had had social, as well as professional, visits with them; that they had said in his presence that Frederick had sued them, and that he had all he was going to have "out of their finances."

[1] The foregoing testimony is the substance of the testimony received by the trial court pertaining to the issue of an oral agreement. Plaintiff testified, regarding the sum of $1500 referred to in Mr. Golles' will as having been received by her, that Mr. Golles told her he had taken the money from a safe deposit box the day Mrs. Golles died and that he wanted to give it to plaintiff. The receipt for said sum, which was in plaintiff's handwriting and signed by her, recited that the said sum was to repay $800 which plaintiff had "given" her parents in 1934, and that "the remainder is in consideration to me for former gifts of money given" to Frederick. There was evidence that Mr. Golles had the $1500 in cash in his home, and there was also evidence that he went to the bank to get part of it. It is not necessary, however, to determine the circumstances under which plaintiff received the money, since that evidence is not material upon the question whether there was an oral agreement between Mr. and Mrs. Golles to make reciprocal wills and not to revoke them. Evidence was also introduced to show that Mr. and Mrs. Golles had not been friendly toward Frederick, principally because he had commenced an action against them for an accounting in a guardianship matter which related to

property he had inherited from his father. While that evidence would tend to explain the action of Mr. and Mrs. Golles in designating persons other than Frederick to take under their wills, it is immaterial upon the question whether there was an agreement between them to make reciprocal and irrevocable wills.

[2-6] The burden was upon the plaintiff to show the oral agreement by clear and convincing evidence. See, Rolls v. Allen, 204 Cal. 604, 608, 269 P. 450. There was no evidence that the testators expressly or impliedly agreed not to revoke the wills. Although each testator made the same testamentary disposition of his property, there was no provision in either will, by direct reference or by implication, indicating the existence of an agreement to renounce the right to revoke those wills. It is provided in section 23 of the Probate Code that a conjoint or mutual will may be revoked by any of the testators in like manner as any other will. In Rolls v. Allen, supra, it was said, at page 608, of 204 Cal., at page 452 of 269 P., that a person who executes a mutual will with another does so with notice given by the statute itself that such will is subject to revocation, and "The mere concurrent execution of mutual wills with full knowledge of their contents by both testators is not enough, therefore, as claimed, to prove a legal obligation to forbear revocation in the absence of a valid contract." It was stated in the case of Notten v. Mensing, 3 Cal.2d 469, at page 477, 45 P.2d 198, at page 202, "The mere fact that the wills are reciprocal or contain similar or identical provisions, or that they were executed at the same time and before the same witnesses, is not of itself sufficient evidence of the alleged oral agreement." The fact that the provisions of the alleged reciprocal wills herein were practically identical, and that they were executed about the same time, and were not revoked during the lifetime of Mrs. Golles, is not of itself evidence of such alleged oral agreement. Even if there had been clear and positive evidence that the testators had agreed to make reciprocal wills, it would have been necessary, in order for appellant to prevail, to show further that the wills had been made pursuant to an agreement not to revoke. Notten v. Mensing, 20 Cal.App.2d 694, 697, 698, 67 P.2d 734. Such an agreement must be certain and definite, founded upon an adequate consideration, and established by the clearest and most convincing evidence. Ibid.

[7] Appellant also contends that the trial court erred in sustaining objections to, and striking out, certain testimony given by another witness who was called on behalf of plaintiff. The substance of that testimony was that Mrs. Golles had told the witness several times that she (Mrs. Golles) and her husband had agreed to make reciprocal wills so that Pauline (plaintiff) would get one-half of their property, and Frederick's three children would get one-half, and Frederick would "not get one cent." Appellant asserts that that testimony was admissible, as an exception to the hearsay rule, to show the intent of the declarer, Mrs. Golles. The rulings were correct. It is not claimed that such alleged statement by Mrs. Golles was made in the presence of Mr. Golles or that he had knowledge that she had made such statement. Testimony as to what the witness heard Mrs. Golles say, out of the presence of Mr. Golles, would not have been binding upon Mr. Golles, and it is not binding upon his representative. In the case of Fuller v. Nelle, 12 Cal.App.2d 576, 55 P.2d 1248, which involved alleged mutual and irrevocable wills, testimony of a third person, as to what the first decedent said relative to carrying out the mutual wills of the testators, was received. That case is distinguishable from the present case in that the statement therein was made in the presence of the second decedent.

Appellant alleged in the complaint that defendants are estopped from asserting the statute of frauds against the enforcement of the alleged oral agreement. The alleged agreement, not being in writing, would have been unenforceable (Civ.Code sec. 1624, subd. 6), unless the defendants were estopped to plead the statute of frauds. It is true, as stated by appellant, that the trial court made no finding on the issue of estoppel. In view of the finding of the trial court, however, that there was no oral agreement, which finding was supported by the evidence, the issue regarding estoppel is immaterial and it was not necessary to make a finding on that issue.

The judgment is affirmed.

SHINN, Acting P. J., and VALLÉE, Justice pro tem., concur.

WEST KEY NUMBER SYSTEM

85 Cal.App.2d 380

MURDOCK v. SWANSON et al.

Civ. 3597.

District Court of Appeal, Fourth District, California.

May 6, 1948.

Rehearing Denied May 26, 1948.

Hearing Denied July 2, 1948.

1. Frauds, statute of 🔑75

Oral agreements to make a will are unenforceable. Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6.

2. Frauds, statute of 🔑138(4)

Ordinarily recovery for personal services rendered or goods furnished under unenforceable oral agreement to make a will must be based upon quantum meruit.

3. Specific performance 🔑39

Where fraud sufficiently appears and no remedy at law exists, equity will intervene and in effect permit quasi specific performance of oral agreement to make a will by impressing a trust upon the property for the benefit of a claimant who would otherwise be defrauded and deprived of any remedy.

4. Specific performance 🔑39

Remedy at law to recover value of personal services rendered and goods furnished by plaintiff under oral agreement to make a will leaving all of decedent's property to plaintiff was adequate and hence equity would not intervene to permit quasi specific performance of agreement by impressing a trust upon decedent's property for the benefit of plaintiff.

5. Frauds, statute of 🔑129(6)

That plaintiff rendered services and furnished goods under oral agreement of recipient of such services and goods, since deceased, to make a will leaving all her property to plaintiff did not constitute such "part performance" as would take oral agreement out of statute of frauds. Civ. Code, § 1624, subd. 6; Code Civ. Proc. § 1973, subd. 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Part Performance".

6. Frauds, statute of 🔑142, 149

Allegation that plaintiff sold her beauty shop at a loss in order to be in a better position to render services under oral agreement by recipient of such services, since deceased, to make a will leaving all her property to plaintiff, showed no such change of position as would entitle plaintiff to equitable relief, in absence of allegation that such sale was requested by decedent or even known to her, since any such loss could be included in showing value of services rendered for which a remedy at law was available.

7. Frauds, statute of 🔑149
Pleading 🔑8(2)

Allegation that services rendered by plaintiff under oral agreement to make a will leaving property to plaintiff were not susceptible of pecuniary compensation was merely a conclusion and did not entitle plaintiff to equitable relief in view of facts alleged showing that services and articles furnished were not extraordinary or exceptional in character.

8. Frauds, statute of 🔑150(1)

Demurrers to complaint seeking enforcement of oral agreement to make a will were sufficient to raise defense of statute of frauds, where demurrers, though general in form, set forth upon their face the authorities relied upon, including the statute. Code Civ.Proc. § 1973, subd. 6.

9. Executors and administrators 🔑438(7)

Decedent's heirs were not necessary parties defendant in action on quantum meruit to recover reasonable value of services, goods and money furnished to decedent.

10. Executors and administrators ⚿431(2)

A claim for reasonable value of services rendered decedent must be filed against his estate before an action for reasonable value of such services can be maintained.

11. Executors and administrators ⚿443(6)

Complaint based on claim against decedent's estate for entire estate on ground that claimant had rendered services and furnished goods to decedent in reliance on oral promise to make a will leaving all her property to claimant failed to state a cause of action on quantum meruit for reasonable value of services and goods, where claim contained no reference to reasonable value of such services and goods and complaint, while alleging nonpayment of claim, did not allege that reasonable value of services and goods had not been paid.

12. Equity ⚿64

Where plaintiff refused to amend complaint after demurrer thereto for failure to state a cause of action had been properly sustained, she could not rely on appeal from adverse judgment upon general equitable principles, since equity will not aid one who, through his own delay and fault, has lost the remedy which the law has provided.

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Louise Murdock against O. P. Swanson, as administrator of the estate of Amanda O. Swanson, also known as A. O. Swanson, deceased, and others, to recover on a claim based upon alleged oral contract to make a will. From an adverse judgment, plaintiff appeals.

Judgment affirmed.

McFadzean & Crowe, of Visalia, Michael F. Shannon, Thomas A. Wood, and Charles W. Wolfe, all of Los Angeles, for appellant.

Gareth W. Houk, Leroy McCormick, Maddox & Abercrombie, James K. Abercrombie and Erling H. Kloster, all of Visalia, for respondents.

BARNARD, Presiding Justice.

This is an action to recover on a claim based upon an alleged oral contract to make a will. The property left by the deceased was reduced to cash amounting to $50,827.61 and the plaintiff filed an amended claim in the estate for that amount, which was rejected. The plaintiff then brought this "Action to Impress a Trust, Specific Performance and on a Claim". After the filing of a second amended complaint demurrers were sustained without leave to amend as to the first cause of action, and with leave to amend as to the second cause of action. The plaintiff, having refused to amend, has appealed from the judgment which followed.

The appellant's main contention is that her first cause of action is sufficient to show that she is entitled to specific performance of the agreement between herself and the decedent, to impress a trust on the property of the estate, and to establish that the defendants are estopped to raise the statute of frauds.

The decedent died on February 5, 1946. The first cause of action alleges that in September, 1941, the plaintiff and the decedent, who was then 74 years of age, entered into an oral agreement whereby it was agreed that the plaintiff would care for the decedent, render personal services to her and furnish her with certain goods during the remainder of her lifetime; that she would assist her in caring for her property to the extent that might be necessary to preserve the property and prevent its sale; and that, if necessary, she would care for the decedent in her own home or in plaintiff's home to the end that she should not be sent to an institution. It is then alleged that in consideration of all these things the decedent agreed to make and leave at her death a will leaving her ranch and all her other real and personal property to the plaintiff; and that, in making this agreement, both parties understood and agreed that the things to be done by the plaintiff would not be susceptible of pecuniary compensation and that it would be impossible to compensate plaintiff except in the manner agreed upon.

It is then alleged that in September, 1941, the plaintiff commenced to fulfill her part of this agreement; that she made trips from her home to the home of decedent, a distance of many miles, on the average of twice a day; that she performed various personal services for the decedent and worked on her ranch; that she furnished laborers from time to time to construct fences and do other work on the ranch; that she furnished decedent with food, clothing, drugs and medicine and other articles, including a milk cow and other animals for her ranch; that she acted as sole companion to the decedent; and that these various services continued until the decedent died. It is further alleged that until 1945 the plaintiff owned and operated a beauty shop; that in 1945 it became necessary to spend so much time with the decedent that she found it impossible to continue to operate her business; and that in order to comply with her agreement and devote her time to the decedent she then sold her business at a great loss with respect to the good will and future profit; that during the last three years the plaintiff was married and living with her husband several miles from decedent's home; and that her carrying out of this agreement caused her to neglect many of her marital, social and household duties and to remain away from her home and husband for many hours at a time.

It is then alleged that the plaintiff has received no compensation for these services, performed in reliance on the agreement; that because of her reliance upon the agreement she kept no record of the things she did for the decedent and by reason thereof it would be difficult for her to render an exact statement of all her services or of all of the things furnished to the decedent; that the decedent left no will; that the services and things so furnished by her are not susceptible of pecuniary compensation or measurement; that she has so changed her status, mode of living and financial position in reliance on the agreement that it would be impossible to compensate her unless the agreement is specifically enforced; and that the failure of the decedent to make such a will will be a fraud on the plaintiff unless the court impresses a trust on the property of the estate for her benefit.

[1, 2] Oral agreements of this nature are unenforceable. Civil Code, Sec. 1624 (6); Code Civ.Proc. Sec. 1973(6). Ordinarily, recovery for personal services rendered under such circumstances must be based upon the theory of quantum meruit. Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146. No sound reasons appear why similar rules should not apply with respect to the furnishing of any goods, wares or merchandise.

[3] In some cases where some form of fraud sufficiently appears, and where no remedy at law exists, it has been held that equity will intervene and in effect permit a quasi specific performance by impressing a trust upon the property for the benefit of a claimant who would otherwise be defrauded and deprived of any remedy. The appellant contends that this is such a case and relies particularly on Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St. Rep. 154; Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198; Wilson v. Bailey, 8 Cal. 2d 416, 65 P.2d 770; Van Fossen v. Yager, 65 Cal.App.2d 591, 151 P.2d 14; and Loper v. Flynn, 72 Cal.App.2d 619, 165 P.2d 256. In all of these cases except the first the injured party had given up property on an oral agreement that he or his heirs would receive certain things, the defendant or his heirs had received the benefits and then refused to comply, a definite fraud appeared, and no other remedy existed. In the first of these cases, Seymour v. Oelrichs, an estoppel was based upon an unusual set of circumstances where no other remedy was available. In none of these cases were the equitable rules applied in order to provide a means of payment for personal services, and in none where another remedy existed.

[4] It is well settled that equity will not intervene in such cases involving payment for personal services since the remedy at law is adequate. Zaring v. Brown, 41 Cal. App.2d 227, 106 P.2d 224; Morrison v. Land, 169 Cal. 580, 147 P. 259; De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522. There can be no question that there

was also an adequate remedy at law here with respect to any goods or articles furnished to the decedent by the appellant.

[5] There was no such part performance here as would take this case out of the statute of frauds and in effect nullify the clear provisions of the statutes providing that such an oral contract shall not be enforced. Loper v. Flynn, 72 Cal.App.2d 619, 165 P.2d 256; Stewart v. Smith, 6 Cal.App. 152, 91 P. 329; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154; Zellner v. Wassman, 184 Cal. 80, 193 P. 84, 87. In Zellner v. Wassman, the court said: "As a general rule, neither the mere omission to put a contract in writing nor such omission coupled with performance is alone sufficient to create an estoppel. 'A plaintiff * * * must be able to show clearly * * * such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement, and not avail himself of the statute to escape his performance, and also that the plaintiff, in reliance on this representation, proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur "an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense."'"

[6] Nor do we think that the allegations, with respect to the appellant's sale of her beauty parlor are sufficient under the circumstances of this case to bring her within the equitable rules upon which she relies. In Morrison v. Land, 169 Cal. 580, 147 P. 259, it was held that the plaintiff's declination of other offers of employment at greater compensation was not sufficient for this purpose. The allegations of loss here are indefinite, and are to the effect that the appellant sold the beauty parlor merely in order to be in a better position to render the services called for by her agreement with the decedent. There is no allegation in this cause of action that any such thing was requested by the decedent or even known to her. If any loss occurred in this respect this was an element which could have been included in showing the value of the services she rendered, and a remedy at law existed. No such change of position here appears as to make it impossible for plaintiff to obtain compensation for anything she did other than through equitable relief, or upon the constructive trust theory as it has always been applied.

[7] There is no merit in the further contention that the services rendered by the appellant were not susceptible of pecuniary compensation and that, as alleged, this situation was recognized and agreed upon by the parties to the oral agreement. The allegation to that effect is merely a conclusion and the facts alleged clearly show that they were all personal services and articles furnished, and that they are not of so extraordinary or exceptional character "as in contemplation of law, cannot be compensated for in money." Morrison v. Land, 169 Cal. 580, 147 P. 259, 262.

[8] While the appellant asks that primary consideration be given to her contention that the first cause of action sufficiently sets forth grounds for the equitable relief sought, she also asks consideration of a further contention that the statutory requirement that an agreement to make a will be in writing was waived by the respondents since no special demurrer was filed raising that defense. While the demurrers filed were general in form they set forth on their face the authorities relied upon, including "Code Civ.Proc. Sec. 1973(6)". This informed the court and the appellant of the fact that this statute was relied upon, the allegations of the first cause of action of the complaint showed that the agreement in question was an oral one, and the matter was sufficiently raised. Harper v. Goldschmidt, 156 Cal. 245, 104 P. 451, 134 Am.St.Rep. 124, 28 L.R.A.,N.S., 689; Bates v. Daley's Inc., 5 Cal.App.2d 95, 42 P.2d 706; Maynes v. Angeles Mesa Land Co., 10 Cal.2d 587, 76 P.2d 109. No possible prejudice appears and the allegations as to the first cause of action "are such as to make it reasonably certain that the pleading could not have been amended truthfully so as to make it state a cause of action." Morrison v. Land, 169 Cal. 580, 147 P. 259.

Finally, the appellant now contends that her second cause of action sufficiently pleaded a claim based upon quantum meruit. In her opening brief, after describing her first cause of action as one to impress a trust on the property of the estate and for specific performance of the agreement between appellant and decedent", she states that "the second cause of action in said complaint is an action on the claim filed by appellant, which covers the same matters as the first cause of action." It is then argued that this second cause of action alleges all of the essentials for an action on the claim, including the fact that a verified claim was filed within time and rejected, that it set forth the nature and amount of the claim, and that the claim was attached thereto and made a part thereof. The essentials as thus set forth did not include any statement or contention that the claim as filed or as sued upon contained any reference to the reasonable value of the things furnished. However, in her closing brief the appellant for the first time contends that the second cause of action is on a claim of quantum meruit, that it pleads the claim, the amount, that it is reasonable, and that no part has been paid.

The second cause of action incorporated therein by reference practically all the allegations of the first cause of action. The portion thus pleaded by reference was properly stricken by the court on motion. It was then alleged that between September, 1941, and February, 1946, the plaintiff rendered services and furnished goods and money to the decedent for which the decedent agreed to pay at the time of her death the sum of $50,827.61 "and which sum is the reasonable value of said work, labor, services, goods, wares, merchandise and money" ; that on August 8, 1946, the plaintiff filed her amended claim in the estate for this sum of $50,827.61; that a copy of this amended claim is attached and by reference made a part of the pleading; that this claim sets forth the agreement between the plaintiff and decedent "as alleged above" ; that the claim was rejected; and that "no part of said claim filed by plaintiff has been paid." The prayer is for specific performance of the agreement and that in the event a trust is not impressed on the property plaintiff receive a judgment on her claim for $50,827.61.

The amended claim thus attached, and made the basis of the second cause of action, contains no reference to the reasonable value of the services and goods furnished to the decedent. It consists of a general statement of services and goods furnished to the decedent with a statement that all thereof was rendered and furnished at the request of the decedent for her use and benefit, and upon her promise to pay the claimant by making a will leaving all of her real and personal property to the claimant; that claimant relied and acted upon this promise and at the further request of the decedent sold her business at a great loss to herself in order to devote more time to decedent and her affairs; and "That in view of the promise and agreement of the decedent to make said will, and of the reliance and action of claimant thereon, claim is hereby made for the whole of the estate of said decedent and of the value thereof, said claim being in money the sum of $50,827.61."

A number of defects appear in this cause of action as alleged. While it alleges that the sum of $50,827.61 is the reasonable value of the things furnished to the decedent this statement is a part of an allegation that the decedent agreed to pay this sum at the time of her death for these services and goods. Not only are the allegations of the first cause of action made a part of this second cause of action but the latter then alleges that a claim had been filed in the estate for the amount named, that this claim sets forth the agreement between the parties as alleged above, and that the claim as thus filed was made a part of this cause of action. It thus appears that this cause of action was based upon the claim filed and not upon the reasonable value of the things furnished. That the two causes of action cover the same matters is admitted in appellant's opening brief. The claim, as filed and thus made the basis of the second cause of action, made no reference to the reasonable value of the things furnished, and stated that these things were furnished upon the agreement of the decedent to pay the claimant therefor by making a will and leaving all of her property to the claimant, and for that reason claim was made for the entire estate, being the sum of $50,827.61. While it is alleged that the "claim filed" has not been paid, it is not alleged that the reasonable value of the services has not been paid.

[9-12] It appears that the second cause of action, like the first, was in fact based upon the agreement and upon a claim filed demanding the entire estate because of that agreement, and no real attempt was made to allege a cause of action based upon quantum meruit. Moreover, in an action on quantum meruit the heirs, who were joined as defendants, were not necessary defendants. Although this was a third attempt to state a cause of action an opportunity to still further amend was given by the court, and appellant refused to so amend. It would appear from the record before us that the appellant did not then desire to rely upon and obtain the reasonable value of the things furnished by her to the decedent, and the first expression of such desire on her part appears in her final brief. It further appears that the claim which was here filed with the administrator was not a claim for the reasonable value of the services and things furnished to the decedent by the appellant, and it set forth no facts from which it could be determined that the making of such a claim was intended. It is well settled that before an action for the reasonable value of such services may be filed and maintained a claim therefor must be filed against the estate. De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522; Zaring v. Brown, 41 Cal.App.2d 227, 106 P.2d 224. In the existing form of the allegations of the second cause of action the court was justified in sustaining the demurrer thereto, and in requiring a more definite and adequate pleading. The appellant, having refused to amend, is now in no position to rely upon general equitable principles. As was said in De Mattos v. McGovern, 25 Cal.App.2d 429, 77 P.2d 522, 524: "Finally, no principle is more firmly settled than that equity will not come to the aid of one who, through his own delay and own fault, has lost the remedy which the law has provided."

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

Hearing denied; CARTER and SPENCE, JJ., dissenting.

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85 Cal.App.2d 448

PEOPLE v. CUCCO.

Cr. 4192.

District Court of Appeal, Second District, Division 2, California.

May 13, 1948.

1. Poisons 🔑9

Evidence warranted conviction for possessing and transporting a preparation of heroin. Health and Safety Code, § 11500.

2. Criminal law 🔑532(2), 1153(6)

Whether confession is free and voluntary is preliminary question to be determined by trial court in exercise of sound discretion if evidence is conflicting, and trial court's finding is binding if supported by substantial evidence in absence of abuse of discretion.

3. Criminal law 🔑519(9)

The fact that confession may have been made after accused has been interrogated for many hours does not render his statement involuntary.

4. Criminal law 🔑1158(4)

Where evidence is in conflict on question of freedom from coercion of defendant making confession, determination of such question by trier of facts will not be disturbed on appeal.

5. Criminal law 🔑531(3)

Evidence whether defendant's statements were free and voluntary warranted admission of defendant's confession

6. Criminal law 🔑696(2), 1044

If witness answers so quickly that objection cannot be made, motion to strike answer is proper remedy, and failure to move to strike evidence is waiver of any objection that might have been made to its admission.

7. Criminal law 🔑260(11)

The determination by trier of facts of elements of crime that were established by evidence may not be set aside on appeal.

8. Poisons 🔑4

Intent or knowledge are not elements of offense of possessing and transporting preparation of heroin, but mere possession is violation of Health and Safety Code, and the only perfect defense is a valid prescription. Health and Safety Code, § 11500.

9. Poisons ⚷9

Evidence that defendant was in possession of glove containing narcotic, and that he handed glove to companion with instructions to throw glove away if automobile in which they were riding was stopped, was sufficient to establish corpus delicti of unlawfully possessing and transporting narcotics. Health and Safety Code, § 11500.

10. Criminal law ⚷680(2)

The order of proof is within trial judge's discretion, and defendant cannot complain because proof of corpus delicti does not precede evidence of admission or confession.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

John Jerry Cucco was convicted for possessing and transporting a preparation of heroin. From the judgment of conviction and from the order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

George Stahlman, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

WILSON, Justice.

Appellant and two others, Boulad and Mathews, were jointly charged with (1) having in their possession and (2) having transported a preparation of heroin, in violation of section 11500 of the Health and Safety Code. Defendants pleaded not guilty and waived a jury trial. The court adjudged appellant guilty as charged in both counts. Appellant made a motion for a new trial which was denied. The appeal is from the judgment and from the order denying the motion for a new trial.

While deputy sheriffs Hines, McKinney and Jones were sitting in an automobile near the corner of Atlantic and Whittier Boulevards a coupe approached from the west on Whittier Boulevard and defendant Boulad, who had been standing near the corner, walked into the crosswalk, stepped onto the running board of the coupe, and motioned with his right arm. The coupe turned into Atlantic Boulevard and stopped after proceeding about a half block. The officers followed and stopped beside the coupe, which was being driven by appellant. Defendant Mathews was seated at the right-hand side and a woman named Frances was seated between the men. As the coupe stopped Boulad stepped off the running board. Officer Hines observed defendant Mathews throw a black article from the right-hand window of the coupe. Hines immediately got out of the officers' car and grabbed Mathews, who said that appellant had told him to throw the object away in the event they were stopped. Appellant made no reply to this statement.

Officer McKinney recovered the black article, which proved to be a woman's glove containing a white envelope in which were enclosed 13 packages or bindles. It was stipulated that the bindles contained heroin.

The three defendants and Frances were taken to the sheriff's substation for questioning. One of the officers testified that the statements made by the parties were all free and voluntary without hope of immunity or reward and free from threats of force or violence.

Before admitting evidence of the conversation, the court, at the request of appellant's counsel, heard testimony on voir dire on the question whether or not the statements of appellant were free and voluntary. Thereupon appellant testified that the conversation at the substation lasted four or five hours and was engaged in by several officers. They questioned him about the package that had been thrown from the window, about telephone calls and other matters. He refused to answer the questions. Frances, who was his fiance, was in custody at the time. Appellant stated that after a few hours the officers told him that if he did not talk they would lock Frances up and she would not see her baby for a year; that while resting his chin on his arm one of the officers knocked his arm from the table; that he saw the officers talking with Frances and believed that she would be released if he answered the questions; that he then made his statement to the officers and Frances was released from custody. Frances gave similar testimony. Officer Hines denied that appellant was told that Frances would be locked up and that she would not see her baby for a year unless appellant talked; that no one struck or threatened appellant or knocked his arm from the table. Two other officers testified to the same effect.

Upon completion of the hearing on voir dire the court overruled the objection to the evidence as to the conversation. Officer Hines then testified that Boulad and Mathews made certain statements in the presence of appellant; that appellant at first refused to answer as to the truth of the statements and then said he would talk if everybody except Hines left the room. Appellant then stated to Hines that he had procured $300 from his aunt and used it to purchase a half ounce of heroin in Mexico, brought it back to Los Angeles and had it rolled into bindles; that he took the narcotic to his car and he, Frances and Mathews drove to the point where they were arrested; that he gave the glove containing the narcotic to Mathews and told him to throw it away in the event they were stopped.

Frances testified that she saw the glove in question on the night of the arrest of appellant and his codefendants, and that it quite possibly was hers. Officer Hines testified that a second black glove, similar to the one which was thrown from the car, was found in the coupe occupied by appellant, Mathews and Frances. Both gloves were introduced in evidence.

Mathews, testifying in his own behalf, stated that he was riding with appellant and Frances; that Boulad stepped on the running board and told appellant "to pull around the corner and stop," which appellant did; that within a few seconds Mathews heard appellant say, "Take it;" that without thinking he, Mathews, took the object, which he saw to be a glove with something like paper in it; that appellant said, "If we are stopped throw that out the window;" Mathews asked "What for?" Appellant replied, "Never mind asking questions, just throw it out if we are stopped;" that when the sheriff's car came alongside the coupe appellant whispered, "Throw it," and Mathews threw it. Mathews denied that he knew the contents of the glove.

Boulad testified in his own behalf. He admitted that he stepped on the running board of the coupe and said that appellant told Mathews to take the package and to throw it.

Appellant denied having given Mathews a glove, denied having told him to throw it out if anything happened, and denied knowing that there were narcotics in the car.

[1-4] The foregoing statement negates appellant's contention that the evidence is insufficient to sustain the judgment. Whether a confession is free and voluntary is a preliminary question to be determined by the trial court. People v. Siemsen, 153 Cal. 387, 394, 95 P. 863; People v. Ferdinand, 194 Cal. 555, 567, 229 P. 341. Where there is a conflict of evidence as to whether confessions had been freely and voluntarily made the determination of the question rests in the sound discretion of the trial judge, and if it is supported by substantial evidence his finding is binding upon a reviewing court. People v. Dolan, 38 Cal.App.2d 96, 98, 100 P.2d 791. The ruling of the trial court will not be disturbed on appeal unless there has been an abuse of discretion. People v. Roebling, 14 Cal.App.2d 586, 588, 58 P.2d 929. The fact that a confession may have been made after the accused had been interrogated for many hours does not render his statements involuntary. People v. McEvers, 53 Cal.App.2d 448, 451, 128 P.2d 93. When the evidence is in conflict on the question of freedom from coercion the determination of that question by the trier of facts will not be disturbed on appeal. People v. Kazarian, 83 Cal.App.2d 471, 189 P.2d 39; People v. Shaffer, 81 Cal.App.

752, 757, 254 P. 666; Lisenba v. People of State of California, 314 U.S. 219, 238, 62 S.Ct. 280, 86 L.Ed. 166.

[5] We find no error in the admission of appellant's confession. It may be added that the evidence concerning the movement of the coupe driven by appellant and the glove containing narcotics, together with the testimony given by appellant's codefendants Mathews and Boulad, is sufficient to sustain the judgment of conviction even if there had been no confession by appellant.

[6] Appellant contends that the court erred in admitting in evidence the accusatory statement made by defendant Mathews in appellant's presence after Mathews had thrown the glove from the coupe and had been grabbed by officers. When the officer was asked to repeat Mathews' statement objection was made to the conversation and the objection was sustained. Later, when the officer was asked what Mathews said, he related Mathews' statement and, without objection from appellant, testified that appellant did not say anything in response to what Mathews had said. Objection was made after the answer had been given. The objection was overruled subject to a motion to strike. No motion to strike the evidence was made. If a witness answers so quickly that an objection cannot be made a motion to strike the answer is the proper remedy. People v. Watson, 165 Cal. 645, 652, 653, 133 P. 298; People v. Dong Pok Yip, 164 Cal. 143, 149, 127 P. 1031. A failure to move to strike the evidence is a waiver of any objection that might have been made to its admission. People v. Guiterez, 126 Cal.App. 526, 530, 14 P.2d 838; People v. Lewandowski, 143 Cal. 574, 579, 77 P. 467.

[7-10] The final objection made by appellant is that the evidence is insufficient to establish the corpus delicti of the offense charged in the information. Aside from appellant's confession the evidence shows that he was in possession of a narcotic and was transporting it (Health & Safety Code, sec. 11500) for the purpose of disposing of it to another person or persons and that he had knowledge of the character of the material in his possession. The trier of facts having determined the elements of the crime that were established by the evidence it will not be set aside on appeal. People v. Bassett, 68 Cal.App.2d 241, 246, 156 P.2d 457. Neither intent nor knowledge is an element of the offense. The mere possession is a violation of the statute and the only perfect defense is a valid prescription under the act. People v. Randolph, 133 Cal.App. 192, 196, 23 P.2d 777; People v. Sweeney, 66 Cal.App.2d 855, 859, 153 P.2d 371. The evidence that appellant was in possession of the glove containing the narcotic and that while they were riding in the automobile he handed the glove to Mathews with instructions to throw it if they were stopped, supports the judgment that he was unlawfully in possession of the heroin and that he was transporting it in violation of the law. People v. Randolph, supra. The order of proof is within the discretion of the trial judge and a defendant may not complain because proof of the corpus delicti did not precede the evidence of an admission or confession. People v. Housman, 44 Cal.App.2d 619, 627, 112 P.2d 944; People v. Allen, 138 Cal.App. 652, 656, 657, 33 P.2d 77; People v. Hudson, 139 Cal.App. 543, 545, 34 P.2d 741.

The judgment and the order denying appellant's motion for new trial are and each is affirmed.

MOORE, P. J., and McCOMB, J., concur.

In re SMITH'S ESTATE.*

Civ. 13383.

District Court of Appeal, First District, Division 1, California.

April 30, 1948.

Rehearing Denied May 29, 1948.
Hearing Granted June 28, 1948.

1. Marriage 🔑40(8)

In proceeding for settlement of estate, where former wife of decedent filed claim as surviving widow and made proof of decedent's marriage to her, a presumption arose of continuation of that marriage, though a further presumption arose that marriage had been terminated by divorce or annulment upon admission by claimant of her later marriage to a second husband. Probate Code, § 41.

2. Marriage 🔑40(11)

Mere proof of a prior marriage and the continued life of both spouses is not sufficient to make a case against a second ceremonial marriage, but there must be a further showing that the first marriage has not been set aside by judicial decree, there being a strong presumption in favor of legality of a marriage regularly solemnized.

3. Marriage 🔑40(9)

Presumption of innocence of a person accused of bigamy prevails over and neutralizes presumption of continuance of life of first wife or husband, being aided by the strong presumption in favor of legality of a marriage regularly solemnized. Code Civ. Proc. § 1963, subd. 30.

4. Marriage 🔑40(10)

In proceeding for settlement of estate, wherein former wife of decedent filed claim as surviving widow, mere testamentary use by decedent of word "wife" in reference to claimant was insufficient to rebut presumption of validity of later marriage admitted by claimant between her and a second husband. Probate Code, § 41.

5. Marriage 🔑40(10)

In proceeding for settlement of estate, wherein former wife filed claim as surviving widow, failure of opposing residuary legatee to produce a record of divorce dissolving marriage between claimant and decedent was insufficient to rebut presumption of validity of a later marriage admitted between claimant and a second husband. Probate Code, § 41.

6. Marriage 🔑47

In proceeding for settlement of estate, wherein former wife filed claim as surviving widow, declarations of decedent to intimate acquaintances on numerous occasions that he was divorced from claimant and that she was his "ex-wife" were admissible to rebut the claim as an exception to the hearsay rule recognized by statute. Code Civ.Proc. § 1870, subd. 4; Probate Code, § 41.

7. Appeal and error 🔑1056(1)

In proceeding for settlement of estate wherein former wife filed claim as surviving widow, where claimant had admittedly married a second time, and evidence of divorce from decedent was uncertain, exclusion of decedent's own statements made to intimate acquaintances that he was divorced from claimant, was prejudicial error. Code Civ.Proc. § 1870, subd. 4; Probate Code, § 41.

8. Judgment 🔑507

Persons not a party to an annulment action cannot collaterally attack the decree.

9. Marriage 🔑67

The statute providing that a judgment of nullity of marriage rendered is conclusive only as against parties to the action and those claiming under them applies alike to voidable as well as void marriages. Civ. Code, §§ 82, 86.

10. Executors and administrators 🔑194(7)

Where woman claiming widow's share of decedent's estate had admittedly married a second husband, judgment of annulment of second marriage based upon decree of probate court finding claimant's marriage to decedent had never been dissolved could not be introduced in District Court of Appeal to support probate court's finding that claimant was entitled to a widow's share as against objection of residuary legatees under will who were not parties to the annulment proceeding. Probate Code, § 41; Civ. Code, §§ 82, 86.

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* Subsequent opinion 201 P.2d 539.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the final settlement of the estate of Lewis Warren Smith, also known as L. W. Smith, deceased, by Wells Fargo Bank & Union Trust Co., executor, wherein Amy Edith Smith, alleged widow, filed a claim objected to by Branford Baptist Church, residuary legatee under decedent's last will. From the final decree, Branford Baptist Church appeals.

Portion of decree appealed from reversed.

Jay A. Darwin and Clifton E. Brooks, both of San Francisco, for appellant.

Weinmann, Moffitt & Quayle, of Alameda, and Cyril Viadro, of San Francisco, for respondent.

PETERS, Presiding Justice.

Lewis Warren Smith died testate May 28, 1945. His olographic will is dated April 7, 1942, at which time the testator was 86 years of age. By it he appointed the Wells Fargo Bank as "administrator", bequeathed $500 to the Widows and Orphans Fund of a designated lodge of Masons, bequeathed "to my wife the sum of Five Dollars," and left to the Branford Baptist Church of Connecticut the balance of his estate. Amy Nichols (Smith) filed a claim alleging that she was the surviving wife of the decedent, and claiming two-thirds of the estate under § 41 of the Probate Code. The executor filed its petition for a settlement of its first and final account and for final distribution. After a trial, the probate court found that Amy Nichols (Smith) was the widow of decedent, approved the account, and ordered the residue of the estate distributed one-third to the Branford Baptist Church, and two-thirds to Amy Nichols (Smith). The Branford Baptist Church appeals from that portion of the decree determining that at the time of decedent's death Amy Nichols (Smith) was his surviving wife, and distributing to her two-thirds of the residue of the estate.

It is an admitted fact that respondent married decedent in January, 1926, and separated from him some time between 1930 and 1933. It is also admitted that in November, 1938, she married Nichols, with whom she lived for many years. Upon Smith's death, and upon discovering that he had left a substantial estate, respondent claimed to be his surviving wife, thus not only admitting but urging that her marriage to Nichols was bigamous. The order from which this appeal is taken was made on August 1, 1946. On August 6, 1946, Ralph Nichols, under circumstances hereafter mentioned, secured from Amy E. Nichols, respondent herein, a decree annulling his marriage to Amy. Thereafter, respondent moved this court to accept as conclusive evidence on this appeal the judgment roll of the annulment proceeding. That motion to take such additional evidence was granted, and the judgment roll in the annulment proceedings, plus a portion of the reporter's transcript, were added to the record on appeal.

The basic contention of appellant is that the finding that respondent is the surviving widow of decedent is totally unsupported by evidence. In this connection appellant contends that, when respondent admitted her subsequent ceremonial marriage to Nichols, a presumption arose that such marriage was valid, and that the Smith marriage had been dissolved by divorce or annulment. It is urged that respondent did not rebut that presumption. It is also urged that the trial court committed prejudicial error in excluding evidence of certain statements made by decedent prior to his death to intimate friends in which he referred to respondent as his "ex-wife" and in which he declared that they were divorced.

Respondent testified that she married Smith in Los Angeles in January, 1926; that they separated "I imagine about 1930 or 1933, something like that * * * around 1932 or 1933"; that thereafter they never lived together; that on November 16, 1938, she married Nichols; that some time prior to her marriage to Nichols she and Nichols visited Smith in Southern California and she asked Smith for a divorce; that Smith told her, "I have a divorce," and asked her why she wanted the information; that she told him that she wanted to marry Nichols, and Smith told her to go ahead and marry him; that Smith did not tell her where he had secured the divorce; that when she asked him how he had secured a divorce without letting her know, Smith replied: "I didn't know where you were * * * All you have to do is publish it in the papers"; that she "supposed" that he had procured the divorce in San Francisco; that she asked him for the divorce papers and he replied that they were in his safe deposit box; that she married Nichols in reliance upon the information so secured from Smith. Counsel for respondent then informed the court that he had investigated the records in San Francisco, Los Angeles and Lake Counties, and in Reno, and that he had been unable to locate any record of a divorce between respondent and decedent. The court suggested that the matter be continued for further investigation, and this was done. At this first hearing the Branford Baptist Church was not represented by counsel, but subsequently such counsel was retained and represented appellant. The probate judge seemed to feel that the burden rested upon appellant to produce a record of the divorce, if one existed. No such record of a divorce was found by either party. It was discovered that respondent had been married and divorced at least once before she married Smith, and that, in her application for a license to marry Nichols, she falsely averred that she had never been married before, and misstated her age. At the final hearing counsel for appellant stated that he had been unable to discover a record of a divorce between Smith and respondent, but offered to show by the testimony of three witnesses, intimates of Smith, that they had heard decedent refer to respondent frequently as "my ex-wife," and repeatedly told them that he had divorced respondent. Counsel for respondent first objected to this evidence, then withdrew his objection, but stated that in his opinion such evidence would not "serve any useful purpose." The trial court stated: "Just to end the matter, I will sustain the objection to it"—although the objection had been withdrawn. It seemed to be the attitude of counsel for respondent and of the trial court that appellant was limited to evidence of a record of a divorce, and that if no such record were produced the court must decide in favor of respondent.

This last hearing was held on May 20, 1946, and at its conclusion the judge stated that he would order two-thirds of the estate distributed to respondent. The court did not prepare its formal order until August 1, 1946. In the meantime the following occurred: On January 9, 1946, Ralph Nichols, the husband of respondent, commenced a divorce proceeding against her in San Francisco, alleging that he had been married to respondent since November 17, 1938, and alleging cruelty in general terms. Thereafter, on June 6, 1946, Ralph Nichols filed an "Amended Complaint Annulment," in which he requested an annulment on the ground that when he married respondent she was married to Smith. Thereafter, on July 26, 1946, respondent, through one of her present counsel, filed a written admission of service of the "amended" complaint and made a formal appearance in the annulment action. On August 6, 1946, the court entered its judgment annulling the Nichols marriage on the ground that respondent was the wife of Smith when she married Nichols. The judgment recites that the cause came on for hearing "on the ——— day of August, 1946, upon plaintiff's complaint taken as confessed by the defendant, whose default * * * has been duly entered, and upon proof taken" the court finds that when respondent married Nichols she was married to Smith. Appended to the clerk's transcript of the annulment proceeding is a reporter's transcript. It is dated September 6, 1946, which, obviously, is in error, because the judgment was entered August 6, 1946. Neither Ralph Nichols nor his wife, the respondent, testified at that hearing. Counsel for the husband simply introduced the judgment of the probate court in the present case, that had been made five days before, and upon that record the annulment was granted. During a colloquy between the court and counsel at the hearing the trial judge stated that "Nichols testified some time ago," and counsel agreed that

that was so. There is no minute entry of any prior hearing, and no reporter's transcript of any such prior hearing.

After appellant had perfected its appeal, respondent moved this court to add to the record on appeal the record of the annulment proceeding, contending that such decree conclusively supported the finding of the court in this probate proceeding that respondent was the widow of decedent. This court granted the motion to take this additional evidence.

[1, 2] That is the state of the record. On such a record we are convinced that the interests of justice, and the law, compel a reversal. In the first place, we are convinced that the trial court was incorrectly of the opinion that, under the evidence, the burden was on appellant to prove that decedent had divorced respondent. While it is true that upon proof of respondent's marriage to Smith a presumption arose of the continuation of that marriage, when respondent admitted her later marriage to Nichols, the presumption arose that the Smith marriage had been terminated by divorce or annulment. This presumption is part of the basic presumption of innocence, because to presume otherwise would be to presume a party was guilty of bigamy. The rule is stated as follows in Kelsey v. Miller, 203 Cal. 61, at page 90, 263 P. 200, 212: "The mere proof of a prior marriage and the continued life of both spouses is not sufficient to make a case against a second ceremonial marriage. There must be a further showing that the first marriage had not been set aside by judicial decree. There is a very strong presumption in favor of the legality of a marriage regularly solemnized."

[3] In 10 Cal.Jur. p. 754, § 67, the rule, supported by several cases, is stated as follows: "The presumption of innocence of a person accused of bigamy prevails over and neutralizes the presumption of continuance of life of first wife or husband, being aided in this by the strong presumption in favor of the legality of a marriage regularly solemnized." This rule has been approved and applied in many cases. (In re Estate of Hughson, 173 Cal. 448, 160 P. 548; Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95; In re Pusey's Estate, 173 Cal. 141, 159 P. 433; In re Estate of Baldwin, 162 Cal. 471, 123 P. 267; McKibbin v. McKibbin, 139 Cal. 448, 73 P. 143; Hunter v. Hunter, 111 Cal. 261, 43 P. 756, 31 L.R.A. 411, 52 Am.St.Rep. 180; Immel v. Dowd, 6 Cal.App.2d 145, 44 P.2d 373; In re Morgan, 106 Cal.App. 602, 289 P. 647; see, particularly, § 1963 (30) Code of Civ. Proc.)

[4, 5] Under this rule there can be no doubt that upon proof of the later ceremonial Nichols marriage, the burden was upon respondent to prove that the Smith marriage had not been terminated either by divorce or annulment. Respondent does not challenge this rule but contends that she met the burden, and that there is sufficient evidence to rebut the presumption. She relies first upon the terms of the will by which the testator left $5 "to my wife." There was no evidence at all as to the identity of this person. There may have been a subsequent marriage and the "wife" referred to may have been such subsequent wife, or the testator may have used the word "wife" to mean his "ex-wife." Certainly this bequest, standing alone, does not rebut the presumption in question. Respondent next makes much of the inability of appellant to produce a record of a divorce between respondent and decedent. That is a purely negative element. The burden was upon respondent, not upon appellant, and appellant's failure to produce a record of a divorce does not prove that none was secured. Respondent's counsel stated that he had searched the records in Los Angeles, San Francisco and Lake Counties, and in Reno, but that no record of such a divorce had been found. Appellant's counsel stated that he had searched the record in 56 of the 58 counties and had found no such record of a divorce. That evidence does not rebut the presumption of the validity of the Nichols marriage. No attempt was made to determine where decedent had resided through the years. The unreliability of records of marriage and divorce was demonstrated in this case because the state has no official record of the Smith marriage. It must be

remembered that respondent married Nichols in 1938, according to her own testimony, in sole reliance upon decedent's statement that he had secured a divorce from her. She had no further information of any kind in 1945 when Smith died and she discovered that he had left a substantial estate, and then claimed to be his wife, thus urging that her marriage to Nichols was bigamous. Under such circumstances, if the Nichols annulment decree be disregarded for the moment, to say the least it is very doubtful if there is any substantial evidence or any reasonable inference from the evidence to rebut the presumption of the validity of the Nichols marriage and to sustain the finding that respondent is the surviving wife of Smith.

[6] But even if there is "some" evidence that might be interpreted to be contrary to the presumption, it must be conceded that such evidence is very weak indeed. This being so, any error in excluding evidence that might support the presumption takes on added significance. There can be no doubt that the trial court committed error in excluding the declarations of decedent made to intimate acquaintances on numerous occasions that he was divorced from respondent, and that she was his "ex-wife." Such declarations of relationship constitute an exception to the hearsay rule recognized by statute in this state. Section 1870, subsection 4, of the Code of Civil Procedure provides that evidence may be given of: "The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person." See, In re Estate of Morgan, 203 Cal. 569, 265 P. 241; In re Estate of Friedman, 178 Cal. 27, 172 P. 140; In re Estate of Strong, 54 Cal.App.2d 604, 129 P.2d 493.

[7] Respondent concedes, as she must, that it was error to have excluded these declarations of relationship, but contends that such error was not prejudicial because respondent had admitted that decedent had declared to her that he had secured a divorce and "no amount of additional evidence to the same effect could do her so much damage as her own testimony on that subject." (Res.Br., p. 6.) In other words, the respondent contends that the rejected testimony was merely cumulative, and that its rejection was not prejudicial. That is an unrealistic approach to the question. As already pointed out, the probate judge seemed to be of the opinion that the burden to show a divorce rested upon appellant, and seemed to feel that that burden could only be met by record evidence of a divorce. In both assumptions the trial judge was wrong. Moreover, this respondent had to offer some reason for marrying Nichols, otherwise she would be guilty of deliberate bigamy. Smith was not here to deny her statements. Nichols, although present at the conversation, was not produced nor was his absence explained before the probate court. To say the least, the evidence as to whether there was or was not a divorce from Smith was most tenuous and uncertain, with a strong presumption that a divorce had been secured. Thus, to have excluded the decedent's own statements on this subject made to several persons on many occasions was obviously error of a most prejudicial nature.

[8] It is clear, therefore, that the decree must be reversed unless it is supported by the Nichols annulment decree. Respondent contends that this decree completely removes from the case the presumption that the Nichols marriage was valid because it determines conclusively that the Nichols marriage was void from the beginning. It is obvious that the Nichols annulment decree cannot be used to bolster the previously secured probate decree. While it is true that appellant, not having been a party to the annulment action, cannot collaterally attack the decree (Mitchell v. Automobile Owners Indemnity Underwriters, 19 Cal.2d 1, 118 P.2d 815, 137 A.L.R. 923; Wells Fargo & Co. v. City and County of San Francisco, 25 Cal.2d 37, 152 P.2d 625), it is also true that by virtue of express statutory provision such a decree is not binding on any one except the parties to it. Section 86 of the Civil Code provides: "A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claim-

ing under them." This section was applied in Price v. Price, 24 Cal.App.2d 462, 75 P.2d 655. There the parties entered into a support agreement in contemplation of a divorce in which it was provided that certain rights of the wife would terminate if he remarried. The parties were divorced and the wife remarried in Mexico. Later the Mexican marriage was annulled in Los Angeles. She attempted to enforce the provision of the support agreement on the theory that the annulment decree conclusively established that she had never lawfully remarried. The court first quoted § 86 of the Civil Code, supra, and then stated (at page 467 of 24 Cal.App.2d, at page 658 of 75 P.2d): "Plaintiff relies upon section 1908 of the Code of Civil Procedure, which prescribes the effect of judgments. The last-named section, however, concerns judgments in general and must give way to the provisions contained in section 86 of the Civil Code, which relates expressly and specifically to a judgment by which the nullity of a marriage is decreed. Regardless of the question of the right of the superior court of Los Angeles to render a judgment of nullity of the marriage contracted in Mexico in so far as it concerns plaintiff and Bergstedt, a question we consider unnecessary to decide, we are satisfied that the decree is not conclusive as to defendant in the present litigation, is not binding upon him, and does not have the effect of obligating him to carry out the terms of the property settlement agreement." See, also, In re Estate of Gosnell, 63 Cal.App.2d 38, 146 P.2d 42.

[9] Respondent makes a totally unconvincing argument that § 86 only applies to "voidable" and not to "void" marriages. The argument is obviously without merit. Section 86 is in the same Article and Chapter as is § 82, permitting an annulment on the ground of a valid pre-existing marriage of one of the spouses, and clearly applies to that subsection of § 82 as well as to those subsections of § 82 referring to the annulling of voidable marriages. Under § 86 of the Civil Code, and the cases interpreting it, it must be held that the Nichols annulment decree is not binding in the present case.

[10] The wisdom of § 86 of the Civil Code is well illustrated in the present case. Nichols started a divorce proceeding against respondent in January, 1946. That was after the death of Smith. Then, after the probate judge on May 20, 1946, had indicated that he was going to find that respondent had been married to Smith, Nichols "amends" by alleging facts warranting an annulment. That was on June 6, 1946. Mrs. Nichols was then represented by one of the same counsel who represents her here. He filed a formal appearance for her in the annulment action on July 26, 1946, and then defaulted. On that date the probate judge had not yet filed his decree in the probate proceeding. Admittedly the probate judge was not informed of the pendency of this annulment proceeding, nor were counsel for appellant so notified. The probate decree was entered August 1, 1946. Five days later counsel for Mr. Nichols appeared in the annulment court and, so far as the record shows, solely on the ground that the probate court had decreed that respondent was married to Smith, secured an annulment. Then counsel for Mrs. Nichols produce the Nichols annulment in this court and contend that it is conclusive in the probate proceeding. To so hold would make a laughing stock of the law. A better example of trying to lift one's self by his bootstraps cannot be imagined. Obviously, in fairness, in justice, in equity, and under the law, no such result should follow in this case.

The portion of the decree appealed from is reversed.

WARD and BRAY, JJ., concur.

85 Cal.App.2d 276

BLINKINSOP v. WEBER et al.

Civ. 16026.

District Court of Appeal, Second District, Division 3, California.

April 30, 1948.

1. Workmen's compensation 🔑2100

Where employer did not have compensation insurance or permission to self-insure at time of accident, injured employee could file application for compensation with Industrial Accident Commission and also commence action at law for damages. Labor Code, § 3706.

2. Workmen's compensation 🔑2110, 2134

In action at law against employer having no compensation insurance or permission to self-insure for injuries sustained by employee while acting within scope of employment, that injury was a direct result of employer's negligence is presumed, employer has burden of proof to rebut such presumption and contributory negligence and assumption of risk are not available defenses. Labor Code, § 3708.

3. Statutes 🔑231

Health and Safety Code, section 16413, requiring a handrail on every stairway, must be construed in connection with three preceding sections taken from preceding provisions in same section of State Housing Act and relating to stairways in an apartment house. Health and Safety Code, §§ 16410–16413.

4. Master and servant 🔑115(3)

Two concrete steps from sidewalk to rear entrance of apartment house manager's apartment not used in common by other tenants to enter apartment house did not constitute a "stairway" within statute requiring a handrail on every stairway, as respects liability of owners as uninsured employers for injuries sustained by manager in fall on steps while acting within scope of employment. Health and Safety Code, § 16413.

See Words and Phrases, Permanent Edition, for all other definitions of "Stairway".

5. Master and servant 🔑286(16)

Failure to construct two concrete steps from sidewalk to rear entrance of apartment house manager's apartment of uniform width and height as required by State Housing Act was not negligence as a matter of law, where such steps did not constitute a stairway within meaning of act. Health and Safety Code, §§ 16410–16412.

6. Appeal and error 🔑1008(1)

Whether condition of concrete steps to rear entrance of apartment house manager's apartment on which manager fell while acting within scope of employment was such as to constitute negligence and whether such negligence was proximate cause of injury so as to render apartment house owners, as uninsured employers, liable in damages therefor were questions of fact for trial court. Labor Code, §§ 3706, 3708.

7. Master and servant 🔑276(3), 278(8)

In action against uninsured apartment house owners for injuries sustained by manager in fall on steps to rear entrance of her apartment while acting within scope of employment, evidence sustained finding that owners were not negligent, implied finding that owners overcame presumption that manager was injured as direct result of their negligence and further finding that injury was not proximate result of owners' negligence. Labor Code, § 3708.

8. Evidence 🔑508

Opinion testimony of an expert is admissible if it adds instruction to that which jury is able to obtain from data before it.

9. Evidence 🔑506

Excluding testimony of civil engineer, who testified fully and in detail from photographs and a map concerning location, design and construction of concrete steps on which plaintiff fell, as to whether in his opinion the steps were safe was not error.

10. Evidence 🔑547

Questions asked civil engineer as to whether concrete steps on which plaintiff fell were of normal and sound construction and were built according to good construction and architectural practice were objectionable as too indefinite.

11. Appeal and error 🔑1056(1)
Evidence 🔑547

Testimony of civil engineer as to whether concrete steps on which plaintiff fell were built in accordance with accepted construction and architectural practice was admissible in action against apartment house owners as uninsured employers for injuries sustained by apartment house manager while acting within scope of employment, but exclusion of evidence was not prejudicial error, in view of engineer's other testimony.

◆

Appeal from Superior Court, Los Angeles County; Elmer D. Doyle, Judge.

Action by Inez D. Blinkinsop against Simon L. Weber and others for injuries sustained while in defendants' employ. From judgment for defendants and order denying motion for new trial, plaintiff appeals.

Judgment affirmed and appeal from order dismissed.

Maddox & Vaughn, Arthur Strock and Jack O. Goldsmith, all of Los Angeles, for appellant.

Syril S. Tipton and Fulcher & Wynn, all of Los Angeles, for respondents.

WOOD, Justice.

Defendants were owners of a 20-unit apartment court, consisting of five two-story apartment buildings in each of which there were four apartments—two on the ground floor and two on the second floor. Plaintiff was employed by defendants on January 15, 1945, as manager of the apartment court, and as such manager one of her duties was to clean the sidewalks on the premises. Her compensation as manager was $60 per month and the right to occupy one of the apartments. She occupied a lower apartment and there were two cement steps at the rear entrance thereof. On May 5, 1945, while plaintiff was on the lower cement step at that entrance, and while she was acting within the scope of her employment preparatory to cleaning the front steps of the building, she fell and injured her ankle.

[1] At the time of the accident the defendants did not have compensation insurance or permission to self-insure. Under such circumstances plaintiff was entitled to file an application for compensation with the Industrial Accident Commission and also commence an action at law for damages. Lab.Code, sec. 3706. On June 1, 1945, the plaintiff filed an application for compensation with the commission and thereafter commenced this action for damages. At the time of the trial the application for compensation had not been determined by the commission. Judgment herein was for the defendants, and the plaintiff appeals.

The trial court found that the defendants were not negligent "in not providing for plaintiff a safe place in which to work"; that defendants did not negligently maintain the said steps; that it is not true that as a proximate result of negligence of the defendants or any of them plaintiff was injured; and that defendants exercised ordinary care in all respects in maintaining said property. Plaintiff contends that the evidence was insufficient to support these findings.

[2] In an action of this kind it is presumed that the injury was a direct result of negligence of the employer. Lab.Code, sec. 3708. Also, in such an action the burden of proof is upon the employer to rebut the presumption of negligence. Id. Also, contributory negligence and assumption of risk are not defenses in such a case. Id.

Appellant asserts that defendants were negligent in that the steps from which plaintiff fell constituted a stairway, and that such stairway was maintained in violation of section 16413 of the Health and Safety Code which requires that "Every stairway shall have at least one handrail," and in violation of other sections thereof which specify the dimensions of the treads and risers of a stairway. The two cement steps involved here extend from the sidewalk to a point on the wall of the building 7⅞ inches below the floor of the service porch. In other words, the bottom step adjoins the sidewalk, and the second step adjoins the wall of the building at such a distance below the porch floor that a person, entering the porch, steps upward and into the porch from the second cement step.

[3, 4] A stairway is not defined by statute. Section 16413 of the Health and

Safety Code, which states that "Every stairway shall have at least one handrail," is preceded by three sections relating to the construction of stairways and each of those sections (sections 16412, 16411, and 16410) refers to a stairway "in" an apartment house. Chapter 13 of the Health and Safety Code, which relates to stairways and includes said section 16413, is based upon the portion of the State Housing Act of 1923 which relates to stairways. (See Stats. 1923, ch. 386, secs. 43–50.) Section 46 of the 1923 statute also includes the provision: "Every stairway shall have at least one handrail." In said section 46, preceding the provision regarding handrails, there are three paragraphs which are in substance the same as said sections 16412, 16411, and 16410, of the Health and Safety Code. In other words, the three paragraphs in said section 46, preceding the paragraph regarding handrails, also refer to stairways "in" an apartment house. Since the provision in section 46 of the 1923 statute, requiring a handrail on every stairway, is preceded by three paragraphs in that same section relating to stairways "in" an apartment house, it appears that the said provision therein, requiring a handrail on every stairway, relates to stairways "in" an apartment house. Since section 16413 of the Health and Safety Code, requiring a handrail on every stairway, is based upon said section 46 of the 1923 statute, and is preceded by three sections which are substantially the same as provisions in said section 46, the said section 16413 of the Health and Safety Code is to be considered in connection with its preceding sections 16412, 16411, and 16410. Those sections relate, as above stated, to stairways "in" an apartment house, and in general relate to stairways from one floor to another. The steps involved here were steps to the rear entrance of plaintiff's apartment only, and were not steps used in common by other tenants to enter the apartment house. The steps involved here do not constitute a stairway within the meaning of the word "stairway" as used in section 16413 of the Health and Safety Code. A handrail was not required on these steps. Appellant relies upon the case of McStay v. Citizens' Nat. Trust & Savings Bank, 5 Cal.App.2d 595, 43 P.2d 560, 561, in which the approach to a platform in a hotel dining room consisted of two steps. The plaintiff therein, who had been standing on the platform, turned to descend and "taking one step, which she thought was her next step on the platform, she 'just stepped off.'" That was an action for damages based upon the alleged negligence of the defendant in maintaining the platform and steps, and did not involve an employer and employee relationship or the failure of defendant to carry compensation insurance. There was no handrail on the steps therein, and the place where the platform was located was unlighted and in darkness, except for light coming through a door from another room. The court therein did not decide that the two steps constituted a stairway. The trial court therein left to the jury the question as to whether the steps constituted a stairway, and instructed the jury as to the provisions of the State Housing Act respecting the maintenance of handrails on stairways, and that if the jury found that the steps constituted a stairway the failure to maintain handrails thereon was negligence as a matter of law. The reviewing court held that the instruction was not improper. It said further (at page 602 of 5 Cal.App.2d, at page 563 of 43 P.2d) that "While all stairways are series of steps ascending or descending to a different level, all steps so ascending or descending are not necessarily stairways." Since there were charges of negligence therein other than the absence of handrails, it does not appear, of course, whether the jury found that the two steps constituted a stairway.

[5] The Health and Safety Code requires that the dimensions of treads and risers on stairways shall be within the limits of certain minimum and maximum specifications, and that all the treads on a particular stairway shall be of the same width and that all the risers thereon shall be of the same height. The treads and risers on the two cement steps herein were within the limits of specified dimensions required by the act, but the tread of the lower or first step was ½ inch wider than the tread of the top or second step, and the riser of the first step was approxi-

mately ⅜ of an inch higher than the riser of the second step. The distance from the top of the second step to the porch floor was ½ an inch higher than the second riser. Since the steps herein did not constitute a stairway within the meaning of the State Housing Act, the failure to construct the treads and risers of the steps in accordance with the dimensions required by the act was not negligence as a matter of law.

[6] The trial court was required, however, to determine whether as a matter of fact it was negligence, irrespective of the requirements of the act, to maintain the steps, and was required also to determine as a matter of fact whether such negligence, if any, was a proximate cause of plaintiff's injury. In addition to the above description of the steps, the tread of the lower cement step sloped downward away from the house 5/16 of an inch on the west side and 3/16 of an inch on the east side, the second cement step sloped downward ⅞ of an inch on the west side and ⅝ of an inch on the east side. The treads of the two steps had a friction resistance of approximately 11 per cent less than the surface of the adjoining sidewalk, which resistance of the sidewalk "was normal or average for" sidewalks. Also, there was no "nosing" or overhanging at the edge of each step where the treads and risers joined. The screen door on the porch swung outward over the steps.

Plaintiff testified that she intended to clean a step at the front of the apartment building; that she went onto the service porch and got a 4-gallon bucket and a broom; that she had the bucket, which was half full of water, in her left hand and had the broom in her right hand; that she opened the screen door of the porch with her right hand, and held it open with her right hand while she went through the doorway; that she went onto the lower cement step, and while she was on that step she reached over and set the bucket and broom on the sidewalk; that she was then "going to turn around and go back in the house"; that "I turned around on that bottom step, and as I turned I fell"; that at the time she started to fall the screen door was at her back and it was held open by her body; that before she started to fall she was standing "with both feet" on the bottom step, and that "I went to turn around, and I turned my left foot and then put my right foot around it on the step and that is when" she slipped; and that she fell forward on the ground.

[7] The findings of the court, above referred to, that defendants were not negligent include, of course, an implied finding that defendants overcame the presumption that plaintiff was injured as the direct result of negligence of the defendants. The evidence was sufficient to support those findings. As above indicated, it was a question of fact for the trial court as to whether the condition of the steps was such as to amount to negligence. Even though there were small variations in the dimensions of the treads and the risers, and in the slope of the treads, and even though the treads may have been about 1/10th smoother than the average sidewalk, and even though there was no "nosing" on the edges of the steps, it does not necessarily follow that the steps were negligently maintained. Even if the court had found that the condition of the steps was such as to amount to negligence, the evidence was sufficient to support the further finding that plaintiff's injury was not the proximate result of negligence of defendants. Plaintiff's testimony as to her actions in attempting to turn around on the 13¾-inch-wide bottom step by turning her left foot and putting her right foot around her left foot may have been the basis for the determination by the court that the condition of the steps was not a cause of the accident.

[8–11] Appellant asserts further that the court erred in refusing to receive testimony of a civil engineer, who was called as a witness, as to whether in his opinion the steps were safe; whether they were of normal construction; whether they were built according to sound construction; whether they were built in accordance with good construction practice; and whether they were built in accordance with good architectural practice. The opinion of an expert should be received if it adds instruction to that which the jury is able to obtain from the data before it. Burch v. Valley Motor Lines, Inc., 78 Cal.App.2d 834, 841, 179 P.2d 47. The witness testified in detail as to the dimensions of the treads and risers of the steps, and the slope and friction resistance of the treads. Photographs of the steps, and a map of the premises made by the witness, were placed in evidence by the appellant. It was not error to reject the opinion of the witness as to whether the steps were safe. "Usually an expert cannot be asked whether a structure is a safe one, but all of the facts may be elicited from the witness from which the conclusion follows." McStay v. Citizens' Nat. Trust & Savings Bank, 5 Cal.App.2d 595, 601, 43 P.2d 560, 562. The questions as to whether the steps were of normal and sound construction, and whether they were built according to good construction and architectural practice, were too indefinite and broad, and it was not error to sustain the objections to them. It appears, however, that the objections were not sustained by reason of the form of the questions, but were sustained by reason of the trial judge's belief that the opinion of an expert regarding the construction of the steps was inadmissible. After objections to the questions above referred to had been sustained, counsel for plaintiff asked the judge whether the questions were objectionable by reason of counsel's manner of phrasing them, and the judge replied that he believed that expert testimony was not proper, and that "All I want to take is the facts." The opinion of the witness as to whether the steps were built in accordance with standard and accepted construction and architectural practice should have been received. His opinion thereon might have been of some assistance in determining whether the defendants were negligent in maintaining the steps. In the case of Martin v. Angel City Baseball Ass'n, 3 Cal.App.2d 586, 40 P.2d 287, which related to the construction of a stairway in a baseball grandstand, the witnesses were asked what in their knowledge was the condition of the stairway in relation to the standard or approved practice of such stairhead structure. The court said, on pages 589 and 590 of 3 Cal.App.2d, on page 288 of 40 P.2d: "Such evidence was proper and relevant to an enlightened consideration of the question whether appellant was negligent in the maintenance of such stairhead." In the McStay case, supra, it was said at page 601 of 5 Cal.App.2d, at page 563 of 43 P.2d, regarding the opinion of an expert as to the construction of steps in a hotel dining room: "It was proper to an enlightened consideration" of the question as to whether appellant was negligent. In that case the step construction was referred to (5 Cal.App.2d on page 602, 43 P.2d 560) as being of peculiar character. Although the opinion evidence of the expert as to whether the steps herein were built in accordance with standard and accepted construction and architectural practice was admissible, it cannot be concluded that it was prejudicial error to fail to receive it. The witness was permitted, as above stated, to testify fully and in detail, by reference to photographs and a map, concerning the location, design, and construction of the two cement steps which were not of peculiar or unusual character.

The judgment is affirmed. The appeal from the order denying the motion for a new trial is dismissed.

SHINN, Acting P. J., and VALLÉE, Justice pro tem., concur.

FULLER v. WHITE.*

Civ. 13564.

District Court of Appeal, First District,
Division 1, California.

May 10, 1948.

Hearing Granted July 8, 1948.

1. Bills and notes 🔑116

All provisions of note must be read together for purpose of ascertaining intent of parties.

2. Bills and notes 🔑537(1)

The determination of intent of parties to note is question of law and not of fact in absence of parol evidence as to intent.

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* Subsequent opinion 201 P.2d 16.

3. Executors and administrators 🔑449

Payee suing on note after death of maker who promised therein to pay designated amount when able during maker's lifetime must plead and prove that maker during his lifetime was able to pay, and complaint failed to state cause of action, and payee's evidence failed to cure such defect where payee neither pleaded nor proved such ability to pay.

4. Appeal and error 🔑193(9)
Pleading 🔑408

Insufficiency of complaint to state cause of action and insufficiency of proof to cure defect were not waived by defendant's failure to demur and could be raised for first time on appeal. Code Civ.Proc. § 434.

5. Limitation of actions 🔑48(2)

Statute of limitations does not run on note payable when maker's financial condition permits until such time as maker is able to pay. Code Civ.Proc. § 337.

6. Limitation of actions 🔑197(1)

In action on note payable when maker's financial condition permits, evidence whether maker was financially able to pay note within four years of action on note was insufficient to show that note was barred by four-year statute of limitations. Code Civ.Proc. § 337.

7. Limitation of actions 🔑48(2)

An action commenced in March, 1946 on note payable on maker's death, was not barred by four-year statute of limitations where maker died in September, 1945. Code Civ.Proc. § 337.

8. Evidence 🔑351

The Uniform Business Records as Evidence Act sould be liberally construed to accomplish its purpose to enlarge operation of business records exception to hearsay evidence rule. Code Civ.Proc. §§ 1953e to 1953h.

9. Evidence 🔑351

The object of Uniform Business Records as Evidence Act is to eliminate necessity of calling each witness and to substitute record of transaction or event, and it is not necessary that person making entry have personal knowledge of transaction. Code Civ.Proc. §§ 1953e to 1953h.

10. Evidence 🔑351

Each document in files of company is not admissible under Uniform Business Records as Evidence Act simply upon being identified by official of company as document relating to problem before court, but document must be record of transaction in dispute made at or near time of transaction and must relate to an act, condition or event, and mode of preparation of document must be made to appear. Code Civ.Proc. §§ 1953e to 1953h.

11. Evidence 🔑382

Where question whether proper foundation has been laid for admitting document under Uniform Business Records as Evidence Act is debatable and there is some evidence from which reasonable deduction can be made that the proper foundation has been laid, the determination of such question is for trial court. Code Civ.Proc. §§ 1953e to 1953h.

12. Evidence 🔑351

The theory of Uniform Business Records as Evidence Act is that business records kept contemporaneously with and relating to a transaction give, by reason of that fact, a circumstantial guarantee of trustworthiness. Code Civ.Proc. §§ 1953e to 1953h.

13. Evidence 🔑352(5)

A letter from insurance company's superintendent of claims stating what the company's records showed as to a 13-year-old transaction was inadmissible under Uniform Business Records as Evidence Act. Code Civ.Proc. §§ 1953e to 1953h.

14. Limitation of actions 🔑51(3)

Where maker of note promises to pay interest monthly, statute of limitations starts to run on each installment of interest as it falls due and is unpaid. Code Civ.Proc. § 337.

Appeal from Superior Court, City and County of San Francisco; R. R. Sischo, Judge.

Action on note by J. L. Fuller against Lanor Catherine White, administratrix with the will annexed of the estate of Lloyd M. Fuller, deceased. From a judgment for the defendant, the plaintiff appeals.

Reversed.

Gregory, Hunt, Melvin & Faulkner and Melvin, Faulkner, Sheehan & Wiseman, all of San Francisco, for appellant.

John K. Hagopian, of San Francisco, for respondent.

PETERS, Presiding Justice.

Lloyd M. Fuller, deceased, and the plaintiff J. L. Fuller were brothers. Lloyd died September 26, 1945. On March 25, 1946, plaintiff commenced the present action against the estate of Lloyd M. Fuller, alleging that on October 1, 1931, decedent made, executed and delivered to plaintiff a promissory note in the sum of $1,500; that said note provided for interest at 6% per annum payable monthly; that no part of the interest or principal has been paid; that a claim was presented to the administratrix in the amount of $2,775 and rejected by her. The administratrix generally denied the allegations of the complaint, and, in addition, as affirmative defenses, pleaded the statute of limitations and payment. The trial court found in accord with the two affirmative defenses, and, in addition, in its opinion, but not in its findings, called attention to the fact that plaintiff had failed to plead or prove that decedent ever had the ability to pay the note. From this judgment for defendant the plaintiff appeals.

The promissory note involved reads as follows:

"$1,500.00 October 1 1931

"Any time after date I promise to pay to the order of my brother, J. L. Fuller or his beneficiary

Fifteen Hundred Dollars.

"Payable at any time my financial condition permits

"Value received with interest at 6% per cent per annum—monthly

"Lloyd M. Fuller

"No. First Due to run in accordance with our understanding.

"J. L. Fuller

"Witness"

On the back of the note appears the following:

"In the event of my death this promissory note is to be paid out of my estate with precedence over any other claims.

"Lloyd M. Fuller"

[1,2] The execution of the note is conceded. The note is, of course, subject to the familiar rule of contract law that each and every provision must be scanned for the purpose of ascertaining the intent of the parties. Neale v. Morrow, 150 Cal. 414, 88 P. 815; Goodwin v. Nickerson, 51 Cal. 166. It is equally clear that, inasmuch as there was no parol evidence as to intent, the determination of such intent is a question of law and not of fact. In re Estate of Platt, 21 Cal.2d 343, 131 P.2d 825; Moffatt v. Tight, 44 Cal.App.2d 643, 112 P.2d 910. When these rules are applied to this note it is readily ascertainable that the decedent made three distinct promises to the promisee: First, he agreed to pay to him $1,500 any time after date when and if his financial position was such that he was able to do so. In the second place, regardless of ability to pay, decedent promised, unconditionally, to pay the interest monthly. In the third place, he promised, unconditionally, that the note would be paid from his estate, with priority over other claims, if it were not paid prior to his death. Thus, if the third and first promises be read together, as they must, the agreement amounted to this—a promise to pay when able during the promsor's lifetime, but in any event a promise to pay upon death.

[3,4] In order to recover upon the first promise, that is, the promise to pay when able, it was necessary for the plaintiff to plead and prove that during his lifetime the promissor was able to pay. Van Buskirk v. Kuhns, 164 Cal. 472, 129 P. 587, 44 L.R.A.,N.S., 710 Ann.Cas.1914B, 932; Gause v. Pacific Gas & Electric Co.,

60 Cal.App. 360, 212 P. 922; Cantwell v. Gage, 111 Cal.App. 209, 295 P. 375; Maurer v. Bernardo, 118 Cal.App. 290, 5 P. 2d 36; Goodfellow v. Goodfellow, 219 Cal. 548, 27 P.2d 898. The plaintiff neither pleaded nor proved that decedent was able to pay during his lifetime. Therefore, so far as this first promise is concerned, the complaint failed to state a cause of action, and the evidence produced by plaintiff failed to cure that defect. Since this defect goes to the sufficiency of the complaint to state a cause of action, and to the sufficiency of the proof to cure that defect, it was not waived by the failure of defendant to demur and may be raised for the first time on appeal. See cases collected 21 Cal.Jur. p. 128, § 83; 9 Cal.Jur. (10 Yr.Supp.) p. 222, § 83; see, also, § 434, Code of Civ.Proc.

[5] The cases cited, supra, also establish another rule and that is that where, as here, the defendant failed to prove, in support of her statute of limitations defense, that decedent during his lifetime was able to pay, then the statute of limitations could not begin to run upon such a promise until the promisor was able to pay, because no action can accrue on such a promise until the condition of the promise—i. e., the promisor's ability to pay—has been proven to exist.

[6] The defendant does not challenge these rules but, in support of the finding that the statute of limitations had run, urges that she proved that at a time prior to four years before the commencement of the action the promisor was able to pay, and therefore contends the statute had run on this promise prior to suit. In this connection defendant relies on some very general testimony given by the divorced wife of decedent, a witness called by plaintiff, that she believed her then husband should have paid the note "inas much as he was making quite a lot of money since the war started. I know that because he had told me about many large contracts." This general testimony did not prove that he was able to pay the note. In the first place, the witness gave no dates. This country declared war in December, 1941. Just what was meant by "since the war started," does not appear. The action was filed in March, 1946, and if "since the war" referred to any time after March of 1942 the four-year statute, Code Civ.Proc. § 337, had not run when the action was filed. Moreover, proof that a promisor is "making quite a lot of money" without any knowledge at all of his then obligations is certainly no proof of ability to pay a particular obligation.

[7] However, it is not vital on this appeal whether the trial court was correct or incorrect insofar as it found that the statute of limitations barred the first promise here involved. As already pointed out, the complaint did not plead a good cause of action on the first promise, and the judgment denying relief on this promise may be supported on that ground. But these rules do not apply to the third promise. This last-mentioned promise was to the effect that upon the death of the promisor the note was to be paid out of the assets of the estate with priority over other claims. This constituted an absolute unconditional promise to pay upon death of the promisor. It did not mature until the death of the maker which occurred in September, 1945. This action was commenced in March of 1946. It is quite clear, therefore, that this promise, which did not mature until the death of the promisor, was not barred by the statute of limitations.

The trial court, however, also found that the note had been paid. The evidence on this issue was most unsatisfactory. The plaintiff was not present at the trial. The former wife of decedent, who had divorced him in 1943, testified that while she was living with decedent no payments were made on the note. The mother of decedent testified that shortly before his death decedent told her that he still owed the note. There is no evidence at all that prior to his death decedent ever made a payment of principal or interest on the note, except some testimony of Charles Lercari, a roommate of decedent prior to his death, who testified that decedent had told him about making some payments on the note, but, upon motion, all of the testimony of this witness on this issue was properly stricken.

The evidence upon which defendant mainly relies to support the finding of payment relates to a certain insurance policy on the life of decedent. Admittedly he had a $2,000 life policy with the Penn Mutual Insurance Company dated June 12, 1932 (the note was executed October 1, 1931), and admittedly the plaintiff was named beneficiary of that policy. Apparently plaintiff paid the premiums on that policy. Admittedly the then wife of decedent joined in designating plaintiff as beneficiary, and admittedly, after the death of decedent, plaintiff collected the proceeds of that policy amounting to $2,066.88. If that policy was given as security for the note, then the principal of the note and most, if not all, of the delinquent interest, were paid from the proceeds of that policy. Most of the evidence on this issue was quite indefinite. In spite of persistent cross examination on the issue the divorced wife of decedent could not remember whether the policy was given as security, The only real evidence on this issue consisted of a letter from the home office of the insurance company dated October 25, 1945, signed by the supervisor of claims of the company and addressed to Forrest J. Curry, the insurance company's general agent in San Francisco. This letter was admitted, subject to a motion to strike, over the vigorous objections of plaintiff. Subsequently the motion to strike was denied. It is primarily, if not solely, upon this letter that the finding of payment is based.

The letter was offered by defendant and admitted by the court on the theory that it was admissible under the "Uniform Business Records as Evidence Act," sections 1953e to 1953h of the Code of Civil Procedure, enacted in this state in 1941. The letter was produced and identified by the cashier of the San Francisco office of the insurance company who testified that it was "part of the record" which was "kept" in the "ordinary course" of business of the company. This employee also testified that it was an "official record" pertaining to the policy in question. The pertinent portions of the letter are as follows, the portions particularly relevant being italicized: "I received your letter of October 12th with further reference to the above claim. Since we have received no adverse claim up to the time of this writing, I feel that it may be possible for us to make payment of the claim under policy No. 1692531 without requiring a community property release. *Under this policy, I find that the insured when applying for the contract, requested it to be made payable to Jo L. Fuller, brother, if living, otherwise to the brother's wife, and no power was to be reserved to the insured. Premium notices were to be mailed to the brother and when forwarding the application, your office stated that the applicant had borrowed some money from his brother, Jo, who would pay the premiums on the contract, that the loan was for business purposes and the interest on the loan would be used in payment of the premiums under the contract.* The Underwriting Department decided to issue the policy payable to the insured's estate, but sent along a designation of beneficiary to bring about the settlement requested in the application. I find that that designation was executed in San Francisco on August 11, 1932 and signed by the insured and consented to and joined in by a Mrs. Georgia A. Fuller, whom I presume was the insured's wife."

It will be noted that the letter, insofar as it refers to this policy being security for a loan, is not the record of the company to that effect but what the supervisor of claims, in 1945, says the records show as to a 1932 transaction, without the production of the records of 1932. There is absolutely no way at all from the proffered letter to know what the actual records show as to the 1932 transaction. Is such a "record" admissible under the sections in question?

The pertinent section is § 1953f of the Code of Civil Procedure. It provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

[8, 9] There is no doubt that this section serves a most salutary purpose and should be liberally construed to accomplish that purpose. As was said in Loper v. Morrison, 23 Cal.2d 600, 608, 145 P.2d 1, 5: "The purpose of this act is to enlarge the operation of the business records exception to the hearsay evidence rule. * * * It should of course be liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed. * * * It is the object of the business records statutes to eliminate the necessity of calling each witness, and to substitute the record of the transaction or event. It is not necessary that the person making the entry have personal knowledge of the transaction."

[10-13] We agree with this rule. But that does not mean that every document in the files of a company is admissible simply upon being identified by an official of the company as a document relating to the problem before the court. It must be a record of the transaction in dispute made "at or near the time" of such transaction. It must relate to an "act, condition or event." The "mode of its preparation" must be made to appear. These foundational facts were not shown in the present case. Quite to the contrary, the letter shows on its face that some thirteen years after the event, the superintendent of claims interpreted something in the files of the company as indicating that the policy was issued to secure a loan. While it is true that where the question as to whether a proper foundation has been laid to warrant the application of § 1953f is debatable, and there is some evidence from which a reasonable deduction can be made that the proper foundation has been laid, the determination of such question is for the trial court (Egan v. Bishop, 8 Cal.App.2d 119, 47 P.2d 500; Ducat v. Goldner, 77 Cal.App.2d 332, 175 P.2d 914), that rule does not apply where, as here, no such reasonable deduction is possible. All that we have here is a letter intimating that the San Francisco office, to which the application for the insurance was probably made, had prepared a record of the transaction in which it apparently appears that decedent had informed the San Francisco office that the policy was to be security for a loan. That document, if it exists, undoubtedly would be a business record and admissible under § 1953f. But that is not the record that was introduced. What was introduced was a letter from an employee of the home office discussing matters supposedly reflected by the records of the company. The probative value of the original business record was not before the trial court. It was not called upon to evaluate the original business record, but to evaluate the home office employee's interpretation of that record. Conceding that § 1953f should be liberally construed, that section is based on the theory that business records kept contemporaneously with and relating to a transaction give, by reason of that very fact, a circumstantial guarantee of trustworthiness. But no such circumstantial guarantee exists as to an account of a record by an employee made many years after the event. On a retrial the real records of the company may be produced, if any exist. We think that it was most serious error to have admitted the letter into evidence, and that such error requires a reversal.

[14] In view of the fact that a retrial must be had, some reference should be made to the second promise—the promise to pay interest monthly. That promise, unlike the first promise, was not conditioned on ability to pay. That being so, the statute of limitations started to run on each installment of interest as it fell due and was unpaid. It follows, therefore, that any installment of interest more than four years overdue at the time the complaint was filed is barred by the statute of limitations.

The judgment appealed from **is reversed.**

WARD and BRAY, JJ., concur.

85 Cal.App.2d 469

SWIGERT et al. v. STAFFORD.

Civ. 16252.

District Court of Appeal, Second District, Division 2, California.

May 14, 1948.

Rehearing Denied June 3, 1948.

Hearing Denied July 8, 1948.

1. **Quieting title** 🔑34(1)

In action by lessor to terminate lease and quiet title to oil lands, complaint alleging oil lease providing that no implied conditions be read into the document and that it would not expire for failure of lessee to drill until 90 days after written notice by owner to perform and failure of lessee to comply, and alleging failure of performance but no notice demanding performance, was insufficient. Code Civ.Proc. § 430, subd. 6.

2. **Landlord and tenant** 🔑94(2)

Where express forfeiture clause is incorporated in a lease, landowner, in order to terminate rights of lessee, must comply with its terms by giving such notice as is prescribed thereby.

3. **Evidence** 🔑448
Landlord and tenant 🔑24(1)

Where covenants and conditions of a lease are so clear as to leave no doubt as to their meaning, and no latent ambiguity is involved, the instrument cannot be varied by proof of subsequent conduct of the parties or by attendant circumstances, and the parties are bound regardless of hardships entailed thereby.

4. **Landlord and tenant** 🔑103(1)

Condition of lease providing for forfeiture must be strictly interpreted against party for whose benefit it is created. Civ. Code, § 1442.

5. **Mines and minerals** 🔑78(3)

Where purpose of notice prescribed by oil lease requiring lessee to commence drilling operations or forfeit lease within 90 days was to insure to lessors a strict compliance with terms of the lease, or in case of default to retake the property, provision for notice was for benefit of lessors and was to be strictly interpreted against them. Civ. Code, § 1442.

6. **Quieting title** 🔑44(3)

In action by lessors to terminate lease for nonperformance by lessees and to quiet title to oil lands, evidence was insufficient to support finding that lessees had abandoned any rights which they had under the lease.

7. **Landlord and tenant** 🔑110(1)

Abandonment of a lease cannot be inferred unless it can fairly be shown that nonuser by lessee is coupled with an intent to relinquish all rights in the premises.

8. **Quieting title** 🔑14

Action to forfeit oil lease and quiet title to land, brought upon failure of lessee to conduct drilling operations but prior to the giving by lessor of notice to lessee to commence operations or forfeit the lease within 90 days as expressly provided therein, was premature.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Action by R. G. Swigert and others against Guy N. Stafford to quiet title to certain leasehold interests in oil land. From the judgment, defendant appeals.

Reversed.

Anthony J. Fritz, of Los Angeles, for appellant.

Joseph R. Vaughan, of Los Angeles, for respondents.

MOORE, Presiding Justice.

This is an appeal from a judgment quieting title to certain leasehold interests in land situated in the Athens-Rosecrans oil field in Los Angeles county.

On November 1, 1943, plaintiffs executed two similar community oil and gas twenty-year leases with Shell Oil Company. The leases were in substance and effect the same, as one of them referred to and incorporated in it the material provisions of the other, so that hereinafter reference will be made to them only as "the lease." The provisions of the lease pertinent to this appeal are as follows:

"1. On or before December 31, 1944, lessee shall commence operations for the drilling of a well on some portion of the leased land * * *."

"5. The parties have expressed herein their entire understanding and agreement, and it is expressly stipulated that no implied covenants or conditions whatsoever shall be read into this lease relating to the drilling or production of any wells, offset or otherwise, or to any other operations of Lessee hereunder or the measure of diligence therefor, or to any thing to be done hereunder by Lessee * * *."

"9. Notwithstanding anything to the contrary herein contained, this lease shall not expire or be terminated as a result of any failure of Lessee to conduct any operations on the leased land until ninety (90) days after written notice from Owner demanding the performance of operations and the failure of Lessee to comply therewith; provided, however, that in case of failure of Lessee to comply with any of its obligations hereunder and the continuance of such failure for ninety (90) days after written notice and demand of Owner served upon Lessee specifying the obligation to be performed, then at the election of Owner this lease shall be forfeited and shall thereupon cease and determine as to all of the leased land * * *."

Shell Oil Company did not commence any drilling operations under the lease, and on December 13, 1944, assigned the leases to defendant. Notice of assignment was given to each landowner although the lease expressly permitted assignment without consent of any of the lessors.

Plaintiffs' complaint sought a declaratory judgment as to their rights of termination under the lease, and an adjudication of abandonment of the lease and a decree quieting title in plaintiffs. Shell Oil Company, Incorporated, filed its disclaimer in the action. Defendant Stafford demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action in that it failed to allege that notice of default had been given by plaintiffs to defendant as required by the express terms of the lease, to wit, "this lease shall not expire or be terminated until ninety (90) days after written notice." The demurrer was overruled.

[1, 2] The complaint declares all the terms of the lease as set out above, but it does not allege notice to defendant demanding performance. Such omission required that defendant's demurrer be sustained. Code of Civ.Proc., sec. 430, subd. 6; Callahan v. Broderick, 124 Cal. 80, 82, 56 P. 782; Dixon v. Cardozo, 106 Cal. 506, 507, 39 P. 857. Not only does section 9 of the lease specifically provide that before the lease can be forfeited ninety days' notice must be given, but it is established law that where an express forfeiture clause is incorporated in a lease, the landowner, in order to terminate the rights of the lessee, must comply with its terms by giving such notice as is prescribed thereby. Welport Oil Company v. Fairfield, 51 Cal.App.2d 533, 537, 125 P.2d 97; Jameson v. Chanslor-Canfield M. Oil Company, 176 Cal. 1, 5, 167 P. 369; Templar Mining Company v. Williams, 23 Cal.App.2d 45, 47, 72 P.2d 566; Sandrini v. Branch, 32 Cal.App.2d 707, 710, 90 P.2d 593.

[3] Plaintiffs rely on Romero v. Brewer, 58 Cal.App.2d 759, 137 P.2d 872, which holds that, notwithstanding a conventional sixty-day-notice clause in the lease therein, notice to lessee was not required. But the lease in that case contained no provision that regardless of any other language the lease should not be terminated for any failure of lessee to conduct operations. The court there read into the lease an implied covenant that the lessee in good faith go forward in compliance with the terms of the instrument. Paragraph five of the lease here involved specifically provides that no implied covenants or conditions whatsoever shall be read into the lease relating to drilling, or to lessee's measure of diligence, or to anything else to be done by lessee. The parties were therefore bound by the precise terms of their agreement. Where the covenants and conditions of a lease are so clear as to leave no doubt as to their meaning, and no latent ambiguity is involved, the instrument cannot be varied by proof of subsequent conduct of the parties or by the attendant circumstances. The parties to a solemn agreement are bound by its terms regardless of the hardships entailed thereby. Jameson v. Chanslor-Canfield Midway Oil Company, 176 Cal. 1, 8, 167 P. 369.

[4, 5] The condition of a lease providing for its forfeiture must be strictly interpreted against the party for whose benefit it is created. Civil Code, sec. 1442. Inasmuch as the purpose of notice was to insure to the lessors a strict compliance with the terms of the lease, or in case of default to retake the property, it follows that the requirement for notice demanding performance was for the benefit of lessors and is to be strictly interpreted against them. Taylor v. Hamilton, 194 Cal. 768, 776, 230 P. 656. Rea v. Glenn, 133 Cal.App. 82, 24 P. 2d 204, does not avail respondents. In that case notice was given to lessees. Neither do they find comfort in John v. Elberta Oil Company, 124 Cal.App. 744, 13 P.2d 538. The general forfeiture clause contained in the lease there involved did not require notice to comply. Thus, in the decisions relied upon by respondents either conditions or covenants were implied by the leases, or notice was given or was not required.

[6, 7] In the conclusions of law there is a statement that defendants as lessees had abandoned any rights which they had under the lease. Even though such statement be considered a finding, yet it is without evidential support. Throughout the proceedings the lessee contended that the lease was in full force and effect and that notice and demand for performance was a condition precedent to a termination of his rights. Abandonment cannot be inferred unless it can fairly be shown that nonuser by lessee is coupled with an intent to relinquish all rights in the premises. Herbert v. Graham, 72 Cal.App. 314, 317, 237 P. 58; Utt v. Frey, 106 Cal. 392, 397, 39 P. 807. There was no such proof.

[8] Since in the instant case respondents have taken no appropriate measures for effectuating the termination of the appellant's rights, their present action was prematurely brought. Sandrini v. Branch, 32 Cal.App.2d 707, 710, 90 P.2d 593; Scheel v. Harr, 27 Cal.App.2d 345, 353, 80 P.2d 1035.

The judgment is reversed.

McCOMB and WILSON, JJ., concur.

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85 Cal.App.2d 510

BURNS et al. v. SOUSA et al.

Civ. 16146.

District Court of Appeal, Second District, Division 3, California.

May 17, 1948.

Hearing Denied July 15, 1948.

1. Landlord and tenant ⚿112½

Evidence sustained finding that books kept by defendant relating to on and off sale liquor business operated by defendant under lease as general partner with plaintiffs as limited partners, correctly reflected amount of defendant's receipts and expenditures in manner required by contract, with exception of receipts from gambling devices, with respect to which plaintiffs had waived strict compliance with lease, precluding plaintiffs as lessors from terminating lease for failure to keep proper books.

2. Landlord and tenant ⚿112½

Evidence sustained finding that as to receipts from gambling devices, plaintiffs who were limited partners under lease had waived strict requirements of lease that defendant general partner who operated on and off sale liquor business keep accurate account books, precluding plaintiffs as lessors from terminating lease for failure to comply with such requirements.

◆

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Unlawful detainer action by Marguerite Burns and Fritzi Ann Lalis against John P. Sousa and Olive V. Dunn. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

John A. Jorgenson, of Los Angeles, for appellants.

Andrew Renetzky, of San Luis Obispo, for respondent Sousa.

A. V. Muller, of San Luis Obispo, for respondent Dunn.

SHINN, Acting Presiding Justice.

On March 24, 1945, Marguerite Burns, Fritzi Ann Lalis and Olive V. Dunn, owned certain real property in the town of Atascadero, San Luis Obispo County, subject to a life estate in their father, John E. Doran. On that day they leased the premises for five years to John P. Sousa, to be used and occupied in carrying on a cafe, on-sale and off-sale liquor business which had theretofore been conducted by the owners of the property. Sousa evidently acquired the stock-in-trade of the agreed value of $10,218.91. As rental he was to pay John E. Doran $150 per month, and also to the three daughters, at the end of each month, 50 per cent of the profits of the said business and any other business conducted on the premises. The profits were to be computed by deducting from the money actually received during the month the monthly rental paid to Doran, the cost of keeping up the stock-in-trade, and the usual and ordinary expense of the business, the cost of liquor licenses, taxes and insurance, and the cost of repairs. The lease provided that the lessee would keep "perfect, just, and true books of account when each of the items of expenditure incurred in the operation of said businesses shall be set down as well as each and every item of income shall be set down, which said books shall be used in common between the parties to this lease so that either of them may have access thereto without any interruption or hindrance of the other." There were stipulations that John E. Doran should make certain exterior repairs and that the daughters would maintain the carpets and other interior fixtures, and that on the expiration of the term, or sooner termination of the lease, stock-in-trade to the value of $10,218.91 should belong to the lessee and that any excess should be divided one-half to Sousa and the remainder to the three women. There was a provision for termination of the lease in the event of violation of its terms by the lessee. There was attached to the agreement a duly executed certificate of limited partnership between Sousa and the three women under which defendant was general partner and the others limited partners in ownership of the liquor licenses. On the termination of the partnership the latter were to own all liquor licenses. The life estate of John E. Doran was terminated by his death in 1945. On December 9, 1946, Mrs. Burns, Mrs. Lalis, and Mrs. Dunn, served on Sousa a written notice of termination of the lease, and demand for possession upon the ground that by the lease "lessee promised to keep at all times just and true books of account when each of the items of expenditure incurred in the operation of said business shall be set down as well as each and every item of income; and whereas said lessee has failed to perform said covenant and others as set forth in said written contracts and has defaulted in the performance of lessee's promises therein contained," and stating, "now therefore, lessors hereby elect to terminate said lease," etc. Sousa refused to agree to the termination of the lease or to surrender possession, and the present action in unlawful detainer was brought by Marguerite Burns and Fritzi Ann Lalis. Olive V. Dunn gave notice that she rescinded and cancelled the notice of termination of lease, so far as she was concerned, she declined to join as a plaintiff, and was named as a defendant. Her interests are identical with those of her two sisters and for convenience we will refer to all three of them as plaintiffs. The complaint alleges that Sousa has not kept books of account as he agreed to do, but that the books he has kept or made accessible to the lessors are imperfect, unjust, incomplete and untrue; that the lessors have been unable to determine therefrom what their share of the profits have been, and they are "informed and believe that defendant Sousa has paid said lessors less than 50% of the net profits of said businesses." Defendant answered and a trial was had before the court. The court found the allegations of the complaint with reference to defendant's failure to keep book accounts as agreed to be untrue; that it was not true that plaintiffs could not determine therefrom what their profits had been; that it was not true that the books were inaccessible to plaintiffs; and not true that defendant had paid them less than 50 per cent of the net profits of the businesses. It was also found that plaintiffs by their conduct had waived strict compliance with the terms and conditions of said contract. Judgment was for defendant. The ground of the appeal is that these findings are unsupported by the evidence.

For an undisclosed time preceding the lease to Sousa, the business had been operated by Mr. Doran and his three daughters. The sources of revenue were the cafe, the liquor business, and 50 per cent of the returns from music machines, slot machines and punch boards. The coin machines and punch boards were gambling devices.

The court received exhaustive evidence as to the methods followed by defendant in keeping books and records reflecting his business operations. All of the plaintiffs testified, defendant was examined at length, and accountants who had examined the books and records at the instance of both parties testified as to defendant's bookkeeping system and as to the results of their audits of the same. Defendant had a cash register in the cocktail lounge and another in the cafe, both of which had been furnished by plaintiffs, and neither of which had a recording tape. Defendant kept a book in his place of business in which he recorded sales of various types of merchandise, such as hard liquor, wines, etc., sales of which were required to be segregated. He entered in this book all of his cash disbursements and receipts, except as hereinafter noted. He kept all of his invoices and bills payable. From time to time he deposited in bank all cash on hand. Periodically he took his records, including all invoices, to Lucille McGowan, a bookkeeper of San Luis Obispo. Mrs. McGowan kept a set of books from defendant's daily cash book, the invoices, and information received from Sousa as to his income from various sources. It was on the basis of these accounts that sales and income taxes were reported and paid. Receipts from slot machines for 1945 were not put in the book until later, but were reported with the 1946 income. Partnership income returns were made by defendant and copies were furnished to each of the three plaintiffs. The testimony of the accountants was to the effect that these returns checked with the books kept by Mrs. McGowan. The original invoices, which Mrs. McGowan had retained, were checked with the books and were found to correspond. As a result of their examinations the accountants discovered, and they testified to, no substantial inaccuracies or lack of completeness in defendant's bookkeeping, except that they found, from an examination of the books checks, and other memoranda, that defendant had expended from the business $4,181.94, in excess of the amount received by the business as shown on the books. After plaintiffs' accountant had examined the books, and defendant's deposition had been taken in another action, defendant caused to be entered on the books an item of $4,122.75 and an item of $663.31, the former being receipts from slot machines and the latter additional receipts from the cafe. We find an explanation of this matter in the testimony of defendant. According to defendant, Mr. Doran had explained to him when he took over the business that it had been the practice not to keep permanent records of machine receipts. Defendant did keep memoranda of these receipts and they were produced for the period subsequent to November, 1946. However, defendant testified that he deposited the income from the slot machines in the bank and divided the money with plaintiffs, whereas the income from the punch boards was divided with plaintiffs periodically, although it was never deposited in bank. We do not find in the testimony of plaintiffs any denial of defendant's claim that slot machine and punch board money had been handled in the past in the same manner it was handled by defendant, that is, without recording it in the account books. Mrs. Dunn testified that she and Mrs. Lalis knew how defendant was keeping his books; that the proceeds from the punch boards had always been distributed in cash; that she had been told by defendant that he was putting the slot machine money in the bank and dividing it without keeping any book record of it; and that this procedure met with her approval.

According to the testimony of the accountants, the computations of monthly profits would have reflected more accurately the true profits if consideration had been given to fluctuations in inventories or if there had been regular mark-ups of supplies purchased, but plaintiffs' accountant, Mr. Boyce, testified that the contract called for accounting on a cash basis and that the books did truthfully portray the receipts and expenditures of the business, and further that in reconciling the figures shown on the books with the sales of merchandise, he found only .007 of 1 per cent of error. Defendant's expert testified that the books of account of "purchases, sales and inventory, are absolutely the next thing to perfect," and that any ordinary person could ascertain from Mrs. McGowan's books in a very reasonable time the amount of monthly profits.

We do not find that plaintiffs ever made objection, and we do not understand that they now seriously object, to the practice followed by defendant of not setting forth in his account books the sums received from slot machines and punch boards. It would not be difficult to understand that they were content to have their partner or co-adventurer, assume the responsibility of handling these gambling devices and to receive their share of the proceeds with a minimum of recorded evidence showing their participation in the gambling profits. If they were not satisfied to trust defendant in the gambling department of the business they should not have taken him in as a business associate, or should have had one of their number on hand to assist in the division of the money when the machines were opened. No point is made respecting defendant's testimony that for a time he derived revenue of 25¢ per player in poker games on the premises, but discontinued the practice when Mrs. Burns demanded a share of the money.

Mrs. Burns, assisted by one O'Callahan, made an examination of Mrs. McGowan's books. They discovered, so they testified, that there was some $1,500 unaccounted for. They reported this fact to defendant and he told them that the $1,500 was in the bank. It does not appear that the money was not in the bank or was not properly accounted for. Defendant made a practice, from month to month, of estimating the amount he should keep on hand for the purchase of supplies and other expenses. It does not appear that he made any secret of this practice, or that plaintiffs made any objection to it. Neither does it appear that they ever made any objection when the profits were distributed as to the method by which they had been computed. It was to their interests that the business have on hand sufficient money to replenish liquor stocks and to meet current operating expenses.

[1, 2] From our analysis of the testimony we are satisfied that it fully justified a finding that the accounts kept by defendant truly and correctly reflected the amounts of his receipts and expenditures in the manner required by the contract, with the sole exception of the receipts from the gambling devices. The finding that plaintiffs had waived strict compliance with the terms and conditions of the contracts is amply supported by the evidence to which we have referred. There was no failure to comply with the terms of the lease unless it consisted of the omission to note on the books the amounts of gambling profits and their omission was unobjectionable to plaintiffs. Defendant's books and records were open to them at all times. They were shown to be complete and correct in all particulars, except in the respects noted. Since the money from the gambling devices was divided with plaintiffs monthly, or whenever they called for it, plaintiffs undoubtedly understood that there was no necessity for making book entries of these sums. The inference is clear that plaintiffs knew how defendant was handling this part of the business and that they approved of it.

The trial involved nothing but the decision of issues of fact as to whether defendant kept true and complete books of account which were open to the inspection of plaintiffs. The findings on these issues being fully supported by the evidence may not be disturbed. The court properly concluded that plaintiffs were entitled to no relief.

The judgment is affirmed.

VALLÉE, J. pro tem., concurs.

WOOD, Justice.

I concur in the judgment, and in the opinion wherein it is held that the evidence justified a finding that defendant kept correct accounts in the legitimate part of the business. As to the receipts from the gambling devices, the parties are not entitled to any consideration at all by the court as to the state of their accounts in those illegal transactions.

* * *

85 Cal.App.2d 506

NICHOLSON v. NICHOLSON.

Civ. 16035.

District Court of Appeal, Second District, Division 3, California.
May 17, 1948.

1. Appeal and error 🔑113(2)

The rule that appeal may not be taken from order refusing to vacate judgment or order which is itself appealable is applicable where grounds upon which it is sought to vacate the judgment existed before judgment was rendered.

2. Divorce 🔑184(1)

Question presented on appeal from order denying defendant's motion to vacate interlocutory divorce decree on ground that her absence from trial was due to mistake, inadvertence, surprise and excusable neglect in that she had been advised and believed that court would grant a motion for continuance was whether defendant made sufficient showing for relief under statute, and not the propriety of the order denying the continuance. Code Civ.Proc. § 473.

3. Divorce 🔑184(5)

Appellate court must abide by trial court's ruling on defendant's motion to vacate interlocutory divorce decree on ground that her absence from trial was due to mistake, inadvertence, surprise and excusable neglect unless satisfied that in denying motion trial court was guilty of abuse of discretion. Code Civ.Proc. § 473.

4. Divorce 🔑161

Denial of defendant's motion to vacate interlocutory divorce decree on ground that her absence from trial was result of mistake, inadvertence, surprise or excusable neglect was not an abuse of discretion, where defendant was not absent from trial as result of her inability to attend but rather because she was relying on her attorney to secure a continuance. Code Civ.Proc. § 473.

5. Judgment 🔑143(5)

A litigant who fails to attend court on day of trial because he believes his attorney will succeed in securing a continuance cannot claim either "mistake" or "surprise" within statute relating to setting aside a default judgment. Code Civ.Proc. § 473.

See Words and Phrases, Permanent Edition, for all other definitions of "Mistake" and "Surprise".

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by Allan C. Nicholson against Della M. Nicholson for divorce, wherein defendant filed a cross-complaint for separate maintenance. From order denying motion to set aside interlocutory decree of divorce, the defendant appeals.

Affirmed.

Benjamin & Lieberman, of Los Angeles, for appellant.

Moidel, Moidel, Moidel & Smith, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Della M. Nicholson, defendant and cross complainant, appeals from an order denying her motion to vacate an interlocutory decree of divorce. The ground of the motion was that she was absent from the trial because she had been advised and believed that the court would grant a motion for continuance upon a showing that she was ill in Denver and had been advised by a physician not to make a trip to Los Angeles to attend the trial. On the motion to vacate she filed certain affidavits which she claims proved that her absence from the trial was due to mistake, inadvertence, surprise and excusable neglect. She made a sufficient showing that she had a meritorious defense and cause of action for separate maintenance and that both depended principally upon testimony she would have given had she been present at the trial.

The interlocutory decree was rendered October 22, 1946; appellant's motion to vacate was filed January 8, 1947, and was denied shortly thereafter. No appeal was taken from the interlocutory decree and no showing was made of reasons for not taking an appeal. Appellant's present counsel did not represent her in the trial court.

[1-3] Respondent objects to a consideration of the appeal on the merits, relying upon the rule that an appeal may not be taken from an order refusing to vacate a judgment or an order which is itself appealable. The rule he invokes is applicable to situations where the grounds upon which it is sought to vacate the judgment existed before the judgment was rendered. Litvinuk v. Litvinuk, 27 Cal.2d 38, 162 P.2d 8. A claim of error in denying a motion for a continuance under such circumstances would be considered on an appeal from the judgment and consequently would be nonappealable. But we are not considering the propriety of the order denying the continuances. The question here is the one that was before the court on the motion to vacate the judgment, namely, whether appellant made a sufficient showing for relief under section 473, Code of Civil Procedure, although we are, of course, under a duty to abide by the ruling of the trial court unless we are satisfied that in denying the motion the court was guilty of an abuse of discretion.

The motion for continuance was made on the morning of the trial. Among the moving papers were a letter dated October 9, from appellant to her then attorneys in Los Angeles, written from Denver, stating that on account of ill health she would be unable to be present at the trial on October 22, "that it would be a physical hardship at this time to travel," and asking her attorneys to obtain a continuance of from 60 to 90 days; a copy of a letter from the attorneys dated October 11, stating, "we wish you would obtain an affidavit from your doctor setting forth all of the facts showing your inability to be present"; a writing dated October 16, signed and "acknowledged" before a notary public, by T. A. Triplett, M.D., addressed "to whom it may concern," reading as follows: "Mrs. Della Nicholson is under my treatment for hypotension, nervousness, insomnia and constipation. Her trouble developed after an operation at the age of forty seven. Due to her low pressure she has attacks of vertigo upon exertion and upon arising from the recumbent position. She informs me that she contemplates a trip but my advice is that at the time she should not travel." This was all the showing that was made on the motion for a continuance. It appears from an affidavit of respondent's counsel, filed on the motion to vacate the judgment, that the calendar judge denied the motion, stating, "the Doctor's affidavit shows nothing substantially wrong with Mrs. Nicholson's health except what most clients in litigation suffer before trial." The additional affidavits which accompanied the motion to vacate the judgment amplified to some extent the showing of appellant's illness. In her affidavit she stated that on the date of the trial she was under the care of Dr. T. A. Triplett; that at the time of the trial she was and had been for some ten days confined to her bed; that she was suffering from vertigo which caused her to lose her balance and fall at frequent intervals; and that her physician advised her that to travel in that condition would be definitely dangerous. She further stated that she consulted two attorneys in Denver as to her right to a continuance and her prospects of getting one in view of her physical condition, and that she was advised by them that she was entitled to a continuance, and that there was no doubt that one would be granted. She stated that she relied upon such advice. Appellant filed an affidavit of a friend in Denver stating that on October 14, appellant informed him by telephone of her illness and the forthcoming trial, and that pursuant to her request that he obtain a physician for her, he brought Dr. T. A. Triplett to appellant's home and waited outside in his car while the doctor interviewed appellant. An affidavit was filed by Dr. Triplett, stating that he had told appellant on October 14 that it would be ill-advised, and possibly dangerous, for her to take a trip. In his affidavit he described plaintiff's ailments as they had been described in his letter, with the exception of the alleged vertigo, of which he made no mention.

[4, 5] We must assume that the inferences drawn from the affidavits upon which the motion was based were those which tend most strongly to support the order. It would have been a reasonable inference that appellant was not physically unable to attend the trial. When she wrote to her attorneys she did not state that she was confined to her bed, or that she was under the care of a physician. Although the physician stated in the letter that he wrote that he was attending appellant, it was shown by an affidavit filed later that he was attending her at the time only for the purpose of aiding her to make a showing for a continuance. It would have been reasonable to infer also, from the fact that appellant consulted attorneys in Denver, that she was intending to go to Los Angeles if the attorneys advised her to do so. There would have been no purpose in consulting the attorneys if she had already made up her mind not to take the trip. We therefore assume that the trial court believed that appellant, although able to attend the trial was willing to run the risk that the court might deny her motion for a continuance. Upon this state of facts denial of the motion to vacate the judgment was not an abuse of discretion. We think it was an order that was properly made under the circumstances. A litigant who fails to attend court on the day of his trial for the simple reason that he believes his attorney will succeed in securing a continuance cannot claim either mistake or surprise, within the meaning of section 473, Code of Civil Procedure, if a continuance is refused. It would be absurd to countenance or encourage practices of that sort. Litigants must be prepared to meet adverse rulings at any and all stages of the proceedings. If this were not true, orderly procedure would be disrupted by resort to section 473 for the correction of all manner of mistakes. In holding that an unexpected ruling of the court in the decision of a case does not result in surprise within the meaning of section 473, the court said, in Porter v. Anderson, 14 Cal.App. 716, 726, 113 P. 345, 350, "in our opinion it would be the very limit of unreasonableness to hold that where a party, under the advice of his attorney, has acted upon an erroneous conception of the law, and suffers the injury which would be the natural and inevitable result thereof, he may be relieved of his untoward situation on the ground that he was taken by 'surprise' by reason of the fatal error into which he had thus been led." See Marr v. City of Glendale, 39 Cal.App. 596, 179 P. 712; Hughes v. Wright, 64 Cal.App.2d 897, 149 P.2d 392; O'Connor v. Ellmaker, 83 Cal. 452, 23 P. 531.

The order is affirmed.

WOOD, J., and VALLÉE, Justice pro tem., concur.

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85 Cal.App.2d 443

In re STALLINGS' GUARDIANSHIP.

Civ. 16353.

District Court of Appeal, Second District, Division 2, California.

May 13, 1948.

Rehearing Denied May 28, 1948.
Hearing Denied July 8, 1948.

1. Guardian and ward 🔑160

Fact that previous accounts of guardian of minor had been approved by Probate Court and time for making objections thereto had expired did not preclude Probate Court from an examination of former accounts rendered by guardian or from modifying prior account as to any item of expenditure previously settled, allowed or approved, or from disallowing an item entirely and withholding its approval or settlement of such item, since settling of guardian's account does not come within rule of res judicata.

2. Guardian and ward 🔑35

Guardian was properly charged with reasonable rental value of premises belonging to minor's estate, where property was occupied by guardian without previous court order authorizing him to do so.

3. Guardian and ward ⚿162

Where guardian's carelessness or neglect in keeping his books and in rendering his account made an audit necessary, costs thereof were properly charged to guardian, and not to minor's estate.

4. Guardian and ward ⚿58

A guardian of minor's estate who failed to procure court order authorizing expenditures before making the expenditures was responsible for those Probate Court disallowed.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Proceeding in the matter of the guardianship of Patricia Ann Stallings, a minor. From judgment disapproving portions of account current rendered by guardian, the guardian appeals.

Affirmed.

Lester E. Hardy, of Los Angeles, for appellant.

WILSON, Justice.

This appeal is from a judgment entered after a hearing of an account current rendered by the guardian whereby the court disapproved portions of the account. After a hearing on the account first filed the court ordered an audit to be made, following which the guardian filed a supplemental and consolidated seventh account current with schedules attached. After several hearings at which the guardian testified in an attempt to explain the account and his attorney made statements in a like effort, the court rendered its findings of fact, one of which reads as follows: "That by reason of the incomplete, inadequate and garbled condition of all of the accounts which have been filed in this estate, including the document denominated Supplemental and Consolidated Seventh Account Current, filed herein May 20, 1947, it is impossible to arrive at an exact determination of the status of this estate. That it is to the best interest of the ward herein that some approximation of the condition of this estate be reached in order to furnish a basis for future accounts."

The court found that the guardian had occupied premises belonging to the ward for a period of 20 months and that the rental value of the property was $20 per month, for which a charge was made against the guardian of $400; that at a later period the guardian occupied other premises belonging to the ward for a period of 19 months for which he was charged rent at the rate of $75 per month, or a total of $1,425. The court disallowed claims made by the guardian against the estate amounting to a total of $1,369.58 as being unauthorized and not for the benefit of the estate. Appellant contends that the court was without power to make any of the foregoing charges against him.

The court charged the guardian with the total sum of $29,553.33 while appellant contends that the amount should be $26,358.75.

The guardian's various accounts were examined by the court commissioner and by the judge of the probate department himself in an attempt to ascertain the proper charges against and credits in favor of the guardian. The court declared that the account was so indefinite and uncertain that an audit was required. At the direction of the court the accounts were audited and the supplemental account was filed. It is apparent from a reading of the transcript that the latter account furnished but little more information than the former. After hearing the evidence the court stated that "there are no proceeds of any of the encumbrances which were authorized by this court which are reflected in the account which will in the slightest give me or anyone else that I know of the ability to sit down with this file and determine what sums were received on what particular loans, and what particular properties are encumbered to bring the particular sums." The court further stated that it appeared that loans were authorized on different properties for different amounts and the account shows no relationship between the amounts authorized and the amounts received and expended; that rental collected from January, 1939, to June, 1940, is shown in the account for 1938. The court referred to the facts: that a long list of alleged expenditures showed merely the names of the persons to whom the payments were made without showing the purpose or the necessity of the expenditures; that property purchased in Oregon for $3,000 was set out in the account as $5,000 with no explanation of the discrepancy in the amounts; that in payment of loans principal and interest were not segregated and that the guardian had failed to charge himself with moneys which were borrowed; that properties were not appraised until such times as sales were to be made; that furniture was set up as an asset of the estate but had not appeared until the court discovered items of furniture at a previous hearing; that the furniture had never been appraised and the court was unable to ascertain where it was located; that one item of attorney's fees, which was requested in connection with the sale of property, had been approved by another judge but although the direction for payment of the amount had been stricken from the order, subsequently that sum of $100 appeared as an item for which the guardian took credit.

The foregoing are only a portion of the criticisms made of the guardian's account current after the audit had been made. None of the censures of the court was refuted by the evidence of the guardian or by the attempted explanations of his attorney. The record sustains the finding above quoted that the guardian's accounts were incomplete, inadequate and garbled and that the condition of the estate could be arrived at only by approximation.

The ward was and is without counsel. She resides in Oregon with her mother. It is within the inherent power of the government through its courts to protect persons non sui juris. The court is the special protector of wards who are without legal assistance. In making its independent examination in this proceeding the court was performing a plain duty. It is manifest from an examination of the record that if the court had failed to perform this duty the ward would have been charged with large sums of money for the payment of which her estate is not liable.

[1] Appellant contends that since his previous accounts had been approved by the court and the time for making objections thereto had expired the court was without power to re-examine them. The settling of a guardian's account does not come within the rule of res judicata. The court is not precluded from an examination of former accounts rendered by a guardian of a minor's estate or from correcting, revising or modifying a prior account as to any item of expenditure previously settled, allowed or approved, or from disallowing an item entirely and withholding its approval or settlement of such item. In re Di Carlo's Estate and Guardianship, 3 Cal. 2d 225, 228, 44 P.2d 562, 99 A.L.R. 990; In re Vucinich's Estate and Guardianship, 3 Cal.2d 235, 240, 44 P.2d 567; In re Guardianship of Cardwell, 55 Cal. 137, 142.

[2] The order charging the guardian with rent for premises belonging to the ward was not error. The property was occupied by him without a previous order authorizing him to do so, and since he had the benefit of the occupancy he is chargeable with the reasonable rental value. We find no fault with the finding and judgment disallowing items which the guardian claims to have advanced from his own funds.

[3] Complaint is made that the court refused to allow the expense of auditing the account which the court ordered when it found the first account to be unintelligible. The estate is not large; the items of receipts and expenses are not complicated and an audit would not have been required if the guardian's books had been properly kept and his accounts had been filed in an adequate form. It does not appear that the services of an auditor were required or necessary until the court attempted without success to unravel the account. Since the guardian's carelessness or neglect in keeping his books and in rendering his accounts made an audit necessary the cost should not be charged to the minor.

[4] Some of the items which were disallowed might possibly have been authorized by the court if application therefor had

been made preceding the expenditure. An order authorizing expenditures for reasonable amounts and for justifiable purposes would have protected the guardian. Since he did not procure the orders he must be responsible for those the court has disallowed. He is in the position of any other fiduciary who acts without the previous authorization of the court—his obligations are not chargeable to the estate of the beneficiary. See Miller v. Fidelity & Deposit Co., 3 Cal.App.2d 580, 583, 40 P.2d 951; Riedy v. Bidwell, 70 Cal.App. 552, 556, 233 P. 995; Sterrett v. Barker, 119 Cal. 492, 494, 51 P. 695.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

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85 Cal.App.2d 490

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 16283.

District Court of Appeal, Second District, Division 1, California.

May 17, 1948.

Hearing Denied July 15, 1948.

1. Workmen's compensation 🔑1208, 1990

Before an employee can institute proceedings to recover for a new and further disability arising from original injuries, such employee must have been furnished a benefit under Workmen's Compensation Act, either voluntarily by employer or pursuant to an award of Industrial Accident Commission. Labor Code, §§ 5405, 5410.

2. Workmen's compensation 🔑1762

Finding by Industrial Accident Commission that claim for compensation for temporary disability was barred by six months' limitation did not constitute an implied finding that no medical treatment was furnished, where first aid treatment received by employee was furnished on same day that original injury occurred and hence could not affect running of limitation. Labor Code, § 5405.

3. Workmen's compensation 🔑2001

Where a determination on employee's original claim for temporary disability that claim was barred by limitation was inevitable, fact that referee in his report, or Industrial Accident Commission in its pleading before District Court of Appeal on review, asserted that no medical treatment was furnished was not determinative of that question so as to preclude a subsequent determination that medical treatment had been furnished as a foundation for continuing jurisdiction of Commission to make an award for a new and further disability. Labor Code, §§ 5405, 5410.

4. Workmen's compensation 🔑52

Where provisions of Labor Code are susceptible of an interpretation either beneficial or detrimental to an injured employee, such provisions should be construed favorably to employee. Labor Code, § 3202.

5. Workmen's compensation 🔑1208

First aid furnished to an injured employee by nurse at employer's plant immediately following accident constituted "medical treatment" and a workmen's compensation "benefit" within purview of the Workmen's Compensation Law so that Industrial Accident Commission had continuing jurisdiction for 245 weeks from date of injury over any application of injured employee for adjustment of claim based upon a new and further disability. Labor Code, §§ 3202, 5410.

See Words and Phrases, Permanent Edition, for all other definitions of "Benefit" and "Medical Treatment".

6. Workmen's compensation 🔑1208

Where injured employee, immediately after accident, applied to nurse at employer's plant for first aid, Industrial Accident Commission was warranted in inferring that employer maintained a record of such employees as applied to nurse for treatment, that such application was made following an industrial accident, and that, employer had notice that employee in question had suffered an injury in the course of employment. Labor Code, § 5410.

7. Workmen's compensation 🔑1208

In determining whether an injured employee has been given a benefit under

Workmen's Compensation Law, thereby giving Industrial Accident Commission 245 weeks of continuing jurisdiction to make an award for a new and further disability, it is not extent or seriousness of injury that is important, but it is whether employee was given medical treatment and employer thereby advised of fact that employee suffered injury in course of his employment, and fact that treatment was furnished by a nurse who was a fellow employee is immaterial. Labor Code, § 5410.

◆

Original proceeding on the petition of Pacific Indemnity Company, as workmen's compensation insurance carrier for Northrop Aircraft, Inc., employer, to review an award of workmen's compensation by the Industrial Accident Commission to Blanche G. Wimmer, employee.

Award affirmed.

Herlihy & Herlihy, of Los Angeles, for petitioner.

T. Groeziner and John A. Rowe, Jr., both of San Francisco, for respondent, Industrial Accident Commission.

WHITE, Justice.

Petitioner herein was the workmen's compensation insurance carrier for Northrop Aircraft, Inc., employer of respondent Blanche G. Wimmer at the time that she sustained an injury arising out of and in the course of her employment. The employee's injury was incurred in July, 1943. In May of 1944 she filed an application for adjustment of claim, alleging that her injury was sustained in the following manner: "Moving office furniture, desks and chairs. Fell off, knocking into jig as they hit me, resulting in right arm lacerations, and sprains in lower part of back and hip." In December, 1944, the commission issued its findings and award, finding that she sustained an injury arising out of and in the course of her employment, but that her claim was barred by the six-months' statute of limitations (Labor Code, sec. 5405(a)). Applicant's petition for rehearing being denied by the commission, she sought a writ of review in this court, which writ was denied without opinion in May, 1945.

On April 11, 1946, the applicant filed another application for adjustment of claim with the commission, alleging that the nature of the claim was "determination of whether the original injury had caused new and further disability". On September 17, 1947, the commission issued its "Order Granting Petition to Reopen and Decision on Petition to Reopen", and therein found that while the claim for temporary disability was barred by the statute of limitations, the claim for permanent disability, being a claim for a new and further disability, was not so barred, and awarded the applicant $1,825 on the basis of a permanent disability of 18¼ per cent. It is this award which petitioner seeks by the present proceeding to have annulled.

At the time she sustained her injury the applicant did not receive medical treatment from a doctor, but reported to the employer's hospital and received first-aid treatment from a nurse for her injured arm. She received no treatment for her bruised thigh or hip, and was never paid any disability indemnity. After her injury in July applicant continued to work until September, and thereafter worked intermittently until some time in January, 1944. She was not examined by any physician on behalf of the employer or the insurance carrier until November 3, 1944, after her original application had been filed.

Upon the filing of applicant's second application for adjustment of claim, based on "new and further disability", the commission reopened the proceedings and found that the original injury had resulted in a permanent disability, for which compensation was awarded, although any claim for temporary disability was barred by the six-months' statute of limitations. Upon petition for rehearing the insurance carrier contended that because her original application was filed more than six months from the date of injury and no compensation benefits, either by way of disability indemnity or medical treatment, were furnished, her claim for any disability indemnity, whether for original temporary, new and further temporary, or permanent disability, was barred; and further, that, regardless of whether the first-aid treatment given at the time of injury by a nurse constituted "medical treatment" and therefore a compensation payment or benefit under section 5405 of the Labor Code, the commission by its original decision and the District Court of Appeal by denying review determined that no "medical treatment" had been furnished. That no "medical treatment" had been furnished is now the law of the case; that therefore the applicant had never received any "benefits" under the Workmen's Compensation Act; and that in the absence of the furnishing of such "benefits" whether pursuant to an award or voluntarily, the applicant may not, after her claim based on the original injury has been barred by the six-months' statute of limitations, recover compensation based on a "new and further disability" under that section of the Labor Code (section 5410) which authorizes an award for "new and further disability" at any time within 245 weeks of the date of the original injury.

Section 5405 of the Labor Code, so far as here pertinent, and as it read when the proceedings here in question took place and prior to its amendment in 1947, provided:

"The periods within which may be commenced proceedings for the collection of medical, disability or other benefits provided by either * * * are, except as otherwise provided in this division, as follows:

"(a)

"Six months from the date of injury, or from the date of the last payment of any compensation, or agreement therefor, or the expiration of any period covered by such payment. * * *"

Section 5410 of the Labor Code, in effect at all times herein pertinent, provides: "*Nothing in this chapter* (Ch. 2, Div. 4, Pt. 4) shall bar the right of any injured employee to institute proceedings for the collection of compensation within 245 weeks after the date of the injury upon the ground that the original injury has caused new and further disability. The jurisdiction of the commission in such cases shall be a continuing jurisdiction at all times within such period. This section does not extend the limitation provided in section 5407." (Emphasis added.)

Petitioner's position is that for an employee to recover for a new and further disability within 245 weeks of the injury, it is necessary that her claim therefor be filed within six months of the injury, or the last furnishing of medical treatment or compensation, or that the claim have been recognized by the furnishing of compensation benefits. Petitioner relies in this respect upon Kauffman v. Industrial Acc. Comm., 37 Cal.App. 500, 174 P. 690, Cowell Lime & Cement Co. v. Industrial Acc. Comm., 211 Cal. 154, 294 P. 703, 72 A.L.R. 1118, and American Motorists Ins. Co. v. Industrial Acc. Comm., 9 Cal.App.2d 66, 48 P.2d 721, 722. It was held in the last-cited case, following the views indicated in the first two cited cases, that where more than two years after an injury the employee filed an application for adjustment of claim, following a "relapse" arising from the original injury, and no compensation, medical service or other benefits had been provided, the employee could not recover upon the theory of a "new and further disability." The court quoted from the first two cited cases as follows:

"In the case of Kauffman v. Industrial Acc. Comm., 37 Cal.App. 500, 174 P. 690, 692, where the essential facts were similar to those which appear to have been present herein, it was ruled that 'if there have been no proceedings commenced within six months from the date of the injury, and if there has been no payment of disability indemnity or agreement therefor, the employee is not entitled to institute proceedings grounded upon "further disability" after the expiration of six months from the date of the injury.'

"And in the case of Cowell Lime & Cement Co. v. Industrial Acc. Comm., 211 Cal. 154, 160, 294 P. 703, 705, 72 A.L.R. 1118, in commenting upon the point under consideration, the same thought was impliedly expressed in the following language:

"'It is conceded by petitioner that, in case an injured employee files within six months from the date of the injury an application for compensation for temporary disability, and the same is granted by the commission, said employee may, in case his disability becomes permanent, at any time within 245 weeks after the date of his original injury, present and file with the commission his application for further compensation on the grounds that the original injury has caused a new and further disability. *This was undoubtedly the clear and unambiguous intent of said section 11 (c) of the Workmen's Compensation Act.*' "

It may be noted that so far as we are here concerned, section 11 of the Workmen's Compensation Act, prior to its incorporation as Chapter 2, Division 4, Part 4, of the Labor Code, contained substantially the same provisions as those here under consideration.

In Kauffman v. Industrial Acc. Comm., supra [37 Cal.App. 500, 174 P. 692], it was expressly held that "If there have been no proceedings commenced within six months from the date of the injury, and if there has been no payment of disability indemnity or agreement therefor, the employe is not entitled to institute proceedings grounded upon 'further disability' after the expiration of six months from the date of the injury."

[1] The foregoing authorities hold, in effect, that before an employee can institute proceedings to recover for a new and further disability arising from the original injury, such employee must have been furnished benefits under the Workmen's Compensation Act, either voluntarily by the employer or pursuant to an award of the commission. Were it otherwise, an employee who had never reported his injury and never received any benefits, could invoke the jurisdiction of the commission upon the grounds of "new and further disability" after the lapse of more than four years from the date of the original injury.

We come now to the question of whether the administration of "first-aid" by a nurse in a hospital maintained on the employer's premises immediately following the original injury or trauma, constitutes such a "benefit" or "compensation" under the Workmen's Compensation Act, or recognition of the claim by the employer, as is necessary as a prerequisite to the prosecution of a claim by the employee for "new and further disability" at any time within 245 weeks of the date of the original injury. In connection with the employee's petition for rehearing following the denial of her initial claim, the referee for the commission stated in his report: "Applicant was given first-aid treatment but apparently no medical treatment." When thereafter, the employee sought a writ of review in this court, the commission in its answer to her petition stated: "As there was no estoppel, no payment of compensation, no medical treatment furnished, and no filing of claim for the original injury within six months, the applicant's claim was barred." Petitioner, as heretofore stated, contends that by virtue of the commission's finding that the applicant's claim was barred and the denial by this court of a writ of review, the fact that no "medical" treatment was furnished is now the law of the case. It follows, urges petitioner, that since no timely application was filed based on the original injury and no benefits or compensation were received by the employee, she may not now recover for a new and further disability under section 5410.

[2, 3] We cannot agree with petitioner that the the commission's finding that the claim was barred constituted an implied finding that no "medical" treatment was furnished. Such treatment as the employee received was furnished on the same day that the original injury or trauma occurred, and therefore could not affect the running of the six-months' limitation prescribed in section 5405. The true question here presented, is, as above set forth, whether the first-aid treatment constituted such a compensation or benefit as to furnish a foundation for the commission's "continuing jurisdiction" for a period of 245 weeks to make an award for a new and further disability. The fact that the referee in his report or the commission in its pleadings before this court asserted that no "medical treatment" was furnished is not determinative, since a decision that the employee's original claim was barred by the six-months' limitation period was in-

evitable, whether "medical" treatment was or was not furnished on the same day that the injury occurred.

We must therefore determine whether first-aid to an injured employee, rendered by a nurse provided by the employer, in a hospital established by the employer, constitutes such a rendition of benefits as will bring into being the commission's 245-week "continuing jurisdiction" to make an award for a "new and further disability." The commission itself originally took the view that such first-aid did not constitute "medical treatment", and that consequently the employee's original claim was barred.

[4-7] Bearing in mind the provisions of section 3202 of the Labor Code, which impose upon the courts the duty of liberally construing the provisions of Division 4 and Division 5 of said code "with the purpose of extending their benefits for the protection of persons injured in the course of their employment", it is at once apparent that where provisions of the Labor Code are susceptible of an interpretation either beneficial or detrimental to an injured employee, such provisions should be construed favorably to the employee. We are persuaded that it would be a narrow and limited construction, in violation of the mandate of section 3202 of the Labor Code, to hold that where immediately following the accident the employee was given first-aid treatment by a nurse at the employer's plant, that such first-aid treatment was not "medical treatment" and therefore a workmen's compensation benefit within the purview of the workmen's compensation laws. The commission was warranted in inferring and assuming that the employer maintained a record of such employees as applied to the nurse for treatment and that such application was made following an industrial accident. Such being the case, the commission was further warranted in assuming that the employer had notice that the employee in question had suffered an injury in the course of her employment. It is not the extent or seriousness of the injury that is important. It is whether the employee was given "medical treatment" and the employer thereby advised of the fact that such employee suffered injury in the course of his or her employment. To hold that first-aid cannot be characterized as "medical treatment" unless the same is administered by a doctor would indeed be a strained construction of a law that is designed to the end that its beneficial features shall not be lost to employees. We are impressed that the fact that the nurse who administered first-aid was a "fellow employee" is not determinative of the question. A doctor might, in some instances, also be so characterized, and in any event, the nurse was not employed in an industrial pursuit, but her services were retained to administer aid to alleviate injuries sustained by employees in the course of their employment. We must therefore hold that under the facts and circumstances present in the instant case the employee was afforded "medical treatment" and therefore a workmen's compensation benefit. Such being the case, the employee had 245 weeks from the date of the injury within which to file with the commission her application for adjustment of claim based upon "a new and further disability".

The award is affirmed.

DORAN, Acting P. J., and BARTLETT, Justice pro tem., concur.

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85 Cal.App.2d 407

DORN et al. v. GOETZ et al.

Civ. 13722.

District Court of Appeal, First District, Division 1, California.

May 11, 1948.

1. Contracts 🔑261(5)

Where performance of contract remains entirely possible, but whole value of performance to one of the parties at least, and basic reason, recognized as such by both parties, for entering into contract, has been destroyed by a supervening and unforeseen event, rescission is authorized under "commercial frustration doctrine."

See Words and Phrases, Permanent Edition, for all other definitions of "Commercial Frustration".

2. Vendor and purchaser ⚷89

Where plaintiffs contracted shortly after end of war to sell their home to defendants, and addenda to contract provided that plaintiffs were about to erect a new home and that when plaintiffs could move into it, they would convey their old home to defendants, and enactment of Veterans' Emergency Housing Act delayed construction of new home, plaintiffs were not entitled to rescind contract under "commercial frustration doctrine." Housing and Rent Act of 1947, § 1, 50 U.S.C.A.Appendix, § 1881.

3. Contracts ⚷261(5)

A promisor who seeks to rescind a contract under the commercial frustration doctrine must show that he has been harmed by the alleged frustration.

4. Action ⚷6

In suit for declaratory relief that plaintiffs were entitled under the commercial frustration doctrine to rescind contract to sell their home to defendants because they were delayed by the Veterans' Emergency Housing Act in constructing a new home, evidence was insufficient to establish that plaintiffs were harmed by the delay so as to be entitled to rescind.

5. Vendor and purchaser ⚷89

Statute providing that performance of an obligation is excused when performance is prevented by operation of law, did not entitle plaintiffs to rescind contract to sell realty to defendants because Veterans' Emergency Housing Act delayed plaintiffs about 13 months in beginning construction of a new home though contract for sale of old home provided that plaintiffs should not be required to convey until plaintiffs were able to move into new home. Housing and Rent Act of 1947, § 1, 50 U.S.C.A. Appendix, § 1881; Civ.Code, § 1511.

◆

Appeal from Superior Court, San Mateo County; Edmund Scott, Judge.

Suit for declaratory relief by C. D. Dorn and May C. Dorn against Arthur F. Goetz and Eva K. Goetz for a judgment that plaintiffs were prevented by governmental regulations from complying with terms of a contract to convey to defendants certain realty and were therefore entitled, as a matter of law, to rescind the contract. From a judgment in favor of the defendants, the plaintiffs appeal.

Judgment affirmed.

C. D. Dorn, of San Francisco, for appellants.

Hoffman & Draper, of San Mateo, for respondents.

BRAY, Justice.

Plaintiffs brought suit for declaratory relief, and particularly for a judgment to the effect that, by governmental regulations, they were frustrated and prevented from complying with the terms of a contract to convey to defendants certain real property, and therefore entitled, as a matter of law, to rescind such contract. The trial court rendered judgment in favor of defendants. Plaintiffs appeal.

Having purchased land upon which they proposed to construct a new home, plaintiffs decided to sell their old home, and on February 15, 1946, entered into a contract to sell it and the land upon which it stands, to defendants for the sum of $13,000. The contract was executed on the standard deposit receipt form of one of the title companies. It provided that the sum of $1000 had been paid as a deposit and that the balance of the purchase price was to be paid as specified in the attached "addenda." There were the usual provisions that in the event of the failure of the purchaser to pay the balance as provided the seller could retain the deposit as liquidated damages; if the seller could not deliver title in 90 days the purchaser could demand his deposit back and be relieved from all obligation under the contract; and "Time is the essence of this contract." The addenda states: "Seller is about to commence erection of a new home and agrees that when said new home has reached a state of erection that will enable him to move into same he will convey, vacate and deliver to purchase the above described property free and clear of all incumbrances * * *. It is anticipated that said new home will be ready for occupancy not later than July 1, 1946, but because of unforeseen building difficulties that may arise seller does not desire to fix this date exactly, accordingly seller agrees to give purchaser notice in writing 30 days in advance of the exact date that seller will vacate said described property and deliver same to purchaser. Within 30 days after receipt of such written notice purchaser agrees to pay the balance of $12,000.00."

On May 22, 1946, the President approved the Veterans' Emergency Housing Act of 1946, Chap. 268, Public Law 388, 79th Congress, 2d Session, 50 U.S.C.A.Appendix § 1821. Pursuant to that act, priorities in building materials were established which, in effect, so far as houses were concerned, limited construction to housing facilities for veterans. Section 1(b) of the act, however, provided that all its provisions and regulations and orders issued under its authority should terminate December 31, 1947, or upon adoption of an earlier, concurrent resolution of Congress. On June 30, 1947, the provisions of the act upon which plaintiffs rely were repealed by section 1, Title I of the Housing and Rent Act of 1947, Chap. 163, Public Law 129, 80th Congress, 1st Session, 50 U.S.C. A.Appendix, § 1881. This action was filed September 5, 1946.

Immediately after signing the contract plaintiffs engaged an architect to draw plans for their new home. The court found that plaintiffs were unable to obtain the necessary building priorities and were temporarily unable to commence the erection of the home contemplated by them because of the government regulations. It also found that "the alleged hardship of plaintiffs was foreseeable but that said plaintiffs assumed the risk and that plaintiffs did or should have contemplated a state of war and the risks arising from it; that counter-performance by defendants is possible; * * * it is untrue that plaintiffs were prevented or completely frustrated in their efforts to comply with the terms of said contract; it is untrue that by reason of said alleged frustration, said contract cannot be complied with, and the court specifically finds that counter-performance was and is possible; it is untrue that plaintiffs are entitled to have the said contract rescinded and cancelled." Defendants have excused the delay and are insisting on the performance of the contract.

Plaintiffs contend that time being made the essence of the contract, and they being prevented by government regulations from building their new home which they claim was the sole object of their making the contract, they were frustrated and entitled to rescind.

[1] The doctrine of commercial frustration is defined in Williston on Contracts, vol. 6, Rev.Ed., p. 5419, as follows: "Performance remains entirely possible, but the whole value of the performance to one of the parties at least, and the basic reason recognized as such by *both* parties, for entering into the contract has been destroyed by a supervening and unforseen event. This does not operate primarily as an excuse for the promisor, the performance of whose promise has lost its value, but as a failure of consideration for the promise of the other party, not in a literal sense it is true, since the performance bargained for can be given, but in substance, because the performance has lost its value. The name 'frustration' has been given to this situation." (Emphasis Williston's.)

That the basic reason for entering into the contract, which it is claimed has been destroyed by the supervening event, must be recognized by *both* parties is emphasized in the case of Brown v. Oshiro, 68 Cal. App.2d 393, 156 P.2d 976. There the defendant tried to apply the doctrine of commercial frustration to a hotel lease in "Little Tokio" in Los Angeles, which defendant contended he intended to operate as a Japanese hotel only and was prevented from so doing because of the evacuation of the Japanese during the war. In reversing the lower court and holding that the doctrine did not apply the appellate court said, 68 Cal.App.2d at page 397, 156 P.2d at page 978: "In order that the defense of frustration be applicable it is not sufficient that the purpose or 'desired object' of one of the parties to the contract has been frustrated. The purpose or 'desired object' of both parties must have been frustrated. On this point it is said in the Restatement of the Law of Contracts (sec. 288) that: 'Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.' Williston on Contracts (rev.ed., vol. 6, pp. 5486-87) states the rule in this language: 'Even more clearly with respect to leases than in regard to ordinary contracts the applicability of the doctrine of frustration depends on the total or nearly total destruction of the purpose for which, *in the contemplation of both parties,* the transaction was entered into.' (Italics added.)"

In Lloyd v. Murphy, 25 Cal.2d 48, 153 P.2d 47, 48, a lessee who had leased certain premises on Wilshire Boulevard in the city of Beverly Hills " 'for the sole purpose of conducting thereon the business of displaying and selling new automobiles (including the servicing and repairing thereof and of selling the petroleum products of a major oil company) and for no other purpose whatsoever without the written consent of the lessor' except 'to make an occasional sale of a used automobile' " (25 Cal.2d at page 51, 153 P.2d at page 50), contended that the restrictions placed by the federal government on the sale of automobiles constituted a complete frustration of the objects and purposes of the lease. In holding that under the circumstances there the restrictions did not have that effect, the court, in an exhaustive compilation of California cases as well as some from other jurisdictions, clearly, concisely and definitely laid down the rules applicable in this state to the doctrine of commercial frustration. The court said:

"Although the doctrine of frustration is akin to the doctrine of impossibility of performance (see Civ.Code, § 1511; 6 Cal.Jur. 435–450; 4 Cal.Jur. Ten-year Supp. 187–192; Taylor v. Caldwell, supra [3 B. & S. 826]) since both have developed from the commercial necessity of excusing performance in cases of extreme hardship, frustration is not a form of impossibility even under the modern definition of that term, which includes not only cases of physical impossibility but also cases of extreme impracticability of performance [Citing cases]. Performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration [Citing cases].

"The question in cases involving frustration is whether the equities of the case, considered in the light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case [citing cases], and the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably to be expected (6 Williston, op.cit. supra, § 1963, p. 5511; Restatement, Contracts, § 454). The purpose of a contract is to place the risks of performance upon the promisor, and the relation of the parties, terms of the contract, and circumstances surrounding its formation must be examined to determine whether it can be fairly inferred that the risk of the event that has supervened to cause the alleged frustration was not reasonably foreseeable. If it was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.

"* * * The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed for frustration is no defense if it was foreseeable or controllable by the promisor, or if counterperformance remains valuable. [Citing cases].

"* * * It is settled that if parties have contracted with reference to a state of war or have contemplated the risks arising from it, they may not invoke the doctrine of frustration to escape their obligations. [Citing cases.]" (25 Cal.2d at pages 53, 54, 55, 153 P.2d at page 50.)

Applying the foregoing rules to the facts of this case, it appears that the desired object or effect and purpose of the contract recognized by both parties was the purchase and sale of the old home. The construction of a new home was not the object, effect, or purpose of the contract, but had to do only with the time when the conveyance and delivery of the property sold would take place. It was merely an event by which consummation of the sale was to be timed. Delay in the construction of the new home was not a frustration of the desire to be attained. Both parties anticipated a delay and contracted in contemplation of it, although the precise cause of possible delay they had in mind was the shortage of labor and building materials rather than a governmental decree. Plaintiffs contend that the trial court should have taken judicial notice of the fact that "the shooting war was over, and our armed forces were being returned and discharged" and, therefore, there was no longer a war risk at the time of making the contract. However, assuming that the court should have taken notice of these facts, plaintiffs' conclusions therefrom are erroneous. As a result of the acute shortages actually contemplated by the parties, government intervention for the protection and welfare of returning veterans became necessary and we cannot, under these circumstances, say that the possibility of such regulation was not reasonably foreseeable.

In Levy v. Caledonian Insurance Co., 156 Cal. 527, 105 P. 598, relied upon by plaintiffs, the court held that the destruction of the business district of San Francisco by the fire of 1906 did not cause a frustration of the objects of a contract to place all the insurance the promisor could sell.

In Johnson v. Atkins, 53 Cal.App.2d 430, 127 P.2d 1027, the plaintiff contracted to buy copra from defendant for shipment to Colombia. After partial performance plaintiff learned that no more copra could be shipped to Colombia because the authorities there denied permission for entry. The court in applying the doctrine of commercial frustration held in effect that the desired object of the contract, namely, shipment of the copra to Colombia, formed the basis on which both parties entered into it, and that the action of the Colombia authorities was not reasonably foreseeable. Here, not only was the action of the government reasonably foreseeable, but the building of another home was one of the desired objects of one party only. In Lloyd v. Murphy, supra (25 Cal.2d at page 54, 153 P.2d at page 50), the Johnson case is given as one of the authorities for the proposition that the promisor seeking to be excused from his contract must prove that the risk of the frustrating event was not reasonably foreseeable.

The case of 20th Century Lites, Inc., v. Goodman, 64 Cal.App.2d Supp. 938, 149 P. 2d 88, likewise is not in point. There the plaintiff leased defendant a neon sign to be used for advertising purposes. The government dim-out regulations prohibited the lighting of such sign. It is obvious that both parties considered the desired object of the contract the use of a lighted sign. Moreover, the contract was entered into prior to the war and the fact that we would have war and that there would be dim-out regulations was not reasonably foreseeable.

The contract provided "Time is of the essence." But that clause must be read and construed in conjunction with the addenda, which states that "unforeseen building difficulties * * * may arise" and therefore the seller did not desire to fix the date of delivery definitely. Plaintiffs contend that as they could not get priorities to obtain materials to start the building, there were no "building difficulties," as this expression could only apply after building was actually commenced. That is certainly a strained construction of the language used. Delay in obtaining labor or materials whether the building has commenced or not is commonly considered "building difficulties"; and in war times and periods following, delay in obtaining materials due to governmental regulations as well as otherwise may be reasonably expected. Mrs. Dorn testified that she anticipated a shortage of both labor and building materials.

[2] The federal regulations upon which plaintiffs base their contentions, did not apply in any way to the house which they contracted to sell. They applied only to the house which plaintiffs contemplated building. Moreover, these regulations merely delayed the commencement of the construction of the new house for a period of approximately 13 months from the time when the house plans were finished, or a period of approximately 9 months after the suit was filed, and the regulations affecting plaintiffs had been repealed at the time of the signing of the findings and judgment. This delay including a reasonable time to complete the new home, the defendants condoned. The true consideration to plaintiffs was not the building of another house, but the payment to them of $13,000 which the government imposed delay has in no wise affected, as defendants are still ready, able and willing to pay. Thus, there has been no failure of consideration. "* * * frustration is no defense * * * if counter-performance remains valuable." (Lloyd v. Murphy, supra, 25 Cal.2d at page 54, 153 P.2d at page 50.) It is possible that the alleged frustration is caused by the fact that either the value of the property sold or the cost of building the new home has increased. But "laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to perform a contractual obligation." (Lloyd v. Murphy, supra, 25 Cal.2d at page 55, 153 P.2d at page 51; Aristocrat Highway Displays v. Stricklen, 68 Cal.App.2d 788, 157 P.2d 880.)

[3, 4] Moreover, plaintiffs have in no way shown that they have been harmed by the delay. Plaintiff C. D. Dorn testified: "We are entire[ly] frustrated *from ever* endeavoring to fulfill that contract." (Emphasis added.) This was his conclusion, but there is no evidence upon which to base it, nor to show any reason why they should not go on and fulfill the contract. The promisor who claims a frustration must show that he is harmed thereby. (Restatement of the Law of Contracts, sec. 288; Johnson v. Atkins, supra, 53 Cal.App.2d at page 434, 127 P.2d 1027.) In their closing brief plaintiffs say: "It does not seem reasonable, fair nor just, that a party should be held to a contract of this kind for a long and indefinite length of time. Time and changing conditions affecting performance change." Yet they introduced no evidence whatever to show in what manner they have been harmed by the delay. As to the claimed hardship of having to move into the street, defendants have stated that they are willing to wait a reasonable time for plaintiffs to do what they originally contemplated—build themselves a new home.

In their reply brief plaintiffs quote F. P. Cutting Co. v. Peterson, 164 Cal. 44, 127 P. 163, on the power of the court to reform an agreement because of mutual mistake. However, there is no evidence here of any mutual mistake of the parties.

[5] The case does not come within the provisions of Civil Code section 1511 which provides that performance of an obligation is excused "When such performance * * * is prevented * * * by the operation of law." The purchase and sale of the old home was in no wise prevented by operation of law. The time of conveying and delivering was merely delayed. In United States Trading Corp. v. Newmark Grain Co., 56 Cal.App. 176, 205 P. 29, the court held that a temporary government embargo upon the shipment of barley which the defendant had contracted to deliver did not constitute a frustration, but required that the defendant deliver the barley as soon as the embargo ended. This case is cited with approval in Graham etc. Corp. v. Mountain View Development Corp., 37 Cal.App.2d 315, at page 321, 99 P.2d 357, 360, where the court states that "where the inability to perform is merely temporary and does not affect the essence of the contract (United States Trading Corp. v. Newmark Grain Co., 56 Cal.App. 176, 186, 205 Pac. 29) and particularly where it causes no damage to the other party," performance must be made when the inability no longer exists.

The judgment appealed from is affirmed.

PETERS, P. J., and WARD, J., concur.

85 Cal.App.2d 316

WILSON v. LOUSTALOT, Sheriff, et al.

Civ. 3719.

District Court of Appeal, Fourth District, California.

May 3, 1948.

1. Appeal and error 🔑110

Order denying a new trial is not appealable. Code Civ.Proc. §§ 936, 963.

2. Appeal and error 🔑94

Order denying application to disqualify the trial judge is not appealable. Code Civ.Proc. §§ 936, 963.

3. False imprisonment 🔑31

In action for false imprisonment following arrest of landlord when he sought to prevent tenant from entering premises by use of arms, evidence sustained finding that landlord was present in tenant's quarters without right after illegal entry as against contention that he was lawfully defending his own home and property. Civ.Code, §§ 50, 789; Pen.Code, §§ 146, 236.

4. False imprisonment 🔑31

Evidence sustained finding that arresting officers were authorized to arrest without a warrant under reasonable belief that plaintiff was in the act of committing an assault with a deadly weapon. Pen. Code, § 836.

5. False imprisonment 🔑20(1), 39

Allegation that plaintiff was imprisoned without process raises presumption of unlawful arrest, shifting burden to defendant to justify it by proving that it was lawful, for purpose of testing validity of complaint on demurrer and directed verdict, or on motion for non-suit.

6. Appeal and error 🔑1067

Where all surrounding facts pertaining to arrest presented by plaintiff showed that plaintiff did in fact assault arresting officer with a deadly weapon, and that such officer was justified in making the arrest, failure to charge that law presumes an arrest unlawful upon allegation that plaintiff was imprisoned without process and thereupon casts burden upon defendant to justify it by proving it lawful, was not prejudicial.

7. Evidence 🔑53, 89

A disputable presumption is a substitute for facts but may be controverted by evidence and is dispelled when evidence is produced by the party or his witnesses covering the subject of the presumption; and when there is a conflict in the evidence introduced by opposing parties, there is no room for the presumption. Const. art. 6, § 4½.

8. False imprisonment 🔑7(3)

An officer is not liable for false imprisonment for the arrest without warrant of a person who he has reasonable grounds to believe is guilty of a crime. Pen.Code, § 836.

9. Appeal and error 🔑1067
Trial 🔑260(1)

Judgment would not be reversed for failure to give instructions either legally improper or adequately covered by others, or where the failure to give them was not prejudicially erroneous.

10. Trial 🔑296(2)

In action for false imprisonment, where court charged at plaintiff's request as to amount of necessary force that a person might use to protect self from wrongful injury to his property, indicating that homicide may be justified in defense of one's habitation, instruction on probable cause of arrest of plaintiff, defining cause as "a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true", if error, was not prejudicial.

11. False imprisonment 🔑7(1), 22, 23

An action for "false imprisonment" is based on an illegal arrest, and the manner of prisoner's release need not be shown, and the reason of the court for his release is in most cases immaterial.

See Words and Phrases, Permanent Edition, for all other definitions of "False Imprisonment".

12. Appeal and error 🔑1050(1), 1056(1)

Where court instructed that neither filing of complaint, arrest nor commitment for trial were to be regarded as evidence of guilt of offense for which plaintiff was allegedly arrested, and that no subsequent matter could legalize the arrest if illegal, erroneous admission of evidence of plaintiff's commitment for trial for offense of which he was allegedly unlawfully arrested, and refusal to permit plaintiff to show that the information was subsequently dismissed was not prejudicial.

13. Appeal and error ⟹1050(1)

In action for false imprisonment, wherein arresting officer's bondsman was impleaded as a defendant, and terms of surety bond were before jury, error in permitting defendant arresting officer to testify that he would personally satisfy judgment for plaintiff in case judgment went against surety company, and refusal to instruct with reference thereto was not prejudicial since statutes specifically made principal bound to reimburse surety under the circumstances. Code Civ.Proc. § 2102; Civ.Code, § 2847.

14. Appeal and error ⟹217

In action for false imprisonment against arresting sheriff, placing of the jury in charge of defendant's deputies was not prejudicial in absence of timely objection.

15. Judges ⟹51(4)

Evidence sustained finding of independent judge that trial judge in false imprisonment action was not disqualified to hear and determine plaintiff's motion for a new trial for alleged misconduct of trial judge and jury, and alleged prejudice of trial judge.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by S. M. Wilson against John E. Loustalot, as Sheriff, Harvey Jordan and Grover Kayes as Deputy Sheriffs of the County of Kern, Thomas Shatwell, LeRoy Youngblood and United States Fidelity & Guaranty Company, a corporation, for false imprisonment. From the judgment, and from orders denying a new trial and denying application of plaintiff to disqualify the trial judge, plaintiff appeals. Attempted appeals from orders dismissed.

Judgment affirmed.

William C. Ring, of Los Angeles, and Wiley C. Dorris, of Bakersfield, for appellant.

Dorsey, Campbell & Bultman, of Bakersfield, for respondents.

GRIFFIN, Justice.

Plaintiff appeals from a judgment, order denying a new trial, and an order denying application of plaintiff to disqualify Hon. Warren Stockton, as judge of the Superior Court of Kern County.

[1, 2] Plaintiff now concedes that the latter two orders are not appealable and that the attempted appeal therefrom should be dismissed. (Code Civ.Proc. secs. 936 and 963.)

Count 1 of the complaint alleges that defendant John E. Loustalot, as sheriff of Kern County, deputized Harvey Jordan, who, with defendant Thomas Shatwell, did, on May 12, 1945, at 10 p. m., without a warrant, forceably break into plaintiff's house and falsely arrested and imprisoned him to his general and special damage. Exemplary damages were asked.

Count 2 impleads defendant, United States Fidelity & Guaranty Company, the surety upon the sheriff's official bond.

Defendants admitted that the deputy acted officially and traversed the false arrest, imprisonment and damage, but in a separate defense alleged that plaintiff illegally entered Shatwell's residence and that he arrested and imprisoned him because plaintiff assaulted him with a deadly weapon. The jury returned a verdict for defendants.

Plaintiff's motion for new trial, in addition to the claim of insufficiency of the evidence and errors of law, assigned misconduct of the defendants, the jury and the trial judge, whose qualification to hear the same was challenged in a statement heard and denied by another judge.

Plaintiff, aged 68 years, owned 38 acres of land near Bakersfield. A duplex constructed of two parallel box cars, interspaced by two middle rooms, was covered by a gabled roof. Plaintiff used the rear center room for storage and occupied the southerly three-room apartment. The Shatwells occupied the north three-room apartment and the front center room. A door on each side of the front center room opened into the respective apartments. In 1942, plaintiff, by written lease, leased to one Olveira for a cash rental, the farm and house, and expressly reserved a small part of the land and the "five south rooms", which includes the two middle rooms above mentioned. Upon the execution of the first lease defendant Shatwell, an employee of the tenant, moved into the north apartment and continued to occupy those premises with his wife and six small children. At the same time or a short time later the Shatwells moved into the front middle room, in which room some of the children kept their clothes and also slept, under some claimed agreement with plaintiff. In 1944, before the expiration of the above lease, Olveira executed a new written lease of the same acreage, for the lessee's "sole and proper use and benefit", on a crop percentage basis. No mention is made in this new lease of any reservation to the plaintiff of the duplex or any portion thereof. Late in 1944, plaintiff orally crop-leased the premises for the year 1945 to one Neves, who testified that he was to get the north one-half of the house; that it was his understanding that he was to have the same house and the same deal Olveira had before he rented the property from plaintiff and that plaintiff was to have one-fifth of the rental from that portion of the premises. He testified that he charged Shatwell $20 per month for rental of the premises and took it out of his wages; that about one week before May 12th, 1945, plaintiff talked to him about wanting Shatwell "moved out of there"; that he told plaintiff he had the right to the north one-half of the house and plaintiff said he didn't care whether he did or not, he still wanted them out of there and "off the place"; that he told plaintiff he would not move them and plaintiff said he "would take the matter up himself".

Plaintiff denied the tenancy relationship of the middle room and claimed that he permitted Shatwell to put a roof over that room and fix it up for his children to sleep in with the proviso that he could use it until such time as he would want to use it himself and that "any time, day or night, that I wanted that room, that I would expect him to vacate". He claimed that about one week before May 12th he found some of his shrubbery destroyed and asked Shatwell to surrender the middle room and that he refused; that on May 12th, about 8:30 p. m. he climbed through the window into that middle room while the Shatwell family were dining in their apartment, nailed one board across the top and one across the bottom of the door leading to that apartment and that he then retired to his apartment. Shatwell called the sheriff. Deputies Jordan and Kayes responded. He told them of plaintiff's action in nailing the door. The deputies went around to plaintiff's apartment and attempted to raise plaintiff by conversation and by pounding, but he failed to answer. They "hollered—told Wilson they were from the sheriff's office, they wanted to talk with him". They were dressed in uniform with deputy sheriff's shields on their caps and a star on each of their coats. Observing no activity and recognizing no response to their calls, the officers went into Shatwell's apartment. Shatwell furnished them with a small pinch bar which Jordan used in prying open the door into the middle room. When the door was finally opened plaintiff was standing on the opposite side of it clad in his B.V.D.'s with a 45 Colt's revolver trained on the door and pointed directly at Jordan. Plaintiff said to Jordan: "I will kill you", and Jordan told him two or three times to drop the gun. One witness testified that he did not hear Jordan tell him before the door was pried open that he was a deputy sheriff, but Jordan was "talking loud enough so he knew he was from the sheriff's office." Plaintiff admitted holding the gun with both hands and pointed at Jordan because "it has got quite a kick when it fires"; that he said nothing to Jordan because "the loaded gun spoke louder than words". Deputy sheriff Jordan placed plaintiff under arrest, and took him to jail "as is".

Later, the officers returned to his apartment, at plaintiff's request, and obtained his clothes for him and other personal effects. Plaintiff was incarcerated until the following day, Sunday, when he made bail May 14th Jordan swore to a criminal complaint charging plaintiff with assault with a deadly weapon. A preliminary examination resulted in holding the plaintiff to answer on that charge.

It is plaintiff's argument that there is no evidence to support the implied finding of the jury that plaintiff's arrest and imprisonment without a warrant was justified by any conduct of plaintiff; that the evidence indubitably shows that, as to the middle room, no other relationship than that of licensor and licensee existed between plaintiff and defendant Shatwell; that said license was revokable at plaintiff's pleasure, and when the latter notified the former and his employer of its termination, plaintiff was entitled to repossess the room without legal process; that it was clear that he did not breach the peace; that in admittedly breaking into plaintiff's home without a warrant or other lawful authority, defendants were at least guilty of a misdemeanor; that any necessary force may be used to protect from wrongful injury the person or property of one's self, citing Civil Code sec. 50; Penal Code secs. 146 and 236; and such cases as People v. Ross, 19 Cal.App. 469, 474, 126 P. 375; Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446; Bridges v. State of California, 314 U.S. 252, 263, 62 S.Ct. 190, 86 L.Ed. 192, 159 A.L.R. 1346; and Cooley's Constitutional Limitations, 8th Ed., 73, quoting (610-611): "Awe surrounded and majesty clothed the king, but the humblest subject might shut the door of his cottage against him, and defend from intrusion that privacy which was as sacred as the kingly prerogatives."

Section 836 of the Penal Code sets forth the circumstances under which a peace officer may arrest another without a warrant, and they are: (1) For a public offense committed or attempted in his presence; (2) When a person arrested has committed a felony, although not in his presence; (3) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it; (4) On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested; and (5) At night, when there is reasonable cause to believe that he has committed a felony.

[3] Although the original written lease would exclude the tenant from a right to occupy the center room, the employee of the tenant did move into that room, under a claimed agreement, which agreement would not necessarily constitute such an employee a mere licensee. The second lease provided that the entire property, including all of the house located thereon, was leased to the tenant "for his sole and proper use and benefit". Although the evidence is in conflict, the jury had the right to believe that the tenant was withholding the wages of Shatwell in payment of rent for the premises actually occupied by him and that plaintiff did or was to receive a one-fifth interest in that rent so retained. Under these circumstances and without proper legal notice to vacate said premises, plaintiff had no authority to reenter the premises and dispossess the Shatwells in the manner attempted. (Blum v. Robertson, 24 Cal. 127, 144; Sec. 789, Civ. Code; 15 Cal.Jur. p. 640, secs. 48 and 49.)

His entry, in the night time, through the window and into their home, would constitute an illegal entry, unauthorized by the law, and the Shatwells had the right to those premises until they were lawfully dispossessed of them and the right to protect them against any such trespasser. (People v. Wheeler, 73 Cal. 252, 14 P. 796.) Mr. Shatwell furnished the means and asked the assistance of the officers in opening the door and this was done in maintaining his rights. Under these circumstances, plaintiff could not maintain that he was lawfully defending his home and property by the use of the loaded revolver.

The evidence would justify the conclusion that the officers endeavored to and did apprise plaintiff of the fact that they were officers and were there intending to peaceably prevent trouble between plaintiff and the Shatwells and to prevent a possible homicide. Even if plaintiff did not know they were officers until the door was opened, the evidence shows that plaintiff continued to assault Jordan with the gun after threatening his life and after Jordan had told him, two or three times, to drop the gun and desist further assault. (See sec. 245, Penal Code; People v.

Montgomery, 15 Cal.App. 315, 114 P. 792; People v. Simpson, 134 Cal.App. 646, 25 P.2d 1008; People v. McCoy, 25 Cal.2d 177, 153 P.2d 315.)

[4] We believe the evidence justified the implied finding of the jury that there was, as a matter of fact, and a reasonable belief of such fact on the part of Jordan, that an assault with a deadly weapon (a felony) was then being committed by plaintiff and that an arrest of plaintiff for such an offense, without a warrant, was authorized under sec. 836 of the Penal Code. (People v. Nihell, 144 Cal. 200, 77 P. 916; Dowdell v. Owl Drug Co., 121 Cal.App. 316, 8 P.2d 890; In re Ajuria, 57 Cal.App. 667, 207 P. 515; People v. Young, 136 Cal. App. 699, 29 P.2d 440; Bruce v. Sibeck, 25 Cal.App.2d 691, 78 P.2d 741.)

The next point involves several refused instructions of plaintiff pertaining to a claimed presumption running in favor of plaintiff that upon a showing or an allegation in the complaint that plaintiff was imprisoned without process, the law presumes such arrest unlawful and the burden is then cast upon the accused to justify it by proving that it was lawful, citing People v. McGrew, 77 Cal. 570, 20 P. 92; Monk v. Ehret, 192 Cal. 186, 219 P. 452; and Peters v. Bigelow, 137 Cal.App. 135, 30 P.2d 450.

[5, 6] In People v. Agnew, 16 Cal.2d 655, 107 P.2d 601, these rules were discussed and although held substantially correct, it was specifically stated that they should not be given in criminal cases without proper qualifications. (See, also, Peters v. Bigelow, supra, and cases cited.) While the presumption of the unlawfulness of the arrest and the shifting of the burden of proof may have been available in testing the validity of a complaint on demurrer and directed verdict, or on a motion for nonsuit, as in Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, under the authorities cited it does not affirmatively appear that the failure to give such an instruction in the instant case constituted prejudicial error where all of the surrounding facts pertaining to the arrest were presented by plaintiff to prove his case, and those facts show that plaintiff did in fact assault the deputy sheriff with a deadly weapon and that such deputy was justified in making the arrest.

In Friddle v. Southern Pacific Co., 126 Cal.App. 388, 14 P.2d 568, it was held that plaintiffs could not rely upon the presumption of due care where the evidence produced by plaintiffs was inconsistent with such presumption. See, also, Fortier v. Hogan, 115 Cal.App. 50, 1 P.2d 23; Tyson v. Burton, 110 Cal.App. 428, 294 P. 750; Duehren v. Stewart, 39 Cal.App.2d 201, 210, 102 P.2d 784; Smellie v. Southern Pacific Co., supra, 212 Cal. at page 553, 299 P. 529.

[7] In State Compensation Insurance Fund v. Lamb, 96 Cal.App. 236, 273 P. 1080, where the trial court refused defendant's offered instruction on the presumption of due care, it was aptly held, quoting from the syllabus: "* * * conceding that the trial court erred either in refusing defendants' requested instruction or in giving the other, the ruling could not have been prejudicial to defendants, where each of the witnesses testified fully as to what he did or did not do and the jury could not have been helped by an instruction on the presumption of care." See, also, Clary v. Lindley, 30 Cal.App.2d 571, 86 P.2d 920, 921, in which it was said: "'A disputable presumption is a substitute for proof of facts. * * *' It may be controverted by evidence. * * * It is dispelled when evidence is produced by the party or his witnesses covering the subject of the presumption. * * * When there is a conflict in the evidence introduced by opposing parties, there is no room for the presumption", citing cases. (See, also, Gay v. Cadwallader-Gibson Co., Inc., 34 Cal.App.2d 566, 93 P.2d 1051; Noble v. Key System, Ltd., 10 Cal.App.2d 132, 51 P.2d 887; Art. VI, sec. 4½ of the Constitution.) This same conclusion must be reached in reference to other presumptions claimed. The jury were in possession of all of the facts and were entitled to find that the defendants were legally justified in making the arrest as contended in their answer.

[8] In Allen v. McCoy, 135 Cal.App. 500, 27 P.2d 423, 426, 28 P.2d 56, the

Court of Appeal reversed a judgment for false arrest against certain officers and held, quoting from the syllabus: "An officer is not liable for false imprisonment for the arrest without a warrant of a person who he has reasonable grounds to believe is guilty of a crime", and determined that the facts there related showed "probable cause" for plaintiff's arrest, as a matter of law. (See, also, Vendiveer v. Charters, 110 Cal.App. 347, 357, 294 P. 440; Bettolo v. Safeway Stores, Inc., 11 Cal.App.2d 430, 54 P.2d 24; Mackie v. Ambassador Hotel and Investment Corp., 123 Cal.App. 215, 11 P.2d 3.)

Many of the other instructions refused, either assumed, as a fact, that plaintiff was entitled to possession of the front center room as a part of his home or that Jordan, as a matter of fact, was a trespasser and that plaintiff was entitled to use all reasonable force to expel him from the premises.

[9] We have examined these instructions and found that they were either legally improper or were adequately covered by other instructions or the failure to give them was not prejudicially erroneous.

The next argument is that the court misdirected the jury on the question of self-defense, and in giving an instruction on "reasonable" or "probable cause" for the arrest of plaintiff, and defined this cause as "a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true."

[10] While the instruction pertaining to self-defense, as here given, may not have been a model, the trial court did give, at plaintiff's request, an instruction on the amount of necessary force that a person might use to protect him from wrongful injury to his person or property and concluded with the clause indicating when a homicide may be justified in the defense of one's habitation. It does not appear that the plaintiff has been prejudiced or that a miscarriage of justice has resulted by the giving of these instructions.

The next complaint is directed toward the admission in evidence, over objection, of the justice's docket. The record shows that plaintiff offered such docket only *as to the time when* Jordan's criminal complaint *was filed* against him and as to *the time* when he was *arraigned.* Defendants then offered into evidence, over objection, the balance of the docket showing that the magistrate found "sufficient cause" to believe plaintiff guilty of an assault with a deadly weapon upon Jordan, and ordered him held to answer to the Superior Court. The court refused to strike this latter portion of the record. Plaintiff then undertook but was precluded from showing that the District Attorney failed to file the information within the time required by law and that the case was subsequently dismissed.

[11, 12] It is argued that the evidence of plaintiff's commitment for trial was inadmissible under the holding in Collins v. Owens, 77 Cal.App.2d 713, 176 P.2d 372, and that the court erred in not permitting plaintiff to show that the information was subsequently dismissed. It appears from the cases that an action for false imprisonment is based upon an illegal arrest and the manner of the prisoner's release need not be shown and the reason of the court for his release in most cases would be immaterial. (Neves v. Costa, 5 Cal.App. 111, 89 P. 860.) However, plaintiff cannot claim prejudicial error because he offered and the court gave an instruction to the effect that "Neither the filing of a complaint, nor the arrest of S. M. Wilson for alleged crime, nor his commitment for trial, after a preliminary examination by Justice of the Peace McGee, is to be regarded by you as any evidence of his guilt of any offense for which he was allegedly arrested and imprisoned, nor is the same any evidence that defendants were justified in arresting or imprisoning him. You are bound to determine whether or not plaintiff was falsely arrested and imprisoned, by the circumstances that existed when the arrest and imprisonment occurred, and no subsequent matter can legalize the same, if illegal when done."

The execution of the surety bond by defendant United States Fidelity & Guaranty Company was admitted in the pleadings and plaintiff introduced the official bond into evidence. The court erroneously permitted the defendant sheriff to testify that he would have to personally satisfy judgment for the plaintiff in case the judgment went against said surety company. It was the province of the court and not the defendant sheriff to interpret the legal effect of the provisions of the bond to the jury. (Sec. 2102, Code Civil Procedure.)

Section 2847 of the Civil Code provides that "If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed * * *."

[13] Plaintiff offered an instruction asking the jury to disregard the testimony of the witness. The court refused this instruction which was error. However, since the defendant surety company was made a party defendant and the terms of the surety bond were before the jury, and since the law specifically makes such principal bound to reimburse the surety under the circumstances related, we see no prejudicial error resulting from the failure of the court to so instruct the jury.

[14] It is next argued that the court prejudicially erred in placing the jury in charge of the deputies of defendant sheriff. No objection was made to this procedure by counsel for the plaintiff nor did counsel call the court's attention to that fact when the deputy sheriff was sworn to take charge of the jury. We are not convinced that plaintiff suffered any prejudice by reason of this procedure, particularly where no complaint was made at the proper time to make such a complaint.

[15] The remaining claim of reversal, calling for review, involves the question raised on a motion for new trial pertaining to the alleged misconduct by the trial judge and the jury and the claimed prejudice of the trial judge resulting in an order by Honorable Clark Clement determining that said trial judge was not disqualified to hear the motion for new trial. The same evidence was introduced in both matters. Affidavits were presented challenging the trial court's qualifications to hear and determine the motion for new trial in which it is alleged generally that the trial judge, during the trial, conversed with, shook hands and fraternized with members of the jury, and likewise with defendant sheriff in the presence of said jury; that the trial judge manifested hostility towards plaintiff's counsel during the trial; and alleged that the sheriff and said judge and their families have been intimate friends in that county for over 20 years and that in view of the apparent errors in the instructions given and in erroneously admitting testimony at the trial the prejudice of the trial judge in favor of the defendant sheriff was apparent. The trial judge denied these charges generally. The judge assigned to hear and determine the issue of the trial judge's disqualification determined that such trial judge was not disqualified to hear the motion for new trial. It cannot be held that such determination was erroneous. There was sufficient evidence to support the verdict. No prejudicial error appears in the rulings of the court or in the instructions given or refused.

Nothing in connection with the nonappealable orders requires a reversal of the judgment.

Attempted appeals from orders dismissed.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

85 Cal.App.2d 557

In re HAMPE'S ESTATE.

PARTRIDGE et al. v. VON AHNDEN.

Civ. 16259.

District Court of Appeal, Second District,
Division 2, California.

May 19, 1948.

Rehearing Denied June 7, 1948.

Hearing Denied July 15, 1948.

1. Wills 🔑775

Phrase "die prior to distribution" as used in a will providing that a legacy shall lapse if legatee "dies prior to distribution" means that if legatee is not alive on date of entry of decree of distribution, the legacy lapses.

See Words and Phrases, Permanent Edition, for all other definitions of "Die Prior to Distribution".

2. **Wills** ⚷775

Under will providing that if one of three residuary legatees "die prior to distribution", all interest in property bequeathed to her shall fail and be given in equal parts to remaining residuary legatees, death of legatee prior to entry of decree of distribution caused legacies in her favor to lapse to the exclusion of her executrix.

3. **Courts** ⚷95(1)

District Court of Appeal is not at liberty to overrule a decision of an appellate court of California establishing a rule of law, in favor of one followed in decisions of other states.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Mathilde Hampe, deceased, for final distribution on petition of Wallace S. Partridge and David P. Litwin, contested by Emma Von Ahnden, executrix of the last will of Martha Ahnden, deceased. From the order of final distribution, contestant appeals.

Order affirmed.

Appel, Dains & Liebermann and Ivares R. Dains, all of San Francisco, and Henry A. Plattner, of Los Angeles, for appellant.

Earle Stuart Rhode, of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from an order of the probate court settling the amended final account and decreeing final distribution of the estate of Mathilde Hampe, deceased.

The essential facts are these:

Mathilde Hampe died on December 17, 1945, leaving a will dated April 17, 1943, which contained among others the following provisions:

"Fourth. I give, devise and bequeath the following property or sums of money to the following persons.

"(a) All of my stocks and bonds, (except all of my series 'E', U. S. Defense Bonds), not sold to provide said funds, I give to my niece Martha Ahnden one seventh; * * *.

"Eighth. I give, devise and bequeath the residue of my estate, wherever situated, in equal parts to Martha Ahnden, Lillian S. Brown and Geraldine S. Litwin, to share and share alike.

"Ninth. In the event that Martha Ahnden, shall *die prior to distribution,* all interests in said properties devised and bequeathed to her by this will, shall fail, and shall be given, in equal parts to Lillian S. Brown and Geraldine S. Litwin, to share and share alike." (Italics added.)

On or about October 29, 1946, a decree of partial distribution was entered, distributing to Martha Ahnden the sum of $7000.00 on account of the specific legacy given to her by paragraph Fourth of decedent's will. This sum was paid to her November 27, 1946.

On March 5, 1947, Martha Ahnden died. On March 21, 1947, an amended final account and petition for distribution of decedent's estate was filed. In the petition for distribution it was alleged: "That said Martha Ahnden, legatee, died on March 5th, 1947, and all interest in said properties devised and bequeathed to her by said will, and not distributed, did fail, and Lillian S. Brown and Geraldine S. Litwin, share and share alike, became entitled to the same."

April 11, 1947, the probate court made an order settling the amended final account and decreeing the distribution of the sum of $5000.00 to Geraldine S. Litwin and a like sum to Lilliam S. Brown. The residue of the estate, consisting of the sum of $180.42, was ordered distributed to the same persons, share and share alike. Nothing was ordered distributed to appellant herein as the executrix of the last will and testament of Martha Ahnden.

This is the sole question necessary for us to determine:

Under the foregoing facts did Martha Ahnden "die prior to the distribution" of *the estate of decedent within the meaning of the phrase as used in paragraph Ninth of the will of Mathilde Hampe, deceased, with the result that appellant as executrix of the estate of Martha Ahnden was not entitled to receive anything by the decree of distribution?*

This question must be answered in the affirmative and is governed by this rule:

[1] The phrase "die prior to distribution" as used in a will providing that a legacy shall lapse if the legatee "dies prior to distribution" means that if the legatee is not alive on the date of the entry of the decree of distribution the legacy lapses. (Estate of Clarke, 103 Cal.App. 243, 246, 284 P. 231 [hearing denied by the Supreme Court].)

[2] Applying the foregoing rule to the facts of the present case it is clear that since Martha Ahnden died on March 5, 1947, and the decree of distribution was not entered until April 11, 1947, she was not alive on the date of the entry of the decree of distribution, and under paragraph Ninth of decedent's will all legacies to her under the will lapsed. Therefore the decree of distribution entered by the probate court was correct.

[3] It is settled that if a rule of law is clearly established by a decision of an appellate court of California we are not at liberty to overrule it in favor of one followed in decisions of other states. (Schneider v. Schneider, Cal.App., 187 P.2d 459.) Hence cases from other states which state a contrary rule relied on by appellant are of no value in deciding the question presented to us. Such cases cited by appellant are: In re Martin's Estate (Pa.) 57 Montg. 352, In re Sutton's Will, 150 Misc. 137, 268 N.Y.S. 458, Rusch v. Melosh, 133 N.J.Eq. 502, 33 A.2d 390, In re Gordon's Estate, 183 Misc. 567, 48 N.Y.S.2d 244, In re Denton's Will, Sur., 46 N.Y.S.2d 145, Biles v. Webb, 118 Ohio St. 346, 161 N.E. 49, In re Will of F. J. Greene, deceased, 240 Wis. 452, 3 N.W.2d 704, 142 A.L.R. 129, and Wengerd's Appeal, 143 Pa. 615, 22 A. 869, 13 L.R.A. 360.

The order is affirmed.

MOORE, P. J., and WILSON, J., concur.

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85 Cal.App.2d 476

HENDERSON v. HENDERSON.

Civ. 13526.

District Court of Appeal, First District,
Division 2, California.

May 17, 1948.

Rehearing Denied June 16, 1948.

Hearing Denied July 15, 1948.

1. Judgment 🔑511

Defendant, who collaterally attacked a default judgement not void on its face, could succeed only in case of extrinsic fraud or mistake.

2. Judgment 🔑511

In annulment of marriage action, where judge at close of evidence expressed doubt as to whether, based on his judgment, a title company would issue policy of title insurance on realty which was to be adjudged to be property of plaintiff wife, and requested plaintiff's counsel to obtain assurance from a title company before judgment was signed, but instead counsel wrote judge a letter arguing adjudication of title to be within court's power, and judge thereupon signed judgment, the alleged fraud, if any, was "instrinsic" and not "extrinsic," for which default judgment not void on its face could not be collaterally attacked.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud" and "Intrinsic Fraud".

3. Judgment 🔑503

If a complaint shows a subject matter and a demand for relief within jurisdiction of the court, mere fact that it fails to state a cause of action does not render judgment void and subject to collateral attack, regardless whether case was contested or whether judgment was a default judgment in other respects valid.

4. Judgment 🔑470

On collateral attack, every presumption should be indulged in support of the validity of the judgment, and any condition of facts consistent with the validity of the judgment will be presumed to have existed rather than one which will defeat the judgment.

5. Deeds 🔑38(1)

Description of real property as being "real property" situated in Shasta County, Cal., and standing in the joint names of stated persons, would be a sufficient decription for a deed.

6. Marriage 🔑63

In action for annulment of marriage and for restoration of property, where plaintiff alleged contribution of money which had been invested, with accruals aggregating a specified amount of money and "equity in real property situated in Shasta County, California, and standing in the joint names of plaintiff and defendant", description of real property was sufficiently certain to give court jurisdiction over property. Code Civ.Proc. § 455.

7. Judgment 🔑503

An insufficient description of real estate in a pleading generally does not subject resulting judgment affecting title to or an interest in such property to collateral attack, even though description may have been too general or uncertain, and even though petition may not have stated a sufficient cause of action to be good on demurrer. Code Civ.Proc. § 455.

8. Judgment 🔑501

A mere erroneous decision on a question of law does not make judgment void, if the court had jurisdiction of the subject matter and of the person of the defendant.

9. Judgment 🔑470

The presumptions are in favor of the validity of a judgment, and any facts consistent with validity will be presumed.

10. Judgment 🔑504(3)

Where description of real property in complaint in action for annulment of marriage and restoration of property was sufficient to give court jurisdiction of property, and court had jurisdiction of defendant, a difference in description between complaint and judgment did not make default judgment, referring to same property described in complaint, void and subject to collateral attack. Code Civ.Proc. § 455.

11. Judgment 🔑504(3)

In action for annulment of marriage and restoration of property, default judgment, insofar as it awarded real property held in joint tenancy to plaintiff, was responsive to prayer of complaint, and fact that, in general terms, judgment awarded to plaintiff all accruals from investment of money contributed by plaintiff, and then specifically awarded plaintiff described real property and automobile constituting part of accruals, did not establish that judgment exceeded the prayer as against collateral attack.

12. Judgment 🔑504(3)

Uncertainty in description of property awarded was not a ground for setting aside a default judgment on collateral attack.

13. Action 🔑45(1)

Action for annulment of marriage and for the determination of the parties' property rights were properly joined.

14. Venue 🔑4

The action for annulment of marriage is a transitory action.

15. Venue 🔑16½

When an action is partly local and partly transitory, it is to be regarded as transitory in determining the place of trial.

16. Venue 🔑16½

Action for annulment of marriage and determination of parties' rights in real property, being partly local and partly transitory, would be regarded as transitory in determining place of trial, so that superior court located in county other than that in which realty was located had jurisdiction over the realty. Const. art. 6, § 5.

◆

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Ileta Henderson against Curtis J. Henderson for annulment of marriage and restoration of property. From three orders denying defendant's motions to vacate and set aside a default judgment and to correct and modify the judgment, defendant appeals.

Orders affirmed.

Melbert B. Adams, of San Francisco, for appellant.

Harry G. Henderson, of San Francisco, for respondent.

DOOLING, Justice.

Appeals are herein presented from three orders denying defendant's motions to vacate and set aside a default judgment and to correct and modify said judgment.

In 1942 the respondent and appellant herein were ceremonially married in Nevada. Thereafter they lived together as husband and wife. On February 19, 1946, respondent filed a complaint in the superior court in San Francisco seeking an annulment of the marriage on the ground that at the time of their marriage the appellant was married to another. Joined in this complaint was an allegation that respondent had contributed $13,000 which had been invested and reinvested by the parties and that "the accruals from said investment and reinvestment now aggregate the sum of approximately $14,000.00, represented by cash in bank, equity in real and personal property, situated in Shasta County, California, and standing in the joint names of the plaintiff and defendant herein, and one 1941 Model Pontiac Automobile standing in the name of defendherein." The complaint further alleges that the respondent permitted the property to stand in the joint names of the parties, and the automobile in the name of the appellant, believing in good faith that she was appellant's legal wife and that she did not intend them as a gift.

The complaint prays: 1. That the marriage be declared void. 2. That the court restore to plaintiff "the sum of $13,000.00 which was her separate property at the time of said marriage." 3. "That this court make its order awarding all of the accruals from the said $13,000.00 aforesaid in the approximate value of $14,000.00 to this plaintiff."

The appellant, after personal service on him of the complaint and summons, defaulted by failure to appear or plead. After trial the court entered a judgment annulling the marriage and decreeing the following with regard to property rights: 1. That the $13,000 mentioned in the complaint is the sole and separate property of the plaintiff. 2. "That all of the accruals from the said sum of $13,000.00 in the approximate value of $14,000.00—all as set out and specified in plaintiff's complaint on file herein, be and the same is hereby ordered, adjudged and decreed to be the sole and separate property of said plaintiff." 3. "That all of that certain real property described as follows, and situated in the Town of Castella, County of Shasta, State of California, towit: (followed by a specific description) be, and the same is hereby ordered, adjudged and decreed to be the sole property of the said plaintiff * * * and that the joint tenancy of the parties in said real property be and the same is hereby terminated." 4. That the Pontiac automobile referred to in the complaint is the sole and separate property of plaintiff.

[1] The motions to vacate and modify the judgment were all made over six months after its entry and for that reason they are admitted to be collateral attacks thereon. On such attack the appellant can only succeed, except in the case of extrinsic fraud or mistake, if the judgment is void on the face of the judgment-roll itself. Wells Fargo & Co. v. City and County of San Francisco, 25 Cal.2d 37, 152 P.2d 625.

[2] Appellant makes only one claim of extrinsic fraud. At the close of the evidence the trial judge expressed doubt as to whether a title company would issue a policy of title insurance on the real property in Shasta County based on his decree and asked respondent's counsel to get assurance from a title company that it would do so before the decree was signed. Instead of doing this counsel wrote the judge a letter arguing that the adjudication of title was within the court's power and the judge thereupon signed the decree. If fraud at all, this was intrinsic and not extrinsic. The trial judge on the motion ruled that no fraud had been practiced on him and this ruling was clearly correct. Counsel did not deceive the court in any way but simply persuaded the judge to enter the decree without counsel's obtaining the assurance from a title company which the judge had originally requested.

The decree in so far as it annuls the marriage is not attacked on appeal. Indeed counsel for appellant in a supplemental brief has stated that "appellant believes it his duty to point out that he has never attacked that part of the judgment annulling the marriage."

[3, 4] The sole attacks are leveled at those portions of the decree awarding to respondent money and property. In considering those attacks it may be well to point out certain settled rules with regard to collateral attacks on judgments: 1. "If a complaint shows a subject matter and a demand for relief within the jurisdiction of the court, the mere fact that it fails to state a cause of action does not render the judgment void and subject to indirect or collateral attack. * * * this rule applies not only to a contested case but also to a default judgment in other respects valid." 15 Cal. Jur. 86. 2. On collateral attack "every presumption should be indulged in support of the validity of the judgment, and any condition of facts consistent with the validity of the judgment will be presumed to have existed rather than one which will defeat the judgment." 15 Cal.Jur. 65, 66.

[5-7] It is urged that the judgment is void because the description of the real property in the judgment is different from that in the complaint. The description of the real property in the complaint, "equity in real * * * property, situated in Shasta County, California, and standing in the joint names of the plaintiff and defendant," would be a sufficient description for a deed. 9 Cal.Jur. 306. It complies with the requirement of section 455 Code Civ.Proc. in that it is described with such certainty as to enable an officer, upon execution, to identify it. So far as pleading is concerned the description is sufficiently certain to give the court jurisdiction over it. "It is generally held that an insufficient description of real estate in a pleading does not subject the resulting judgment affecting the title to or an interest in such property to collateral attack, even though the description may have been too general, or uncertain, and indeed, even though the petition may not have stated a sufficient cause of action to be good on demurrer." 31 Am.Jur. 187; and cf. Scarf v. Aldrich, 97 Cal. 360, 368, 32 P. 324, 33 Am.St.Rep. 190.

[8-10] Counsel for appellant cites cases such as Flores v. Smith, 47 Cal.App.2d 253, 117 P.2d 712, holding that where a default judgment describes real property differently than it is described in the complaint the judgment is erroneous and will be reversed on appeal or other direct attack. These cases are not in point where the attack is collateral. "A mere erroneous decision on a question of law * * * does not make the judgment void, if the court had jurisdiction of the subject matter and of the person of the defendant." Wells Fargo & Co. v. City and County of San Francisco, supra, 25 Cal.2d 37, 40, 152 P.2d 625, 627. Nor are such cases as Petition of Furness, 62 Cal. App. 753, 218 P. 61, where the description in the complaint and the description in the judgment on their face refer to different parcels, in point. Here the judgment refers to the same property described in the complaint, real property in Shasta County held in joint tenancy by the parties. The presumptions are in favor of the validity of the judgment and any facts consistent with its validity will be presumed. Wells Fargo & Co. v. City and County of San Francisco, supra, 25 Cal.2d 37, 40, 152 P.2d 625. As said in Scarf v. Aldrich, supra, 97 Cal. 360, 368, 32 P. 324, 327, "the defective description in the petition and order to show cause did not affect the jurisdiction of the court, or the validity of the sale by the correct description * * *."

[11] We find no force in the argument that the judgment exceeds the prayer. The prayer was for "all of the accruals from the said $13,000.00 aforesaid in the approximate value of $14,000.00." Among such accruals described in the complaint was "real * * * property, situated in Shasta County, California, and standing in the joint names of the plaintiff and defendant." The judgment in so far as it awards real property in Shasta County held in joint tenancy to respondent is responsive to the prayer; and the fact that in general terms it first awards all accruals to respondent and then specifically awards to her the described real property and automobile must be construed, following the presumption of validity on collateral attack, as an award of the described items of accruals by specific description and all other accruals in more general terms.

[12] It is also claimed that portions of the judgment are void for uncertainty.

Conceding that the award of "all of the accruals * * * in the approximate value of $14,000.00—all as set out and specified in plaintiff's complaint," is so uncertain as to be vulnerable to direct attack on appeal (Cooke v. Aguirre, 86 Cal. 479, 25 P. 5), no cases are cited that uncertainty is a ground for setting a judgment aside on collateral attack.

[13-16] Although the point is not argued by appellant, we have given some attention to the question whether the San Francisco court had jurisdiction over the real property in Shasta County under sec. 5, Art. VI of the California Constitution. We have concluded that it had. The action for annulment and for the determination of the parties' property rights were properly joined. Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 99, 69 P.2d 845, 111 A.L.R. 342; Taylor v. Taylor, 66 Cal.App.2d 390, 152 P.2d 480. The action for annulment is a transitory action. When an action is partly local and partly transitory it is to be regarded as transitory in determining the place of trial. Neet v. Holmes, 19 Cal.2d 605, 122 P.2d 557; 25 Cal.Jur. 858. The action was therefore properly commenced in San Francisco.

The orders appealed from are affirmed.

GOODELL, J., concurs.

85 Cal.App.2d 525

HUNTER v. RUFENER et al.

Civ. 3823.

District Court of Appeal, Fourth District, California.

May 17, 1948.

Rehearing Denied June 14, 1948.

Hearing Denied July 15, 1948.

1. Bills and notes 🔑443(2)

Where, under terms of deposit receipt, purchaser's check was part of purchase price and was made payable to broker to secure discharge of vendors' obligation to pay broker a commission of a smaller sum, there being no promise by purchaser to pay broker anything except as evidenced by check, so that, even if transaction had been completed, broker would not have been entitled to full proceeds of check, broker was not entitled to recover on check when transaction was not completed.

2. Damages 🔑79(5)

The recital in deposit receipt to effect that purchaser's $10,000 check made payable to broker to secure commission owing broker by vendors could be retained as liquidated damages in case purchaser refused to complete the transaction was void as to broker because amount of his loss was easily ascertainable. Civ.Code, §§ 1670, 1671.

3. Contracts 🔑186(4)

A broker, who is employed by and acts for only one of parties to a transaction, and who is unable to collect a commission from his principal because of failure of other contracting party to complete transaction, cannot recover damages from such other contracting party with whom broker has no contract.

◆

Appeal from Superior Court, San Bernardino County; A. D. Mitchell, Judge.

Action by Harold E. Hunter against William K. Vernon, Jean J. Vernon, and Jules E. Rufener, doing business as Alta Vista Drug Company, to recover a real estate commission and to recover from last named defendant on check. From a judgment in favor of defendant Jules E. Rufener after his demurrer was sustained, plaintiff appeals.

Affirmed.

Jacob Chaitkin, of Pasadena, and Clifford A. Rohe, of Sherman Oaks, for appellant.

Robert G. Beloud, of Ontario, for respondent.

MARKS, Justice.

This is an appeal from a judgment for respondent after his general demurrer to appellant's second amended complaint had been sustained and appellant had failed to amend within the ten days allowed by the court.

The second amended complaint contained two causes of action. The first was against William K. and Jean J. Vernon to recover a real estate commission from them amounting to $7,125 for the sale of property known as Vernon's Mt. Baldy Lodge. The second was directed against respondent, and respondent doing business as Alta Vista Drug Company, on a check for $10,000 given as a down payment on the purchase price of the property. The record does not disclose what disposition, if any, was made of the cause of action against Mr. and Mrs. Vernon so little further attention need be given it as appellant has brought before us for review only the judgment in favor of respondent.

The allegations of the second amended complaint, material here, must be summarized. It is alleged that plaintiff is a duly licensed real estate broker; that on August 30, 1946, he was employed by Mr. and Mrs. Vernon to find a purchaser for the property involved; that he would be paid a commission of 5% of the selling price; that on September 14, 1946, he procured Mr. and Mrs. Rufener as purchasers of the property for $142,500; that the purchasers were then willing, ready and able to purchase the property; that a written contract of purchase and sale, called a deposit receipt, was executed, a copy of which was attached to and made a part of the pleading; that as part of the transaction respondent executed and delivered to appellant a check for $10,000, payable to him, on the back of which was written, "This check not to be deposited until deal on Vernon's Mt. Baldy Lodge goes in escrow;" that this check was made payable to appellant, at the request of Mr. and Mrs. Vernon, to secure and discharge their obligation to pay appellant his commission of $7,125; that respondent refused, failed and neglected to complete the purchase and to pay any part of an additional $40,000 down payment into escrow, and on September 17, 1946, stopped payment on the check so that it was not paid when presented.

The deposit receipt signed by respondent and the sellers contained the following:

> Received from Jules E. & Ann E. Rufener . . . the sum of $10,000.00 being a part payment on Vernons Mt. Baldy Lodge, Camp Baldy, California. . . . Balance of first payment, to wit $40,000.00 dollars to be deposited in escrow within thirty days from above date and failing to make such payments, above amount paid is retained by and forfeited to ——— as liquidated damages. Purchaser agrees to purchase said property at above price and terms. . . . Dated this 14th day of September, 1946, at Camp Baldy, California. /s/ Jules E. Rufener Purchaser Agent Harold E. Hunter, License #17045 /s/ Ann E. Rufener Purchaser Per /s/ Harold E. Hunter
>
> "I accept above sale and agree to pay Harold E. Hunter commission of Five Percent (5%)—Dated September 14, 1946
>
> "Owner /s/ Jean J. Vernon
> "Owner /s/ Wm. K. Vernon."

[1] It is not claimed that respondent, in writing or otherwise, ever promised to pay appellant any commission for his services in the transaction nor did he promise to pay him anything except as evidenced by the check.

It is clear from the deposit receipt that the $10,000 evidenced by the check, was part of the purchase price of the property to be paid by respondent to Mr. and Mrs. Vernon. It is also clearly alleged that it was made payable to appellant "to secure and discharge the obligation of the defendants William K. Vernon and Jean J. Vernon to pay the sum of $7,125.00 to the plaintiff as and for his brokerage commissions." If the sale had been completed appellant would not have been entitled to the full $10,000 but only to $7,125.

[2] The recital in the deposit receipt to the effect that the $10,000 could be retained as liquidated damages in case the purchasers refused to complete the transaction was clearly void in so far as appellant is concerned because the amount of his loss is easily ascertainable. Secs. 1670, 1671, Civil Code; McInerney v. Mack, 34 Cal.App. 153, 166 P. 867.

[3] The case of Lubeck's Investment Co. v. Voris, 68 Cal.App. 652, 229 P. 1025, 1026, is factually similar to the instant case. There the plaintiff, who was a broker negotiating the sale, received the entire purchase price from the purchaser to hold until certain formalities had been completed. The buyer refused to complete the purchase and the broker demanded its commission out of the funds in its possession. This was allowed in the judgment which was reversed on appeal, the court saying: "The effect of this agreement made the entire sum paid and held by plaintiff due and payable to the purchaser, and no part thereof could be properly withheld by plaintiff (the broker) for consummating the sale. Plaintiff was the agent of Voris; and whatever right it may have acquired to a commission under the circumstances was one against the seller and not the purchaser, who was no party to the contract providing for a commission."

The case of Steinberg v. Buchman, 73 Cal.App.2d 605, 167 P.2d 207, 209, is another case where a broker employed by the seller attempted to collect a commission from a buyer who had failed to complete the purchase. A judgment against the broker based on a directed verdict was affirmed on appeal. It was there said:

"The case is governed by another rule, which is that a broker who is employed by and acts for only one of the parties to a transaction, and who is unable to collect a commission from his principal because of the failure of the other contracting party to complete the transaction, cannot recover damages from the latter, with whom he has no contract. 8 Am.Jur., Sec. 149, p. 1073; Brockway-Mecklenburg Co. v. Hilderman, 90 Mont. 317, 2 P.2d 1018; Goff v. Adelson, 229 App.Div. 802, 242 N.Y.S. 278; Hokar Products Corporation v. Griscom & Co. Inc., Sup., 40 N.Y.S. 2d 54; Giovannoni v. Waple & James, Inc., 70 App.D.C. 229, 105 F.2d 108."

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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85 Cal.App.2d 517

KENNEDY v. OWEN.

Civ. 16173.

District Court of Appeal, Second District, Division 3, California.

May 17, 1948.

Hearing Denied July 15, 1948.

1. Appeal and error ⚿102

Order sustaining, without leave to amend, plaintiff's demurrer to defendant's cross-complaint, was not appealable. Code of Civ.Proc. § 963.

2. Appeal and error ⚿103

Order striking out defendant's cross-complaint was not an appealable order though defendant by cross-complaint had sought to bring in as cross-defendants two persons who were not parties to original action. Code Civ.Proc. § 963.

3. Appeal and error ⚿95

Order denying defendant's motion for an order bringing in new parties as cross-defendants was not an appealable order. Code Civ.Proc. § 963.

4. Appeal and error ⚿102

An appeal will not lie from an order sustaining a demurrer to a complaint or cross-complaint without leave to amend, but only from the resulting judgment.

◆

Appeals from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by Alice R. Kennedy against Bessie Owen, H. A. Rheindorf, and certain fictitious persons to quiet plaintiff's title to certain realty and for reformation of a deed by William J. Knapp and wife to Bessie Owen, wherein Bessie Owen filed a cross-complaint against the plaintiff, William J. Knapp and his wife. From orders sustaining without leave to amend, the demurrer of the plaintiff to the cross-complaint, striking out the cross-complaint, and denying the motion of Bessie Owen for an order bringing in William J. Knapp and wife as cross-defendants, Bessie Owen appeals.

Appeals dismissed.

W. P. Butcher, of Santa Barbara, for appellant.

Heaney, Price, Postel & Parma, of Santa Barbara, for respondent.

SHINN, Acting Presiding Justice.

Defendant Bessie Owen appeals from orders sustaining without leave to amend the demurrer of plaintiff, Alice R. Kennedy, to defendant's cross complaint, striking out the cross complaint and denying a motion of defendant and cross complainant for an order bringing in as cross defendants, William J. Knapp and Louise Allen Knapp.

The complaint alleged that on March 15, 1946, one William J. Knapp was the owner of certain land in Santa Barbara county, particularly described in the complaint, and which we will refer to herein as parcel B; on that day Knapp and wife deeded the land to defendant, Bessie Owen, by metes and bounds description; that the grantors and grantee understood that a portion of said real property, which we will designate parcel A, was to be excepted from said transfer and that Bessie Owen was to acquire only the remainder of said parcel B; that the scrivener of said deed was instructed to prepare a description of parcel B, exclusive of parcel A, but through inadvertence, mistake, error and misprision, failed to omit parcel A, and that the deed was executed and delivered under the mutual mistake and belief of the grantors and grantee that it described only parcel B, exclusive of the area of said parcel A; that on May 29, 1946, said Knapp and wife conveyed parcel A to plaintiff, then being ignorant of the fact that said parcel was embraced within the description of their said deed to defendant, and that plaintiff likewise was and remained ignorant of said fact until on or about February 17, 1947. In addition to Bessie Owen, one H. A. Rheindorf and certain fictitious persons were named parties defendant, and as to all of the defendants it was alleged that they claimed some right, title or interest in or to parcel A, but that such claims were without right. The prayer was that plaintiff's title to parcel A be quieted, that the Knapp-Owen deed be reformed to conform to the alleged intention of the parties, for costs of suit and for general relief. Defendants Owen and Rheindorf, answered separately by denials putting in issue all the material facts alleged by plaintiff as grounds for reformation of the deed. Following the answer, and as a part of a single document, there was also filed by Bessie Owen a cross complaint. It was alleged in the cross complaint that cross complainant had purchased parcel B from Knapp and wife for $8,000; that thereafter, while cross complainant was the owner of the land, Knapp sold said parcel A to plaintiff Alice R. Kennedy and made, executed and delivered to her a deed purporting to convey said parcel A, which deed was duly recorded; that the Knapps and plaintiff well knew that cross complainant was the owner of the property, and in the conveyance of the same to plaintiff they all acted maliciously, intending to vex and harass cross complainant and to cloud her title; that cross complainant's title thereby became doubtful, depreciated in value and unmarketable, to cross complainant's damage in the sum of $1,500. The prayer of the combined answer and cross complaint was that plaintiff take nothing by her action, that cross complainant recover $1,500 damages as aforesaid, the sum of $1,000 as a reasonable expense of clearing the title, the sum of $5,000 exemplary damages, and a decree that Alice R. Kennedy has no right, title or interest in or to said parcel A. The cross complaint named as cross defendants, Alice R. Kennedy, William J. Knapp and Louise Allen Knapp. Bessie Owen made a motion for an order bringing in the Knapps as defendants to the cross complaint. This motion was denied; no summons was issued on the cross complaint; and no process was served upon Knapp and wife. Plaintiff demurred generally and specially to the cross complaint and made a motion to strike out the cross complaint in its entirety, or, in the alternative, certain portions thereof. The demurrer was sustained without leave to amend and the motion to strike out the cross complaint was granted.

[1-3] The first point for consideration on the appeal is whether the three orders are, or any of them is, appealable. We

conclude that no one of them is an appealable order. The orders sustaining the demurrer and striking out the cross complaint operated to the same end; they eliminated as an issue to be tried the matter of alleged slander of defendant's title, leaving as the sole remaining issue the controversy respecting the alleged mistake in the deed to defendant. Neither order resulted in a judgment, nor had the effect of a judgment; neither is specified in section 963, Code of Civil Procedure, as an order from which an appeal may be taken, and the rulings would be subject to review upon appeal by cross complainant from the judgment that may be entered. These propositions are thoroughly established.

[4] It has been held times without number that an appeal will not lie from an order sustaining a demurrer without leave to amend, but only from the resulting judgment. 2 Cal.Jur. 156. Identical reasons exist for holding that an appeal will not lie from an order sustaining a demurrer to a cross complaint without leave to amend. Gossman v. Gossman, 74 Cal.App.2d 233, 168 P.2d 495; Mortgage Guarantee Co. v. Lee, 61 Cal.App.2d 367, 143 P.2d 98; County of Humboldt v. Kay, 57 Cal.App.2d 115, 134 P.2d 501. Like the order sustaining the demurrer, the order striking out the cross complaint was not a final adjudication as between plaintiff and defendant. As between them the orders would be reviewable on an appeal from the judgment. Neither order was appealable. Yandell v. City of Los Angeles, 214 Cal. 234, 4 P.2d 947; Pritchard v. King, 104 Cal.App. 460, 285 P. 1086; Merchants Nat. Bank v. Clark-Parker Co., 97 Cal.App. 757, 276 P. 387.

Appellant does not point out wherein these authorities are not controlling as between herself and plaintiff, but she argues that a different rule applies as to Knapp and wife, who are not parties to the original action and whom she sought to bring in as cross defendants. She cites Howe v. Key System Transit, 198 Cal. 525, 246 P. 39, and County of Humboldt v. Kay, 57 Cal.App.2d 115, 134 P.2d 501, in both of which cases orders striking out cross complaints were held to be appealable for the reason that the parties to the cross complaint were not identical with the parties to the original action and therefore the orders amounted to final adjudications between the cross complainants and cross defendants. The Howe case was distinguished in the Merchants National Bank and the Yandell cases, in the former of which it was pointed out that in determining whether an order striking out a cross complaint is appealable, the controlling feature is whether it amounts to a final judgment. Here, William J. Knapp and Louise Allen Knapp were not parties to the action, were not served with process on the cross complaint, and made no appearance. Obviously, none of the three orders adjudicated anything as between the cross complainant and the Knapps.

Since we have before us only attempted appeals from nonappealable orders, any discussion as to the correctness of the orders would be dictum.

The appeals are dismissed as to each order specified in the notice of appeal.

WOOD, J., and VALLÉE, Justice pro tem., concur.

85 Cal.App.2d 816

In re GUARDIANSHIP OF O'DONNELL'S ESTATE.

DEPARTMENT OF MENTAL HYGIENE OF CALIFORNIA v. DUNHAM.

Civ. 13575.

District Court of Appeal, First District, Division 1, California.

May 12, 1948.

Hearing Denied June 10, 1948.

Insane persons ⚷62

In absence of express contract, heir hunter's right to fee in guardianship proceeding is based primarily on showing that incompetent is missing person in true sense and that therefore heir hunter's services were of real value to incompetent, and in determining reasonable value of such services judge may consider nature and extent of services and customary fee in such cases, although heir hunter has no automatic right to a percentage.

WARD, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

On petition for rehearing and petition for modification.

Petitions denied.

Prior opinion 192 P.2d 94.

Fred N. Howser, Atty. Gen., and Elizabeth Palmer, Deputy Atty. Gen., for appellant.

Robert E. Hatch, of San Francisco, for respondent.

PETERS, Presiding Justice.

Respondent's petition for rehearing contends that our opinion leaves open the question as to whether in fixing an heir hunter's fee in a guardianship proceeding it is proper for the trial judge to use a percentage. As pointed out in the main opinion, where there is no express contract, the right to a fee is based primarily upon a showing that the incompetent is a missing person, in the true sense, and therefore that the services of the heir hunter are of real value to the incompetent. When that is shown, the judge may fix the reasonable value of the services rendered. If the nature and extent of the services are shown and if it be the fact that there is a customary percentage for such services, the judge may take all those factors into consideration in fixing the value of the services rendered. There is no automatic right to a percentage. In arriving at that value, the court may as a yardstick take into consideration testimony concerning the customary fee in such cases, but is not bound by such measure.

The petition for a rehearing, and the petition for a modification, are denied.

BRAY, J., concurs.

WARD, Justice (dissenting).

I vote for a rehearing for the reason that the order granting the payment of $4000 to the American Research Bureau should be stricken, because such bureau as a matter of law is not entitled to a fee.

Hearing denied; SCHAUER, J., dissenting.

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85 Cal.App.2d 416

LANDE v. SOUTHERN CALIFORNIA FREIGHT LINES.

Civ. 16130.

District Court of Appeal, Second District, Division 2, California.

May 11, 1948.

Rehearing Denied May 28, 1948.

Hearing Denied July 8, 1948.

1. Appeal and error ⚷197(1)

Generally, where cause of action is tried and evidence introduced on theory that material issues have been raised by pleadings, and trial court renders judgment on such theory, a party will not be allowed for first time on appeal to complain that such issues were not raised by the pleadings.

2. Appeal and error ⚷197(6)

Where case was tried upon theory that damages were being claimed for breach of contracts covering lease of motor vehicle equipment and evidence was offered on both sides for and against such issue, defendant could not for first time on appeal claim that pleadings did not present issue of damages to trial court.

3. Contracts ⚷33

A contract in legal contemplation is neither written nor oral, but oral or written evidence may be received to establish terms of contract between the parties. Civ.Code, § 1549.

4. Evidence ⚷397(2)

Where parties have agreed that terms of contract are embodied in a written document executed by them, parol evidence is inadmissible to add to, alter, or vary terms of contract as set forth in writing. Civ. Code, § 1549.

5. Contracts ⚷33

A so-called partly written and partly oral contract is in legal effect a "contract," the terms of which may be proven by both written and oral evidence. Civ.Code, § 1549.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

6. Appeal and error 🔑1071(6)

Generally, if a judgment is supported by findings it is not prejudicial error to fail to make a finding upon an issue in support of which evidence has been introduced if finding would necessarily have been adverse to appellant.

7. Appeal and error 🔑1071(6)

Trial court's failure to make specific finding that contract between parties was partly oral and partly written did not result in prejudicial error to defendant, where it was clear that if such finding had been made it would necessarily have been adverse to defendant's position.

8. Evidence 🔑129(6)

Generally, in absence of a common plan, scheme, habit or usage, contracts between different parties have no probative value in consideration of other and different contracts even though one of the parties may be common to both.

9. Evidence 🔑129(6)

In action for breach of written contracts covering defendant's lease of motor vehicle equipment, excluding defendant's proffered evidence of contracts entered into between it and other persons during period contracts between plaintiff and defendant were negotiated, and which other contracts were similar to contracts involved in present litigation, was not error in absence of any claim that there was a common plan, scheme, habit or usage followed by plaintiff.

10. Appeal and error 🔑1071(2)

Trial court's conclusion of law that contracts entered into between parties did not correctly state agreement of the parties as to certain provision, if error, was not prejudicial to defendant, where trial court held that defendant had not breached such provision and did not award plaintiff any damages for such breach.

11. Bailment 🔑31(3)

In action to recover damages for breach of written contracts covering defendant's lease of motor vehicle equipment, evidence supported finding that all employees operating described equipment were employees of defendant, so that amount paid by defendant to employees in wages was not deductible from rent due under lease.

12. Bailment 🔑31(3)

In action for breach of written contracts covering defendant's lease of motor vehicle equipment, evidence supported conclusions of law that plaintiff was only liable for such expenses of maintenance of operation as repairs attributable to ordinary use, wear and tear, and that all repairs or replacements of parts or tires made necessary by negligence while equipment was in defendant's control was to be borne by defendant.

13. Trial 🔑404(2)

A finding of fact, though mistakenly placed among conclusions of law, will be treated as a finding of fact on appeal.

14. Bailment 🔑31(3)

Evidence supported finding that defendant, as lessee of certain motor vehicle equipment, wrongfully deducted $866.03 for wages paid drivers of such vehicles and $402.45 for shop work from rental accrued under the lease agreement.

15. Bailment 🔑31(3)

In action for breach of written contracts covering defendant's lease of motor vehicle equipment, evidence supported finding that plaintiff was entitled to damages for injury to equipment in sum of $3,332.65 and to damages for injury to tires in sum of $1307.20.

16. Bailment 🔑31(3)

Evidence supported finding that plaintiff's cost of operating her motor vehicles leased to defendant for round trip between Los Angeles and San Diego was $10.50 for purpose of computing plaintiff's damages for defendant's failure to make minimum number of trips required under lease contracts.

17. Bailment 🔑31(3)

Evidence supported finding that plaintiff had not acquiesced in defendant's failure to make minimum number of round trips required in contracts covering defendant's lease of motor vehicle equipment, and had not agreed that omitted trips could be made up in succeeding weeks, as regards plaintiff's right to recover damages therefor.

18. Bailment ⟹32

In action to recover damages for breach of contracts covering defendant's lease of certain motor vehicle equipment, evidence supported finding that plaintiff had suffered damages of $11,519 as result of defendant's failure to make minimum number of round trips with leased equipment required by contracts.

◆

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Florence Lande, doing business as North & South Transportation Company, against Southern California Freight Lines, to recover damages for breach of written contracts covering lease of certain motor vehicle equipment. From a judgment for plaintiff, the defendant appeals.

Affirmed.

H. J. Bischoff, of Los Angeles, for appellant.

Pacht, Warne, Ross & Bernhard, Isaac Pacht and Irving Hill, all of Beverly Hills, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for the breach of written contracts covering the lease of certain motor vehicle equipment, defendant appeals.

Disregarding conflicting evidence the record discloses that prior to 1942 plaintiff was engaged in the trucking business on a small scale, owning two truck and trailer units. This business was operated by plaintiff's brother who was a truck driver. In 1942 plaintiff, learning that her brother might be inducted into the armed forces, began negotiations with defendant to take over her business and equipment. As a result defendant, by written leases, took over plaintiff's trucking accounts and equipment. The leases provided that defendant would use plaintiff's equipment between Los Angeles and San Diego at a fixed price per round trip with defendant guaranteeing a minimum of five trips per week. There were three separate contracts dated April 20, 1942, July 1, 1942, and September 1, 1942, respectively.

Shortly after the execution of the contracts disputes arose between the parties as to their proper interpretation, and the present action was instituted by plaintiff seeking a judgment for: (1) damages because of breach of the contracts, (2) reformation of the contracts, and (3) declaratory relief.

Questions Presented for Determination

First: *Did the trial court commit prejudicial error in awarding damages to plaintiff for failure to operate plaintiff's equipment at least five round trips a week between Los Angeles and San Diego for the reason that the complaint was for equitable relief which was denied, and there was no separate pleading of a cause of action at law alleging a breach of the contracts?*

[1] This question cannot be considered by us for it is the general rule that where a cause is tried and evidence introduced on the theory that material issues have been raised by the pleadings and the trial court renders judgment on such theory, a party will not be allowed for the first time on appeal to complain that such issues were not raised by the pleadings. (Freeman v. Gray-Cowan, Inc., 219 Cal. 85, 87, 25 P.2d 415; Deseret Water, Oil & Irr. Co. v. State, 176 Cal. 745, 746, 171 P. 287; Smithson v. Atchison, T. & S. F. Ry. Co., 174 Cal. 148, 155, 162 P. 111; Grimes v. Nicholson, 71 Cal. App.2d 538, 543, 162 P.2d 934; Asnon v. Foley, 105 Cal.App. 624, 627, 288 P. 792.)

[2] In the present case defendant was apprised by plaintiff's counsel in his opening statement that damages were sought for breach of the guarantee to operate the trucks a minimum of five days per week. The case was tried upon the theory that damages were being claimed for breach of the contracts, and evidence was offered on both sides for and against such issue. Therefore the general rule heretofore stated is applicable and defendant will not for the first time on appeal be permitted to avoid liability by claiming the pleadings did not present the issue to the trial court.

Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386, relied on by defendant, is not applicable to the facts in the present case. In the cited case the plaintiff sought to enforce an agreement by seeking injunctive relief and an accounting. The judgment of the trial court was reversed for the reason that equitable relief had not properly been granted, and as a result plaintiff was not entitled to an accounting, it being evident that where an accounting is ancillary to equitable relief, if the latter is not properly granted, the accounting must also fail. Such is not the present case in which the relief sought is for a breach of contract, and the issues relative to which were considered by all parties as being clearly defined at the time of the trial.

Lyon v. Goss, 19 Cal.2d 659, 123 P.2d 11, is likewise inapplicable. In such case the parties did not treat the question of damages as being an issue in the trial court. Therefore in reversing the judgment on the ground that the trial judge had improperly made an award in favor of plaintiff the Supreme Court properly observed that if the parties wished to amend their pleadings and try out the issue of damages for breach of contract such procedure would not be objectionable.

Second: *May a contract be partly written and partly oral?*

[3-5] This question posed by defendant must be answered in the affirmative in this sense: that a contract or agreement in legal contemplation is neither written nor oral, but oral or written evidence may be received to establish the terms of the contract or agreement between the parties. (Sec. 1549, Civil Code; McNulty v. Prentice, (N.Y.) 25 Barb. 204, 207; Wilcox v. Cherry, 123 N.C. 79, 31 S.E. 369, 370; Musgrove v. City of Jackson, 59 Miss. 390, 392. See also Vol. I, Williston on Contracts, revised edition, 1936, sec. 13, p. 17 et seq., sec. 221, p. 667.) When the parties have agreed that the terms of the contract are embodied in a written document executed by them, parol evidence is inadmissible to add to, alter, or vary the terms of the contract as set forth in the writing. A so-called partly written and partly oral contract is in legal effect a contract, the terms of which may be proven by both written and oral evidence. (Fabian v. Lammers, 3 Cal.App. 109, 114, 84 P. 432.)

In the instant case the trial court found, supported by substantial evidence, as follows: "The Court finds that under the terms and provisions of said agreements of April 20, 1942, July 1, 1942, and September 1, 1942, the defendant undertook and agreed to furnish and hire the drivers and operators of each of the vehicles described in each of the said contracts, and the Court further finds that all drivers, operating the vehicles described in the contracts between the parties were, in fact, hired by the defendant and their wages were paid and their duties fully and completely controlled by the defendant. Plaintiff never, at any time, agreed to hire or furnish such drivers or operators."

Predicated upon the foregoing finding the trial court drew the following conclusion of law:

"The Court finds and declares that the plaintiff and defendant intended to and did agree when each of said contracts was executed, as follows: * * * (b) that all employees operating the said described equipment shall be employees of the defendant, furnished, hired, and paid by it, and their duties fully and completely controlled by the defendant."

Third: *Should the trial court have made a finding that the contract between the parties was partly oral and partly written?*

[6] This question presented by defendant is immaterial in the instant case for the reason that it is the general rule that if a judgment is supported by the findings it is not prejudicial error to fail to make a finding upon an issue in support of which evidence has been introduced if the finding would necessarily have been adverse to appellant. (Moss v. Underwriters' Report, Inc., 12 Cal.2d 266, 271, 83 P.2d 503; Mortgage Guarantee Co. v. Smith, 9 Cal.App.2d 618, 621, 50 P.2d 835. See also cases cited in 10 Cal.Jur., 10 year Supp., 1936, Trial, p. 741, sec. 188.)

[7] In the present case, since the trial court found, "Plaintiff never at any time agreed to hire or furnish said drivers or operators," it is clear that had any other findings been made upon the subject of whether the contracts between the parties were written or oral, the trial judge would have

found that they were oral, which finding would have been adverse to defendant's position. Therefore the general rule above stated is here applicable and the trial court did not commit prejudicial error in failing to make more specific findings upon the subject.

Fourth: *Did the trial court commit prejudicial error in excluding evidence of contracts entered into between defendant and other persons during the period the contracts between plaintiff and defendant were negotiated, and which other contracts were similar to the contracts involved in the present litigation?*

[8] This question must be answered in the negative. It is the general rule that in the absence of a common plan, scheme, habit or usage, contracts between different parties have no probative value in the consideration and interpretation of other and different contracts even though one of the parties may be common to both. (Sun Oil Co. v. Union Drilling & Petroleum Co., 208 Cal. 114, 120, 280 P. 535; Mahan v. Wood, 105 Cal. 12, 14, 38 P. 507; Whepley Oil Co. v. Associated Oil Co., 6 Cal.App.2d 94, 107, 44 P.2d 670; Larimer v. Smith, 130 Cal.App. 98, 103 et seq., 19 P.2d 825.)

The leading case supporting this rule dates back to Hollingham v. Head, 4 C. B. n.s. 388 (1858), (to show a warranty, by a traveling agent of a manure-company, that his product should be equal to Peruvian guano, evidence that other contracts of his contained such a guaranty was rejected). In passing upon the correctness of the probative value of the particular facts offered, the judge said: "I am of opinion that the evidence was properly disallowed as not being relevant to the issue. It is not easy in all cases to draw the line and to define with accuracy where probability ceases and speculation begins; but we are bound to lay down the rule to the best of our ability. * * * Now it appears to me that the evidence proposed to be given in this case, if admitted, would not have shown that it was more probable that the contract was subject to the condition insisted upon by the defendant. The question may be put thus: Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would I think be fraught with great danger. * * * If such evidence were held admissible it would be difficult to say that the defendant might not, in any case where the question was whether or not there had been a sale of goods on credit, call witnesses to prove that the plaintiff had dealt with other persons upon a certain credit; or in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons, or upon other persons of a particular class, for the purpose of showing that he was a quarrelsome individual and therefore that it was highly probable that the particular charge of assault was well-founded. The extent to which this sort of thing might be carried is inconceivable."

[9] Applying the foregoing rule to the facts here involved it is apparent that the trial court properly excluded the questioned evidence. The other contracts offered were not material in determining the nature of the transaction between plaintiff and defendant. Since there was an absence of any claim that there was a common plan, scheme, habit or usage followed by plaintiff, the general rule above stated is applicable.

Moody v. Peirano, 4 Cal.App. 411, 88 P. 380; Lobree v. L. E. White Lumber Co., 53 Cal.App. 85, 199 P. 821; Bone v. Hayes, 154 Cal. 759, 99 P. 172; Turner v. Luning, 105 Cal. 124, 38 P. 687; Asamen v. Thompson, 55 Cal.App.2d 657, 131 P.2d 839; Swanson v. Wilsen, 13 Cal.App. 389, 110 P. 336, relied on by defendant, are all inapplicable for the reason that in such cases there were a series of agreements, each involving one common party and a number of separate parties, and such evidence was held admissible against the party who was common to all of them as evidence of a common plan, habit or usage, and in the nature of admissions against interest. In the present case, since there was not any common plan, scheme, habit or usage, the evidence would have been merely self-serving declarations of the defendant.

Fifth: *Was it prejudicially erroneous for the trial court to make the follwing con-*

clusions of law: (a) That the contracts entered into between the parties did not correctly state the agreement of the parties in that "a round trip" was meant and agreed by the parties to mean one between defendant's terminals and docks in Los Angeles and San Diego; (b) that while units L902 and L903 were in the service of, or in the control of defendant during the term of the agreement of April 20, 1942, the tonnage transported or trips made by said units in any one month on a north bound haul from San Diego to Los Angeles should not exceed 20% of the tonnage transported or number of trips made by said units on the south bound haul from Los Angeles to San Diego for the same period; (c) that units L905 and L909 could not be used for back hauls or for pick-ups and delivery services whether at San Diego or at Los Angeles, but were to be used exclusively for making round trips from the terminal of defendant on Mateo street in Los Angeles to the terminal of defendant at 549 K street, San Diego; and (d) that defendant was obligated to pay plaintiff $3.00 an hour for use of equipment for services other than between defendant's terminals in San Diego and Los Angeles?

[10] It is unnecessary for us to consider this question for the reason that the trial court found in favor of defendant and held that it had not breached such provision in the contract and did not award plaintiff any damages for such breach. Therefore it is harmless error by which defendant was not prejudiced and will not be considered by us. (Buck v. Canty, 162 Cal. 226, 236 et seq., 121 P. 924; Webb v. Boyle, 125 Cal. App. 326, 328, 13 P.2d 785.)

Sixth: *Did the trial court commit prejudicial error in making a conclusion of law that all employees operating the described equipment should be employees of defendant, furnished, hired and paid by it, and that their duties were fully and completely controlled by defendant?*

[11] This question must be answered in the negative. Paragraph II of the questioned lease read as follows: "That all employees operating the above described motor vehicle shall be employees of the lessee and that all their duties shall be fully and completely controlled by the lessee." Evidence was introduced tending to show that after the agreements were entered into, defendant actually furnished the drivers, carried them on its pay roll, and compensated them. Clearly in construing the foregoing provisions of the agreement the evidence just cited sustained the trial court's finding to the following effect:

"The Court finds that under the terms and provisions of said agreements of April 20, 1942, July 1, 1942, and September 1, 1942, the defendant undertook and agreed to furnish and hire the drivers and operators of each of the vehicles described in each of the said contracts, and the Court further finds that all drivers, operating the vehicles described in the contracts between the parties were, in fact, hired by the defendant and their wages were paid and their duties fully and completely controlled by the defendant. Plaintiff never, at any time, agreed to hire or furnish such drivers or operators."

The foregoing finding clearly supports the conclusion of law here questioned.

Seventh: *Did the trial court commit prejudicial error in making conclusions of law, (a) that plaintiff was only liable for such expenses of maintenance of operation as repairs, parts, tires, oil, grease etc. attributable to ordinary use, wear and tear, and (b) that all repairs or replacements of parts or tires made necessary by the negligence or carelessness of defendant and its employees or others while the equipment was in the possession of or control of defendant was to be borne by defendant?*

[12] This question must likewise be answered in the negative. The contracts of the parties provided that "all expenses for maintenance of and operation of said described motor vehicles' equipment, such as repairs, parts, tires, gasoline, grease, oils, etc. shall be borne by and paid for by" plaintiff. Plaintiff contended that under the contracts she was obligated to pay only ordinary expenses of upkeep and maintenance, and that other expenses, including expenses resulting from misuse of the equipment and negligence in its operation were payable by defendant, and that defendant had wrongfully required plaintiff to pay for repairs and replacements due to damage resulting to the equipment as a result of overloading beyond the limits specified in the contracts.

Defendant controverted plaintiff's contentions.

The trial court, supported by substantial evidence, made the following findings relative to these issues:

"That all expenses for maintenance and operation of the said described motor vehicle equipment, such as repairs, parts, tires, gasoline, grease, oils, etc., attributable to ordinary use and wear and tear of the Units shall be borne and paid for by the plaintiff, but that repairs to the Units, replacement of parts or tires made necessary by the negligence or carelessness of defendant or its employees or others or by defendant's violation of the terms of any of the said agreements while the said equipment was in the possession of, or under the control of the defendant, was to be borne by and paid for by the defendant."

[13] It is immaterial that this finding of fact is found among the conclusions of law, and since it is a finding of fact, it will be so treated by this court. (Linberg v. Stanto, 211 Cal. 771, 776, 297 P. 9, 75 A.L.R. 555; Gossman v. Gossman, 52 Cal.App.2d 184, 191, 126 P.2d 178.)

Eighth: *Was there substantial evidence to sustain the following findings of fact:*

[14] (a) *That defendant wrongfully deducted $866.03 for wages paid drivers from rental accrued under the agreements?*

This finding finds support in the evidence that the agreements between the parties required defendant to use the leased trucks a minimum of five trips per week and compensate the plaintiff for such use. It was alleged that defendant had failed to use the trucks for the minimum number of trips. By way of defense defendant alleged that plaintiff had acquiesed in the use of the trucks for less than five trips in certain weeks with the understanding that the omitted trips would be made up in the future. Evidence was introduced in support of plaintiff's claim and of defendant's claim, and the trial court in performance of its duty weighed the evidence and found in favor of plaintiff.

(b) *That defendant wrongfully deducted $402.45 for shop work from rental accrued under the agreement between the parties?*

This finding is supported by ample direct testimony of witnesses that this shop work was never authorized by plaintiff and was not a proper charge against plaintiff, and hence that in deducting the same from moneys due plaintiff such deductions were wrong.

[15] (c) *That (i) plaintiff is entitled to damages for injury to equipment in the sum of $3,332.65, and (ii) plaintiff is entitled to damages for injury to tires in the sum of $1,307.20?*

There was substantial direct testimony of witnesses to sustain each of the foregoing findings.

[16] (d) *That plaintiff's cost of operating her equipment for a round trip between Los Angeles and San Diego was $10.50?*

Fred Lande, who acted in the capacity of plaintiff's business partner, testified that plaintiff's cost of operating her equipment on the round trip was $6.50 per unit. On the other hand, defendant's witnesses testified that plaintiff's cost of performance was more than the rental rate provided in the contract. In one contract the rental rate was $25.00 per round trip; in another it was $31.00 per round trip. Hence the trial court was called upon to resolve this conflict of evidence which it did by finding that the cost was $10.50 per round trip, which was a figure less than that testified to by defendant's witnesses. Therefore the finding finds substantial support in the evidence.

[17] (e) *That plaintiff had not acquiesced in defendant's failure to make the minimum number of trips, and had not agreed that the omitted trips could be made up in succeeding weeks?*

This finding finds support in the evidence through direct testimony of two witnesses, Fred Lande and Jacob Lande, that plaintiff had never acquiesced in the failure of defendant to make less than the minimum number of trips or that omitted trips could be made up in succeeeding weeks.

[18] (f) *That plaintiff had suffered damages in the sum of $11,519.00 for trips less than five round trips per week per unit from the date of the contracts to May 29, 1944?*

This finding is supported by direct testimony as to the number of trips omitted for each of the units leased by plaintiff to defendant, and the trial court made findings accordingly. Predicated upon such findings the court correctly awarded damages to plaintiff for the amount of the omitted trips according to the contract price less the cost of performance.

Since the record is free from error the judgment is affirmed.

MOORE, P. J., concurs.

WILSON, J., deeming himself disqualified, did not participate in the foregoing opinion.

85 Cal.App.2d 540

PEOPLE v. RIVAS.

Cr. 4203.

District Court of Appeal, Second District, Division 3, California.

May 18, 1948.

Hearing Denied June 10, 1948.

1. Homicide ⚷354

Until the Adult Authority affixes a lesser term than life imprisonment for second-degree murder which is punishable by imprisonment in the state prison from five years to life, the sentence for second-degree murder is imprisonment for life. Pen.Code, § 190.

2. Criminal law ⚷1216(2)

A sentence of defendant for second-degree murder to imprisonment for the term prescribed by law which fixes punishment at from five years to life, was a sentence for an indeterminate term and not a sentence to "life imprisonment", so as to preclude trial court from ordering sentences for offenses committed by defendant at the same time and part of same transaction to run consecutively. Pen. Code, §§ 190, 669.

See Words and Phrases, Permanent Edition, for all other definitions of "Life Imprisonment".

3. Criminal law ⚷1023(12)

Order of commitment directing that defendant's sentences for second-degree murder, assault with deadly weapon, and assault with intent to commit murder, should run consecutively, was not an appealable order.

◆

Appeal from Superior Court, Santa Barbara County; Atwell Westwick, Judge.

Vicente Rivas was convicted of murder in the second degree, of assualt with a deadly weapon, and of assault with intent to commit murder, and the defendant appeals from the judgment and from the order of commitment sentencing defendant to serve sentences running consecutively.

Judgment affirmed and appeal from order of commitment dismissed.

Francis Price and Ralph C. Raddue, both of Santa Barbara, and William C. Rice, of Santa Maria, for appellant.

Fred N. Howser, Atty. Gen., Frank Richards, Deputy Atty. Gen., and David S. Licker, Dist. Atty., of Santa Barbara, for respondent.

WOOD, Justice.

Defendant was convicted, in a trial by jury, of murder in the second degree, of assault with a deadly weapon, and of assault with intent to commit murder. Three persons were victims of the crimes. The court sentenced defendant on each of the three counts to imprisonment in a state prison for the term prescribed by law, and directed that the sentences run consecutively. The defendant appeals from the judgment and from the "order of commitment."

On April 5, 1947, about 7 p. m., defendant went to a house, where his former wife and two of their children and his former wife's brother resided, and knocked on the door, but no one responded. At that time the former wife, Maria Castro Rivas, her two children, and her brother, Raymond Castro, were in a bedroom of the house. After knocking on the door defendant knocked on the window of the bedroom, but no one responded. He then went up on the roof and entered the house through a hole in the roof. Mrs. Rivas then entered the hallway, and defendant fired a pistol at her, but missed her. Raymond Castro then entered the hallway, and defendant shot him three times through the heart and killed him. Mrs. Rivas, in the meantime, had run into the bedroom and closed the door. Defendant then shot through the closed door, and the bullet struck his daughter, Virginia, in the leg. Appellant then hid in a nearby dry river bed for approximately two weeks, and when he was arrested he had on his person a loaded automatic pistol and about 150 cartridges.

[1] Appellant's contention is that the trial court exceeded its jurisdiction, as prescribed by section 669 of the Penal Code, in directing that the sentences run consecutively. Said section 669 provides that when any person is convicted of two or more crimes the judgment shall direct whether the terms of imprisonment shall run concurrently or consecutively "provided, however, if the punishment for any of said crimes is *expressly prescribed to be life imprisonment,* whether with or without possibility of parole, then the terms of imprisonment on the other convictions * * * shall be merged and run concurrently with such life term." (Italicis added.) Appellant argues that since the punishment for murder in the second degree, under section 190 of the Penal Code, is "imprisonment in the state prison from five years to life," the punishment "expressly prescribed" by statute for murder in the second degree is "life imprisonment," and therefore under the provisions of said section 669 the sentences for the other crimes should run concurrently with the "life term" sentence for second degree murder. The punishment for second degree murder is not a punishment that is expressly prescribed by statute to be life imprisonment. The punishment for such offense is imprisonment for an indeterminate period of time from a minimum term of five years' imprisonment to a maximum of life imprisonment. Section 190 of the Penal Code provides that "* * * every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life * * *." The trial court, as above stated, sentenced the defendant for the crime of second degree murder to imprisonment in a state prison for the term prescribed by law, and did not fix a definite term for such imprisonment. The court was not empowered to fix the term or duration of imprisonment on that count in any other manner than it did fix it, that is, for the term prescribed by law (sec. 1168, Penal Code), which term is prescribed by section 190 to be for a minimum term of imprisonment for five years and a maximum term of imprisonment for life. The Adult Authority is empowered to fix the definite term for such imprisonment, and it may fix such term for a lesser period than life imprisonment. Until and unless the Adult Authority fixes a lesser term than life imprisonment, the sentence for second degree murder for the period prescribed by law is imprisonment for life. In matter of In re Quinn, 25 Cal.2d 799, 154 P.2d 875, the court directed that sentences for two counts of robbery in the first degree and for escape run consecutively. Defendant therein contended that since the punishment for first degree robbery, under section 213 of the Penal Code, was imprisonment "for not less than five years," a sentence for first degree robbery, being for an indeterminate term without a specified maximum, is a life sentence, at least until the Board of Prison Terms and Paroles has fixed the term at a term for years; and that the court upon pronouncing judgment on the first robbery count became powerless to direct that any other sentence run consecutively. The court therein said, 25 Cal.2d at page 800, 154 P.2d at page 876: "There is no merit in petitioner's contention. Certainly an indeterminate sentence without a fixed maximum is regarded for certain purposes as having the effect of a life sentence until and unless the prison term board has acted and fixed a term for years [citing cases] but this proposition of law does not preclude our recognizing the reality that, in the absence of action by the board, an indeterminate sentence *is an indeterminate sentence.* It is neither a life sentence nor a

fixed term sentence; it is entitled to recognition as a distinct *species intelligibilis*. The fact that for some purposes it has the legal effect of a life sentence does not mean that it must be regarded as the equivalent of a life sentence for all purposes. [Citing case.] A defendant against whom such a judgment has been pronounced may or may not be required to spend the entire term of his natural life in prison." In that case the court considered the question whether the punishment for first degree robbery, namely, "for not less than five years," was "expressly prescribed to be life imprisonment" within the meaning of said section 669, and the court held that it was not punishment expressly prescribed to be life imprisonment, stating in 25 Cal.2d on page 804, 154 P.2d on page 878: "* * * it is obvious that the punishment is not as to any of the counts expressly prescribed to be life imprisonment."

[2] Appellant asserts that the Quinn case is distinguishable from the present case in that the maximum penalty of life imprisonment for the crime in the Quinn case (first degree robbery) was not expressly stated in the statute but was implied only, whereas in the present case the maximum penalty of life imprisonment for the crime (second degree murder) was expressly stated in the statute and the word "life" was expressly used. Even though those differences exist in the language of the code sections relating to the punishment for those two crimes, the maximum penalty prescribed by law for each crime, whether by statute or judicial interpretation, is the same, that is, life imprisonment. Since the Quinn case decides that a sentence for first degree robbery is an indeterminate sentence with a minimum penalty of five years and a maximum penalty of life, and that the punishment for such crime is not expressly prescribed to be life imprisonment, and since the punishment for second degree murder is the same as that for first degree robbery, a sentence for second degree murder is also an indeterminate sentence and the punishment for such crime likewise is not expressly prescribed to be life imprisonment. The trial court in the present case did not err in directing that the sentences run consecutively.

An instance where punishment is expressly prescribed to be life imprisonment is indicated in People v. Holman, 72 Cal.App.2d 75, 164 P.2d 297. In that case the defendant was convicted on twenty-two counts of murder in the first degree, with the recommendation of imprisonment for life, and the court sentenced the defendant to imprisonment for life on each of the counts, and directed that the sentences run consecutively. The reviewing court therein held that the sentence should run concurrently, stating (75 Cal.App.2d at page 100, 164 P.2d at page 311) that the provision in section 190 of the Penal Code prescribing life imprisonment as punishment for murder in the first degree is a provision wherein punishment is "expressly prescribed to be life imprisonment," within the meaning of section 669 of the Penal Code.

[3] The order of commitment herein is not an appealable order. See People v. Sourisseau, 62 Cal.App.2d 917, 928, 145 P.2d 916; People v. Flannelly, 128 Cal. 83, 94, 60 P. 670; In re Ralph, 27 Cal.2d 866, 870, 872, 168 P.2d 1.

The judgment is affirmed, and the appeal from the order of commitment is dismissed.

SHINN, Acting P. J., and VALLEE, Justice pro tem., concur.

Hearing denied; CARTER, J., dissenting.

GOLDING et al. v. RKO RADIO PICTURES, Inc., et al.*

Civ. 15917.

District Court of Appeal, Second District, Division 3, California.

April 23, 1948.

Rehearing Denied May 17, 1948.

Hearing Granted June 21, 1948.

1. Literary property 🔑4

Author's common-law right in unpublished manuscript is the sole right to decide by whom, when, where, and in what form his manuscript should be published for first time, to restrain others from publishing it without his permission and from using it without his authority, and to recover damages from such persons.

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* Subsequent opinion 208 P.2d 1.

2. **Literary property 🔑8**

To constitute invasion of author's common-law right in unpublished manuscript of play, whole of play need not have been copied, nor even a large portion of it, in form or substance.

3. **Literary property 🔑8**

If dissection rather than observation is required to discern any resemblance, there is no "piracy."

See Words and Phrases, Permanent Edition, for all other definitions of "Piracy".

4. **Copyrights 🔑53**
Literary property 🔑8

The test of "piracy" is the same in case of unpublished, uncopyrighted material as in case of copyrighted material.

5. **Literary property 🔑8**

The privilege of "fair use" accorded in statutory copyright cases is not accorded by commonlaw in case of unpublished works, and author has exclusive control of his work. Civ. Code, § 980.

6. **Copyrights 🔑53**

"Fair use" of copyrighted material is use for some legitimate, fair and reasonable purpose such as illustration and criticism. Civ.Code, § 980.

7. **Literary property 🔑8**

In determining whether unpublished material has been pirated, access alone means nothing without similarity.

8. **Literary property 🔑9**

In determining whether play has been pirated, proof of "access" means that defendants read play before or in course of production of picture.

See Words and Phrases, Permanent Edition, for all other definitions of "Access".

9. **Literary property 🔑8**

There is no "piracy" because of similarity of locale, the taking of a general idea, scheme, or historical incident, or use of old or stock situations or dramatic ideas.

10. **Literary property 🔑2**

Ideas, as such, are not protected against piracy.

11. **Copyrights 🔑4**
Literary property 🔑2

At common law, as well as under copyright acts, the form, sequence and manner in which the composition expresses the idea, not the idea itself, are secured to author. Civ. Code, § 980.

12. **Literary property 🔑8**

Monopoly inheres only in expression of work, and theme and ideas may be freely borrowed.

13. **Literary property 🔑8**

The "theme" of a play or picture, as affecting piracy, is the dominant emotion of the basic character, and is personified by the basic character. Civ. Code, § 980.

See Words and Phrases, Permanent Edition, for all other definitions of "Theme".

14. **Literary property 🔑8**

The "plot" of a play or picture, as affecting piracy, is the story or narrative; the designed sequence of connected incidents; the thing which moves the play from cause to effect; etymologically, a weaving together.

See Words and Phrases, Permanent Edition, for all other definitions of "Plot".

15. **Literary property 🔑8**

If such similarities exist as to justify an inference of copying of protectible material, it is necessary to prove only that a substantial part of plaintiff's play was copied to sustain liability of defendants.

16. **Literary property 🔑8**

A subsequent author cannot avoid liability for piracy by making changes in, omissions from or additions to the original story.

17. **Literary property 🔑8**

Unlawful appropriation cannot be excused by showing that much of the original work was not appropriated.

18. Literary property ⚷8

Where access is admitted, similarity of incident rests upon a high degree of probability of copying and a low degree of probability of independent creation.

19. Literary property ⚷8

Unconscious plagiarism is actionable as much as deliberate plagiarism.

20. Appeal and error ⚷1010(1)

On appeal from verdict allowing recovery for piracy of play, reviewing court which finds no similarity after reading play and viewing picture is not required to conclude that evidence does not support implied findings that defendants copied, appropriated, and embodied part of the play.

21. Literary property ⚷9

In action for piracy, issues of identity and piracy are for jury, and existence of piracy is always a question of fact.

22. Literary property ⚷9

Recovery for piracy of play "The Man and His Shadow" by moving picture "The Ghost Ship" was sustained by direct testimony of piracy, access having been admitted, and similarities in setting on ship, in basic character of captain who was homicidal egomaniac, and in plot.

23. Evidence ⚷474(16), 568(4)

Owner of property may, without being qualified as expert, testify as to his opinion of its value, weight and value of such testimony being left to jury.

24. Literary property ⚷9

Testimony of owners of uncopyrighted play was sufficient to support award of $25,000 for plagiarism thereof.

25. Appeal and error ⚷837(1)

Where reviews of dramatic critics were received in evidence in action for plagiarism for limited purpose of showing access, statements in such reviews could not be deemed to support verdict on issue of value of play.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Samuel R. Golding and another against RKO Radio Pictures, Inc., and another, for damages for plagiarism. From a judgment for plaintiffs, and from an order denying defendants' motion for judgment notwithstanding verdict, defendants appeal.

Affirmed.

Mitchell, Silberberg & Knupp, of Los Angeles, for appellants.

Harold A. Fendler, of Beverly Hills, for respondents.

VALLÉE, Justice pro tem.

Appeal by defendants from a judgment for plaintiffs entered upon a verdict of a jury in an action for damages for plagiarism, and from an order denying defendants' motion for judgment notwithstanding the verdict.

Plaintiffs are the authors of a stage play, "The Man and His Shadow." Defendant RKO Radio Pictures, Inc., referred to as RKO, produced and distributed a motion picture, "The Ghost Ship." Defendant Lewton was employed by RKO as producer of the picture. Plaintiffs alleged that defendants pirated the stage play in the making of the picture. Defendants admit that they had the script of the stage play in their possession for at least six weeks before the picture was produced. They deny piracy. During the trial the play was read to the court and jury and the picture was viewed by them. Plaintiffs had judgment for $25,000. Defendants appealed.

Appellants specify two errors: First, that there is no evidence sufficient to support the implied finding of the jury that in the production of the picture "The Ghost Ship," they copied, appropriated or embodied any part of the material of the play, and that this is conclusively established by a comparison of the play and the picture; second, that there is no evidence sufficient to support the implied finding of the jury that by the production and distribution of the picture the value of the motion picture rights of the play was reduced in the sum of $25,000, or any other amount.

We have read the play and viewed the picture. An understanding of the questions presented requires description of the play and the picture.

The Play

A steam yacht is about to leave on a pleasure trip to Havana. Brancato, a well-known Shakespearean actor, is on board. The captain is late. Brancato meets Werner whom he recognizes as a government witness. Werner informs him he is taking the trip for protection. Brancato implies that he is escaping from something. Impatient to get to sea, he talks to Dr. DeVries, an alienist, who says Brancato has frightened him many times and wonders how he could run the gamut of violent emotions night after night. Brancato explains that for ten years he had a voice double, Crawley; that scenes of violence were played on a darkened stage; that Crawley spoke the lines from the wings; that Crawley had a howling, offending voice which blended perfectly with his own; that Crawley lived the parts and his realism had finally got under his (Brancato's) skin. He had not engaged another voice because Crawley was indispensable, almost a part of him. He had been trying to get rid of him. Crawley had "got so" on his nerves that his doctor had advised a trip. Brancato tells DeVries that Crawley resented his (Brancato's) success, "hidden away in the wings for hundreds of performances, while all the plaudits went to me." Brancato is preparing for Richard the Third, "a demoniac role."

The captain comes aboard, goes to the salon, says he has just been assigned to the command, examines the passenger list, discovers Brancato is on board. A large trunk is carried through the salon, labeled "Captain Henry Mason." The yacht sails. The captain meets DeVries, learns his profession, asks him to keep an eye on Brancato, says he has word that Brancato is a victim of hallucinations and delusions. Brancato encounters the captain in the dark, is startled, recognizes the voice, says, "Crawley." The captain, smiling, says, "Not Crawley! Captain Henry Mason!"

The following evening Brancato, in an hysterical, nervous state, encounters the captain, asks what he is doing in uniform. The captain says, "I am the captain here * * * You are on my boat * * * and I am the master"; adding that for the first time he is the one who gives orders; that no one will know the difference. Brancato is skeptical, angry. Crawley: "We have said goodbye to the despised Mr. Crawley. Crawley was a weakling—a spineless coward—a gibbering fool—a snivelling imbecile. He has ceased to exist—for both of us. There is no more Crawley." Brancato threatens to expose Crawley to the passengers. Crawley: "Go ahead! * * * You have the freedom of the ship! We will see whom they believe—who is the better actor." Brancato: "You're mad." Captain: "It is you who is mad, my friend—you have a strange hallucination that I am not the captain." Brancato: "I'm going to prevent you from endangering the lives of the passengers. You may destroy us all." Captain: "Not all." Brancato: "* * * it's me you're after." Crawley believes that Brancato had suppressed and destroyed him, until he has become only a voice, a shadow, a nobody. He is going to prove he is the greater actor—Brancato "will be in eclipse." He says they cannot live apart. Brancato says he can. Crawley says that when he learned Brancato engaged passage he was anxious to go too, and so went to see Captain Mason for a job. Mason refused. Brancato: "And then what happened—where is Captain Mason?" Captain: "If you'll excuse me—I have some duties."

Doctor DeVries appears, observes Brancato "terribly upset." Brancato tells him that the lives of all passengers are in danger; that the captain is not Captain Mason, that he is Crawley, the voice in the wings; that he murdered Captain Mason to get on the boat, and that he will murder all. DeVries refuses to believe this, says the captain is a charming man. Brancato says he will warn the passengers. DeVries attempts to dissuade him, saying "* * * let me observe the captain for a while." Brancato threatens he will inform the first mate and radio the police. He tells the first mate the "captain is a dangerous criminal," that he is not Captain Mason. The first mate says to DeVries that the captain had mentioned that Brancato "suffers

* * * from obsessions." DeVries suggests a sedative. Brancato to First Mate: "I want to send a radio to the police—my life is in danger—all the passengers!" The first mate says he will notify the police and Brancato promises not to say anything to the other passengers. Brancato is afraid.

Malone, a passenger, is murdered—stabbed in the back in his cabin. While passengers discuss it in the salon, the captain is seen passing by. Brancato indicates to DeVries that he knows the murderer but doesn't dare say so as he may be accused. The captain conducts an inquiry. Brancato intimates to the captain that he suspects him. The captain implies he has enemies. DeVries says he was making notes about things, people, "explaining what goes on around us." He says to the captain, "Yes, you know—that black is not always black—and red is not always red, even though they seem to be,"—that he probes beneath the surface. The captain puts the radioman in the brig for the murder. He is anxious to know whether DeVries shares Brancato's suspicions.

The captain and Brancato are alone. Brancato accuses the captain of the murder of Captain Mason. The captain says he knows Brancato has an obsession that he (captain) murdered Mason and that if he had murdered Mason it would have been found out unless he conceived the perfect crime. The captain explains with passion that he had dreamed, planned, plotted and waited for this moment; that Captain Mason could not stop him, nor Brancato, nor DeVries; that anyone who opposed him would be destroyed—Brancato would be drowned or shot; that he was the strong one, Brancato the weakling. The Captain takes out a gun and drops it on a table, saying Brancato does not dare shoot him. Brancato: "Justice will catch up with you!" Captain: "Justice—bah!—It's only the strong that survive!" The captain leaves the gun; Brancato puts it in his pocket.

Brancato and DeVries are alone. DeVries tells Brancato that during the hearing he suddenly had the notion the captain was an imposter, that he had slain Malone, that he knows now that he (Brancato) has no obsessions—that, up to now, the captain has fooled him. DeVries says there is no use telling the first mate—he will not listen—"A master is a God on a ship." He informs Brancato that he has a bold, dangerous plan which may require great courage on his (Brancato's) part. Brancato assures him he is not afraid.

A storm comes up. DeVries learns the captain will be on the bridge all night. After the storm the captain and DeVries are alone. The captain knows that the notes of DeVries concern him. What DeVries said during the inquiry was "A captain is not always a captain." He knows DeVries searched his cabin during the storm. He is afraid of DeVries. He says to him, "I'm afraid of you too, Doctor. * * * You're the only person on this boat I'm afraid of." He tells him, "You're always watching me—thinking about me! * * * Since I came on this boat you've been watching me, studying me, persecuting me! Why don't you leave me alone?" He knows DeVries isn't afraid of him. The captain admits he has never traveled. He becomes aware that DeVries knows Captain Mason's body is in the trunk, and draws a gun. He says that DeVries is too clever, that he has concluded he is a dangerous criminal. "You're an intermeddler—Alive you are dangerous to me." He says that DeVries is getting ready to spring the trap; that he is just as smart as DeVries; that he has him in the trap, ready for the kill. DeVries calls the captain "Crawley." Crawley is stunned. DeVries attempts to dissuade him from killing him. Captain: "* * * there is no more Crawley." DeVries to Captain: "* * * you are afraid—you may have no physical fear—but you're tortured by greater fears * * * In your lust for power and glory you almost succeeded in murdering * * * Crawley, but Crawley himself will destroy you."

Brancato enters, halting, nervous, distressed, wants to see DeVries alone. The captain says, no. Brancato: "My memory is gone.—I'm lost! I can't remember the lines any more—For me it is the end, I'm through!" He quotes from "Richard the Third." Crawley, coldly, helps him. Brancato repeats from "Richard the Third,"

—cannot go on, asks Crawley for help. Crawley: "* * * it's your final curtain." Brancato staggers out on deck. A shot is heard. DeVries wants to go to him. Crawley: "* * * he doesn't exist any more." Crawley, still holding the gun, loses his assurance, becomes remorseful, "I—I didn't—kill—him." DeVries demands the gun. Crawley doesn't know DeVries, doesn't remember he (Crawley) is the captain. He asks for Brancato. He is told that Brancato is dead. Thinking aloud, he tells how he killed Captain Mason —saw his uniform, saw his great chance—a great part to play—he always lived his parts, he had never acted them—now he would "live the captain—the Master—the Commander!" He tells how he took the uniform and gun and put Mason's body in a trunk. "I'm a murderer!" Overcome with horror, Crawley shoots himself.

DeVries calls Brancato who enters. Brancato speaks to Crawley. Crawley: "Help me, Mr. Brancato—help me." He requests Wolsey's words from "Henry the Eighth." Brancato: "'Nay then, farewell! I have touched the highest point of all my greatness, and from that full meridian of my glory—'" Crawley: "And from that full meridian of my glory, I haste now to —my—setting." Crawley dies.

The Picture

A freighter is about to leave from San Pedro for a coastwise voyage down the Pacific Coast. Tom Merriam, a new third officer, comes aboard. He is off a training ship, without experience. The first man he meets on board is a mute, the Finn, whose thoughts are conveyed to the audience by the voice of an unseen person, which says "In my own silence I can hear things they cannot hear—know things they cannot know." He meets Captain Stone, a man with an air of authority, of many years' experience at sea and in command of ships. The captain immediately seeks to impress Tom with his authority, among other things, saying, "You will even learn to take great joy in it." Tom learns that the last third officer had died mysteriously in his bunk. A roll call of the crew is made before the ship sails and one of them is found dead. The captain takes no interest. He is callous about the death.

Shortly after sailing, the captain allows a large, freshly painted iron hook to remain loose and sway. Tom calls the captain's attention to the loose hook and suggests that it be made fast. The captain implies to Tom that it be left loose. A rough sea develops. The hook sways back and forth, nearly killing some of the crew. Tom calls the captain's attention to the fact that the hook may kill a seaman. The captain makes it clear that the lives of the men are his responsibility and if he wants to risk them, it is his affair, saying, "I have already given you my considered opinion as to the danger involved." Captain Stone watches the hook sway back and forth and seems to take a bestial delight in the probability of a seaman's being killed. Afterward, when Tom thinks the captain was negligent, Stone seeks to impress him with his authority and his rights over the lives of the crew.

A seaman is stricken with appendicitis. The captain is about to begin an operation on the man, under directions from a surgeon on the mainland given over the radio. Tom stands alongside. The captain becomes nervous, his hand falters, his is unable to perform the operation. Stone turns his head. Tom takes the instrument, successfully operates, saving the man's life. Tom asks Sparks, the radioman, the only other person present, not to reveal the fact that he, Tom, and not the captain, operated. Shortly thereafter, the captain explains his inability to perform the operation to Tom by saying that he is not squeamish of blood, "I'm not afraid of anything but failure—I might have failed." Tom is impressed.

In a discussion amongst the crew, Louie, a sailor, says that the captain should put into port and fill his crew because of the sailor found dead and one off duty. Another sailor says that the captain is the law on board ship. Louie says that he is going to complain to the captain. Other members of the crew dare him to, and wager with him that he will not. Louie complains to the captain, who resents this disparagement of his authority. He says to Louie, "You know, some captains would hold this against you, Louie."

The crew is busily engaged on deck in rapidly rolling the anchor chain into the anchor chain locker. Louie is below deck in the locker keeping the chain straight as it comes in, expecting to leave before the entire chain is in the locker. The captain comes by, sees Louie in the locker, closes and bolts the door, Louie's only means of escape. The rushing anchor chain kills Louie. Tom appears to check the anchor chain in the locker, unbolts and opens the door and sees Louie dead, turns around and is confronted by the captain. Tom accuses the captain of having murdered Louie. The captain neither admits nor denies the murder, saying that the dead man has been a troublemaker, without proper regard for discipline, and "You're a little hasty, Mr. Merriam. * * * What do you propose to do? Denounce me?" There is an implication that the captain feared Louie. Tom goes to the first officer and then to the radioman and tells them that the captain is incompetent, crazy, and murdered Louie. They refuse to listen. Tom tells the radioman that as soon as the ship reaches San Sebastian he is going to report to the company's agent,—"When something is wrong I have to do something about it."

The ship docks at San Sebastian. Tom goes to the company's agent, a long-time friend of the captain, tells him what has happened on the ship and accuses the captain of murder. The agent is skeptical, but calls the crew together in the presence of the captain and Tom. Members of the crew extol the captain's virtues. Tom's effort fails and he is discredited. He is dismissed from the ship.

Tom meets Ellen, who is in love with the captain. She tells Tom that she has learned all about him from the captain. She queries Tom about his outside interests. He tells her he has no girl. She tells him she will see to it that he will meet some; he should not lead a lonely "ghost-like existence" such as the captain has led these many years; the captain's only hobby and interest has been that of "authority," and now she is free to change all that. The captain talks to the agent and to Ellen separately. To each he expresses fear of losing his mind. To the agent he says that some of the crew are suspicious and distrustful of him and are turning against him. The agent attempts to quiet him, telling him that all he needs is a rest and a good checkup. The captain tells Ellen that he is afraid, afraid of his mind. He relates a haunting experience, in his early days of seamanship, of seeing a captain go crazy.

A street brawl takes place between members of the crew and some loafers. Tom comes along, joins in the fight and is knocked out. One of the crew picks up Tom, takes him back to the ship, and puts him in his bunk. Upon awakening and discovering that he is on the ship where he should not be. Tom goes to the captain and attempts to explain. The captain tells Tom that he is glad he is aboard, that they will forget that Tom has told the agent that he was a murderer, and then makes the same remark he had made to Louie, "Mr. Merriam, there are some captains who would hold this against you."

Tom realizes that the captain intends to kill him. The crew avoid him and will not talk. Tom tells the radioman the captain is going to kill him, that he is a homicidal maniac. He does not want Tom around. Tom asks the radioman to send a message to Ellen in San Sebastian telling her that he is aboard. The radioman tells him that he has orders from the captain not to send any messages without the captain's approval. Tom tells the radioman that that, in itself, is an indication that the captain is out to get him. The radioman refuses to listen. Tom goes to his cabin. He finds the lock to his cabin door removed and other evidences of an effort on the part of the captain to terrorize him. The Finn is vigilant. To protect himself, Tom goes to the gun cabinet to obtain a gun. He is discovered by the captain, who has a gun in his hand, is deranged, and threatens to kill him, saying "I want you to learn that great lesson that authority cannot be questioned." Tom tells the captain that he is crazy, that he wishes the crew could see him in his present state. The captain says, "I control the destiny of all aboard—you think I am insane—I am captain—there isn't a man who will listen or believe you. They are too lazy, cowardly, disinterested. Men are worthless cattle and a few men are given authority to rule them." Tom: "You can't prove that to me at the point of a gun—men are kind and help each other. It is only hard to get them to understand." Captain: "—go any place on board ship—see if you can get them to help you—see if they will stand up against authority.—Even your friend Sparks [radioman] will not help you—[shouting] Try and get help against me—try—try—try." Unknown to Tom, the Finn is aware of what is going on. The Finn resolves to protect Tom.

A message comes by radio for the captain from the agent, asking if Tom is aboard. The radioman takes the message to the captain, who writes a reply saying that Tom is not aboard. The radioman shows Tom the message and tells Tom that he may be right about the captain, that he will help him. The captain sees the radioman leave Tom's cabin, walks with him. They pass the Finn. The radioman drops the reply. The Finn picks it up.

The captain goes to Tom's cabin and asks if he can operate a wireless. Tom says, "Yes," and asks where the radioman is. Captain: "The message I am asking you to send will answer your question." They go to the radio room and the captain hands Tom the message he wishes sent. It says that the radioman had been "lost overboard in heavy seas." Tom accuses the captain of lying, of having killed him. A fight between the two ensues. The first officer and members of the crew appear. The captain tells them that Tom is insane. At the command of the captain, Tom is bound, gagged, placed in his berth, and given a sedative.

The Finn takes the message in the captain's handwriting to the first officer. The first officer talks about it to some members of the crew. They think that perhaps Tom is not the crazy one and that he may be right about the captain. The captain, eavesdropping, hears this talk, is losing his mind, goes to his cabin, gets a dagger, goes to Tom's cabin. He raises the dagger over Tom, who lies helpless under the drug. The Finn intercepts the captain in the nick of time. A battle takes place between the Finn and the captain. The captain is killed. The Finn: "The boy is safe—His belief in man and man's essential goodness is secure."

There was testimony that in writing the play respondents considered the period, the early part of 1941, "when the whole world was concerned with the madness that was raging over Europe, the totalitarian idea of the rule of absolutism, of one man over the other; of one man over peoples," and decided that a play should be written dealing with that subject. They hit upon the idea of using a ship because a ship "represents * * * a complete unit, with one man exercising the power of life and death, under certain circumstances, over everybody on board ship." There was testimony that the theme of the play—"basically the lust for power by the master of the ship, suffering from the Hitlerian complex," is identical in both the play and in the picture; that the important dramatic situation is where "the captain commits the murders with impunity, masquerading as a very affable and very considerate captain; concerned about the welfare of everybody on board, which is a mask; a man who is doing a great deal of good for everybody around him, but in reality driven by a murderous, homicidal, sadistic drive, growing psychologically out of a great fear of failure"; that the basis of those occurrences psychologically is identical; that the situation in the picture when Tom begins to understand the captain and wants to warn the rest of the crew about what sort of a character he was, and the way everyone turns from him, is identical with the play. There was testimony that "the psychological employment by the captain of his authority, * * * the fetish he makes of it; that he is the only thing in the world worth while and that everybody who stands in his way" will be destroyed, was literally copied from the play by the picture; that although the captain could dispose of either Brancato or Tom, he does not dispose of him, but by some peculiar psychological reasoning or quirk within him feels that he must convince this man that he is right; that a peculiar insane drive to bend this man psychologically to his will, is similar in play and picture; that the captain in both play and picture says to the man who holds the secret that he is a murderer, "I give you the freedom of the ship. You tell anybody that I am a murderer, * * * and see if they will believe you." Further there was testimony that if the general public, after having seen the play, saw the picture and listened to the dialogue, they could not avoid detecting in the picture the important elements of the play.

There was also testimony to the effect that the primary plot of the play concerns itself with the psychopathic homicidal captain, who is in charge of the ship, and who murders the people whose lives are under his control; that "the dramatic scene is brought out—by the situation where there is only one man on board who knows that the captain is a murderer and goes to the captain and charges him with it," who passes it off by saying, in effect, that he can't get anybody on board the boat to believe him; that dramatically what the audience sees in the picture is the captain committing murders and telling the other man on the boat, "You can try to convince anybody on the ship that I am a murderer."

The play was submitted to RKO and read by its story department in the summer of 1942. It was returned to respondents with the statement that it was not suitable for RKO at that time. Appellant Lewton, during the time involved here, was story editor and a producer employed by RKO. In December, 1942, RKO assigned the production of a picture, which at that time had only a title, "The Ghost Ship," to Lewton. One Fanty was employed to write a story for the picture. Early in April, 1943, respondents submitted the play, "The Man and His Shadow" to Lewton, who read it. About May 7, 1943, Fanty delivered his story to Lewton. Fanty's story was not satisfactory. After Fanty's story was discarded, Lewton was looking for a sea story for the picture "The Ghost Ship." RKO needed a ship story in order to utilize a ship set it had on hand and save some cost of construction. At this time Lewton had respondents' manuscript on his desk. "The Man and His Shadow" was returned to respondents about May 21, 1943. They had some difficulty in securing its return. Between the time that "The Man and His Shadow" was delivered to Lewton and its return to respondents, respondents had two or more conversations with Lewton. In the course of the conversations Lewton told them that he was looking for a sea story. They suggested to him "The Man and His Shadow," which they said was a psychological thriller—a play on a boat, showing lust for power. They showed Lewton laudatory articles of the play published in newspapers at the time it was produced at the Pasadena Laboratory Theatre. Lewton indicated that he was concerned about the cost of a picture based on the play. Respondents told him that it was not necessary that the play take place on a luxury yacht, that it could be set on a tramp steamer; that a picture could be made with an all male cast, creating the same dramatic atmosphere, by cutting out minor characters and changing the picture set so as to have just the basic story of the captain and the other men and their relationship with the real figure, the captain. Lewton said to them, "You know, Mr. Golding, I personally really don't have to buy any story. I usually take an idea and I take my writers and tell them what to do, and that's the way it is done."

About May 23, 1943, and either just before or shortly after "The Man and His Shadow" was returned to respondents, employees of RKO began the writing of the screen play for "The Ghost Ship." Lewton acted as chairman of the group and participated in all conferences in the writing of the screen play. He made a substantial contribution to the ideas in the script of the screen play. He suggested a number of story situations which were adopted in the picture as finally produced. He guided the creative writing of the picture. He made contributions with respect to the characters, the characterizations, the development of the theme and of the plot, and of the dramatic sequence of events. The screen play was completed early in July, 1943. Shooting of the picture began about July 29, 1943. Lewton was the producer of the picture. As producer he had the responsibility of making the picture and was in charge of all concerned in the making of the picture. Neither the screen play, nor the cutting continuity, nor any writing from which the picture was made, was introduced in evidence.

[1, 2] Respondents' right is the common-law right of an author in his unpublished manuscript. It is the sole right to decide by whom, when, where, and in what form, his manuscript shall be published for the first time; to restrain others from publishing it without his permission and from using it without his authority; and to recover damages from those publishing it without his permission or using it without his authority. Palmer v. DeWitt, 47 N.Y. 532, 7 Am.Rep. 480; Moore v. Ford Motor Co., D.C., 28 F.2d 529, 536; Johnston v. Twentieth Century Fox Film Corporation, 82 Cal.App.2d 796, 187 P.2d 474. To constitute an invasion of respondents' right, it is not necessary that the whole of the play should have been copied, or even a large portion of it, in form or substance. An unauthorized appropriation is not to be neutralized on the plea that "it is such a little one." Universal Pictures Co. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354, 361. In "Law of Copyright and Literary Property," Ball says (p. 371): "If a substantial number of incidents, scenes and episodes in an alleged infringing play are so nearly identical in detail, combination and arrangement with those found in the copyrighted book, to which the author of the play had access, as to exclude all reasonable possibility of chance coincidence and point inevitably to the conclusion that they were taken from the book, the play is a piracy, irrespective of the fact that some of the similarities may logically result from identity of subject matter, theme and locale."

[3] The ultimate test laid down by some courts to be applied in determining whether any substantial part of the play was used in the picture is stated in Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F. 2d 1, 18: "The question really involved in such comparison is to ascertain the effect of the alleged infringing play upon the public, that is, upon the average reasonable man. If an ordinary person who has recently read the story sits through the presentation of the picture, if there had been literary piracy of the story, he should detect that fact without any aid or suggestion or critical analysis by others. The reaction of the public to the matter should be spontaneous and immediate." See, also: Kustoff v. Chaplin, 9 Cir., 120 F.2d 551, 561; Dymow v. Bolton, 2 Cir., 11 F.2d 690, 692; Barbadillo v. Goldwyn, D.C., 42 F.2d 881, 885; 13 Corpus Juris, sec. 307, p. 1136; 18 C.J.S., Copyright and Literary Property, § 111. The test, thus stated, appears to us to be deceptive for it is obvious that an ordinary observer could not differentiate between the original or unoriginal material included in the play and the picture, and could not say, from such shallow comparison, whether a substantial similarity between them is traceable to material copied from sources in the public domain, as the use of old or stock situations, or common sources, or arises from coincidence. Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 23, 24; Sheldon v. Metro-Goldwyn Pictures Corporation, D.C., 7 F. Supp. 837; 18 C.J.S., Copyright and Literary Property, § 113, 231, 232. If dissection rather than observation is required to discern any resemblance, there is no piracy. Dymow v. Bolton, 2 Cir., 11 F.2d 690, 692; Frankel v. Irwin, D.C., 34 F.2d 142, 144; Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 25; Ball, Law of Copyright and Literary Property, sec. 270, p. 618. In Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 561, 90 P.2d 371, 374, the test laid down for determining whether a substantial part of a play was copied in a picture is: Do "the two works, when compared, show pronounced similarities of substantial portions of protectable material, i. e., of details, sequence of events, and manner of expression and treatment, as to warrant the inference of copying"?

[4-6] A dispute exists between the parties as to whether the test to be applied here—a case of alleged piracy of unpublished, uncopyrighted material—is the same as that applied in cases of alleged piracy of copyrighted material. The test for determining whether there is piracy is the same in both cases. The only distinction between the two classes of cases is that the law permits "fair use" of copyrighted

material. It does not permit "fair use" of unpublished, uncopyrighted material. In each case the first question to be determined is whether there has been piracy. In a case of alleged piracy of unpublished, uncopyrighted material, piracy is to be determined by application of the test laid down in the Barsha case. In a case of alleged piracy of copyrighted material, the first question to be determined is whether there has been piracy; and the test to be applied is that laid down in the Barsha case. In the latter class of cases, if piracy is found, then the question of whether there has been "fair use" is to be determined. Sheldon v. Metro-Goldwyn Pictures Corporation, 2 Cir., 81 F.2d 49, 54; 18 C.J.S., Copyright and Literary Property, § 94, p. 219. The privilege of "fair use" accorded in statutory copyrighted cases is not accorded by the common law in the case of unpublished works and the author has exclusive control of his work. Civ. Code sec. 980; 18 C.J.S., Copyright and Literary Property, § 5, p. 140; 13 C.J., § 2, p. 946. "Fair use" is defined as use for "some legitimate, fair, and reasonable purpose, such as for illustration, comment, criticism, and the like." Sheldon v. Metro-Goldwyn Pictures Corporation, 2 Cir., 81 F.2d 49, 54; Hill v. Whalen & Martell, D.C., 220 F. 359, 360.

[7-14] Access is admitted. Access alone "means nothing." "There must still be similarity." Cain v. Universal Pictures Co., D.C., 47 F.Supp. 1013, 1015. Proof of access means that appellants read respondents' play before or in the course of the production of the picture. Kustoff v. Chaplin, 9 Cir., 120 F.2d 551, 560. There is no piracy because of similarity of locale, the taking of a general idea or scheme, or an historical incident, or the use of old or stock situations or dramatic ideas. Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 17; Moore v. Ford Motor Co., D.C., 28 F.2d 529, 536; Barbadillo v. Goldwyn, D.C., 42 F.2d 881; Echevarria v. Warner Bros. Pictures, D.C., 12 F.Supp. 632. Ideas, as such, are not protected. Kalem Co. v. Harper Bros., 222 U.S. 55, 32 S.Ct. 20, 56 L.Ed. 92, 96, Ann.Cas.1913A, 1285; Holmes v. Hurst, 174 U.S. 82, 19 S.Ct. 606, 43 L. Ed. 904, 906; Johnston v. Twentieth Century Fox-Film Corporation, 82 Cal.App. 2d 796, 187 P.2d 474. At "common law, as well as under the copyright acts, it is the form, sequence, and manner in which the composition expresses the idea which is secured to the author, not the idea." Moore v. Ford Motor Co., D.C., 28 F.2d 529, 536; O'Rourke v. RKO Radio Pictures, D.C., 44 F.Supp. 480, 483. It is only in the expression of an alleged infringed work that monopoly inheres; "the 'theme,' * * * the 'ideas' may always be freely borrowed." Dellar v. Samuel Goldwyn, Inc., 2 Cir., 150 F.2d 612; Dellar v. Samuel Goldwyn, Inc., 2 Cir., 104 F.2d 661. It has been said that "plot," "sequence of events," and "theme," mean the same thing. Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 24. Other cases and writers disagree. The "theme" of a play or picture is the dominant emotion of the basic character. The "theme" is personified by the basic character. The "plot" is the story or narrative. It is "the designed sequence of connected incidents." It is the thing which moves the play from cause to effect. It means, as its etymology implies, a weaving together. The "theme," or dominant emotion, personified by the basic character, evolves and develops by means of the "plot"—the story—motivated by conflict, complication or intrigue, or both, to a crisis and climax. Price, The Analysis of Play Construction and Dramatic Principle, 3, 46, 140; Malevinsky, The Science of Playwriting, 63, 110, 162, 219, 233, 234; Baker, Dramatic Technique, 58; Andrews, Technique of Playwriting, 35, 45, 63; Frankel v. Irwin, D.C., 34 F.2d 142, 143; Roe-Lawton v. Hal E. Roach Studios, D.C., 18 F.2d 126, 127; Becker v. Loew's Inc., 7 Cir., 133 F.2d 889, 892.

[15-19] If such similarities exist as to justify an inference of copying of protectible material, it is necessary to prove only that a substantial part of respondents' play was copied to sustain liability on the part of appellants. Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 561, 90 P.2d 371. A subsequent author cannot avoid liability by making changes in, or by omissions from, or by additions to, the original story. Unlawful appropriation cannot be excused by a showing that there was much

of the original work which was not appropriated. Barsha v. Metro–Goldwyn–Mayer, supra. With access admitted, similarity of incident rests upon a high degree of probability of copying and a low degree of probability of independent creation. Shipman v. RKO Radio Pictures, 2 Cir., 100 F.2d 533, 538. "Unconscious plagiarism is actionable quite as much as deliberate." [Sheldon v. Metro-Goldwyn Pictures Corporation, 2 Cir., 81 F.2d 49, 54.] Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 198, 51 S.Ct. 410, 75 L.Ed. 971, 976, 76 A.L.R. 1266; Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 16; Fred Fisher, Inc. v. Dillingham, D.C., 298 F. 145, 148.

[20-22] Were we judges of the facts, we would have no hesitation in saying that, as ordinary observers, having read the play and sat through a presentation of the picture, we could not detect any literary piracy of the play without critical analysis; nor was there, in our minds, any spontaneous or immediate reaction that there was piracy. We would have been compelled to agree with appellants' contention that, from a reading of the play and a viewing of the picture alone, there is no evidence of similarity of protectible material. We are not judges of the facts. Appellants are in error in their contention that if we read the play and view the picture and find no similarity we must conclude that there is no sufficient evidence to support the implied finding of the jury that in the production of the picture appellants copied, appropriated, and embodied, part of the play. Issues of identity and piracy are for the jury. Barsha v. Metro–Goldwyn–Mayer, 32 Cal.App.2d 556, 560, 90 P.2d 371; Liggett & Meyer Tobacco Co. v. Meyer, 101 Ind.App. 420, 194 N.E. 206, 213; Brunner v. Stix, Baer & Fuller Co., 352 Mo. 1225, 181 S.W.2d 643, 651. The question of whether there is piracy is always simply one of fact. Universal Pictures Co. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354, 360; Moore v. Ford Motor Co., D.C., 28 F.2d 529, 536; 13 C.J., § 307, p. 1137; 18 C.J.S., Copyright and Literary Property; § 111, p. 228. As we have said, there was direct testimony that there was piracy. There was evidence from which the jury could infer that appellants deliberately copied, appropriated, and embodied, parts of the play in the picture. Twelve jurors and the trial judge so inferred.

Analysis of the play and the picture discloses the following similarities of detail, sequence of events, and manner of treatment, which the jury reasonably could have found. Barsha v. Metro–Goldwyn–Mayer, 32 Cal.App.2d 556, 561, 90 P.2d 371. The setting of both is on a ship. The background of both is the life of a captain on a ship. The emotional response, stimulated in both play and picture, is horror. The theme of each is madness and ruthlessness. The basic character in each is the captain. Madness and ruthlessness are the dominant emotions of Crawley in the play and of Stone in the picture. Each is a homicidal egomaniac. Each murders with reckless abandon. Crawley to Brancato: "Anyone who opposes me will be destroyed!" Again, "Justice—bah!—It's only the strong that survive!" Crawley to DeVries: "—alive you are dangerous to me." Stone to Tom: "I have rights over their [the crew's] lives—I have certain rights of risk over them.—Death is absolute." Again, "Men are worthless cattle and a few men are given authority to rule them."

Each captain has the same subsidiary or secondary emotions: egotism, fear, jealousy, hate and revenge. These subsidiary emotions thread in and out of play and picture in the development of the plot. Each captain parades his superiority and authority. Each brazenly flaunts his authority as captain. Each "can bore through you, or wither you with a levelling glance of contempt." Each captain resents intermeddling with his prerogatives as captain —Crawley by DeVries—Stone by Tom and Louie. Crawley says to DeVries: "You're an intermeddler—Alive you are dangerous to me." Stone says to Tom: "I have already given you my considered opinion as to the danger involved." He killed Louie because he was a troublemaker. Each is accused of murder. Each seeks to avert suspicion by saying that his accuser is suffering from hallucinations or delusions. In play and picture, the accusers are at the mercy of the captain. Each captain permits his accuser freedom of the ship while scheming to destroy him. Each accuser goes to the first officer and says that the captain is a criminal. Neither first officer will listen. In play and picture the captain is beset by fear. Crawley—fear of discovery of the fact that he is not Captain Mason, that he had murdered Mason, that he had murdered Malone. When Brancato suspects that Crawley killed Malone, Crawley fears that DeVries also suspects him. Later Crawley fears DeVries. Stone says, "I'm not afraid of anything but failure. —I might have failed." He says, "I am afraid—afraid of my mind." Each captain is plagued with the fear that others are suspicious of him. Crawley to DeVries: "You're always watching me—thinking about me—I want you to be afraid of me, but you're not—you've been watching me, studying me, persecuting me.—Why don't you leave me alone?" Stone to agent: "I don't want him [Tom] on my ship.—People seem to be turning against me—the boy—some of the crew. I feel their dislike—their distrust."

The conflict between the emotions of the captain and the emotions of the secondary characters creates the same complications in play and picture. In the play the captain says to Brancato, "Go ahead! Expose me! You have the freedom of the ship! We will see whom they believe." In the picture the captain says to Tom, "—there isn't a man who will listen or believe you—go any place on board ship—see if you can get them to help you—try and get help against me—try—try—try." In play and picture no one will believe them. As the plot develops in the play, DeVries becomes aware that the captain is not Captain Mason, that he is a murderer and dangerous to all on board. As the plot evolves in the picture, the radioman and first officer become aware that the captain is incompetent, crazy, a murderer and dangerous to all on board. In play and picture the identical complications bring about the final crisis, the ultimate emotional point: the mental breakdown of the captain. In each the climax is the inevitable result of the conflict between the captain and his accuser. The climax, the thing that happens to the causative character—the captain—is the same. He loses, he dies. It is the logical result of the captain's moving through substantially the same sequence of events or episodes. In each the climax satisfies the same emotional reaction of the audience. Play and picture are orientated to the idea that justice will ultimately triumph.

The dominant emotion of the accuser in both play and picture is justice. Each is actuated by the idea of bringing a murderer to justice. Each endeavors to do so in the same way. Neither is believed or listened to. As the plot unfolds, others realize that he is right. In the play DeVries becomes convinced. In the picture the radioman and the first officer awaken. In play and picture, the knowledge that others are convinced of his guilt brings about the death of the captain.

One watching the play and viewing the picture may find similarities between DeVries and the Finn. Both probe beneath the surface. Both are the first, other than the accusers, to become aware of what is occurring on the ship. DeVries makes written notes "explaining what goes on around us." The Finn appears at intervals from the opening of the picture, making mental notes which are conveyed to the audience by the voice of a person unseen. In the play DeVries watches over, protects and schemes for the accuser, Brancato. In the picture the Finn watches over, protects and schemes for the accuser, Tom. DeVries, in the play, the Finn in the picture, brings about the death of the captain.

If similar emotions are portrayed by a sequence of events presented in like manner, expression, and form, then infringement is apparent. Nichols v. Universal Pictures Corporation, D.C., 34 F.2d 145, 147. We cannot say that the jury could not reasonably have concluded that sufficient subject matter of the play, as to setting, atmosphere, sequence of events, and detail of narrative, was utilized in the picture as to constitute piracy. There is as much similarity here as existed between "I Am the Law" and "The Valley of Silent Men" in International Film Service Co. v. Affiliated Distributors, D.C., 283 F. 229, in which Judge Knox found infringement.

In Nutt v. National Institute Inc. for the Improvement of Memory, 2 Cir., 31

F.2d 236, 238, the court said: "Copying is not confined to a literary repetition, but includes various modes in which the matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration." A picture may be a piracy in whole or in part, irrespective of the fact that some of the similarities may logically result from identity of locale, theme, and subject matter. Ball, The Law of Copyright and Literary Property, sec. 173, p. 371. A reasonable inference which is supported by evidence cannot be disturbed by this court. The effect of inferences reasonably deduced from facts in evidence is not destroyed by the testimony of witnesses when the testimony is contradictory of the inferences. The uncontradicted testimony of the witnesses in the employ of appellant RKO, who took part in the conception and production of the picture, that they did not use plaintiffs' play, does not compel the conclusion that respondents' production was not pirated. Sheldon v. Metro-Goldwyn-Pictures Corporation, 2 Cir., 81 F.2d 49; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371. Merely because a reviewing court, as ordinary observers having read the play and viewed the picture, cannot, from such reading and observation, detect any literary piracy of protectible material, is not sufficient ground for reversing the judgment. A reversal is compelled only where there is no substantial evidence in support of the verdict. If two opposing inferences as to piracy may fairly and reasonably be deduced from the evidence, the question is determined by the jury and it cannot be set aside by this court on the ground that it is not sustained by the evidence. Hamilton v. Pacific Electric R. Co., 12 Cal.2d 598, 602, 86 P.2d 829; Washko v. Stewart, 20 Cal.App.2d 347, 348, 67 P.2d 144; Beck v. Sirota, 42 Cal.App.2d 551, 557, 109 P.2d 419.

The evidence of access, the circumstances under which the screen play was written, the fact, that Lewton, who read the play, took the lead in the writing of the screen play and produced the picture, comparison of play and picture, and the testimony of similarities, were sufficient to warrant the jury in concluding that there was piracy.

Appellants refer us to decisions of Circuit Courts of Appeal in equity cases where the courts have reviewed the facts and found no piracy after a holding of piracy by a District Court, or have found piracy after a holding of no piracy by a District Court. Those decisions are of no value here. On appeal in equity cases the Circuit Courts of Appeal review questions of fact subject to the rule that the finding of the trial court will not be lightly disturbed. Oxley v. Sweetland, 4 Cir., 94 F.2d 33; Standard Accident Ins. Co. v. Simpson, 4 Cir., 64 F.2d 583, 588, certiorari denied 290 U.S. 688, 54 S.Ct. 123, 78 L.Ed. 593; Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 5. In actions at law the rule in the federal courts is the same as here. White v. United States, 10 Cir., 48 F.2d 178, 180; Security Nat. Bank v. Old Nat. Bank, 8 Cir., 241 F. 1, 6.

There is sufficient evidence to support the finding of the jury that by the production and distribution of the picture the value of the motion picture rights of the play was reduced in the amount of the verdict—$25,000. Appellants say that as to the value of the play "the finding was supported only by the testimony of the plaintiffs as owners of the play, and that their estimated value was supported by no witness versed in the value of such literary property, and was contradicted specifically, not only by the expert witnesses called by the appellants, but also by circumstances and facts which were of greater evidentiary value than the unsupported opinion of the owners of the property or of the experts called by the appellants"; that as to the second element, i. e., the value of the play after the production and distribution of the picture, the plaintiffs testified that the play was of no value and that such testimony is not substantial evidence in support of the verdict.

[23] The owner of property may, without being qualified as an expert, testify as to his opinion of the value of such property, the weight and value of such testimony being left to the jury. Wigmore states the principle as follows: "* * *

the general test, that any one familiar with the values in question may testify, is liberally applied, and with few attempts to lay down detailed minor tests. The owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury." 3, Wigmore on Evidence, sec. 716, p. 48. See, LeBrun v. Richards, 210 Cal. 308, 319, 291 P. 825, 72 A.L.R. 336; Hood v. Bekins Van & Storage Co., 178 Cal. 150, 152, 172 P. 594: Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 14, 151 P. 286; 20 Am.Jur. 751, sec. 892. "Literary property is not distinguished from other personal property and is subject to the same rules. * * *" Universal Pictures Co. v. Harold Lloyd Corporation, 9 Cir., 162 F.2d 354, 369. See, also, Yadkoe v. Fields, 66 Cal.App.2d 150, 160, 151 P.2d 906; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371.

[24, 25] Plaintiff Golding testified, as an owner, that the value of the motion picture rights of the play, "The Man and His Shadow" as of May, 1943, was "anywhere between 25 to 50 thousand dollars * * * 25 thousand dollars would be a very minimum price." He also testified that after the production and distribution of the motion picture, "The Ghost Ship," the motion picture rights were of "no value." Plaintiff Faulkner testified, not only as an owner but as an expert, that the reasonable market value of the motion picture rights of the play, as of May, 1943, "was fifty-thousand dollars, but if necessary we would have sold it for twenty-five," and that after the production and distribution they were of no value. The foregoing evidence as to value is sufficient to support the award of damages. The most that can be said of the testimony of appellant's experts that the stage play contained no material of value for motion picture purposes, is that it created a conflict in the evidence. Appellants severely criticize counsel for respondents, for arguing in his brief, and in support of his contention that the award of damages is supported by the evidence, that "The fact that dramatic critics reviewing it (the play) engaged in extravagant praise of its 'novel theme,' 'sparkling dialogue,' 'powerful dramatic situations,' etc., is evidence which abundantly supports the jury's implied finding of value." Appellants' stricture of the argument is well taken. Counsel for respondents knew, or should have known, that the reviews of dramatic critics were no evidence whatsoever of value or of damages. The reviews were received in evidence because they were handed to Lewton by respondents. Counsel for respondents expressly stated to the court that they were offered for a limited purpose. They were received in evidence for that limited purpose only. The trial judge instructed the jury, in effect, that they were not evidence of the truth of their contents. The argument is highly improper and should not have been made.

The judgment and order appealed from are, and each is, affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

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85 Cal.App.2d Supp. 827

NYULASSIE v. MOZER.

Civ. A. 6665.

Superior Court, Appellate Department,
Los Angeles County, California.

April 29, 1948.

1. Appeal and error 🔑919

Allegations of amended complaint, demurrer to which was sustained without leave to amend, must be taken as true on appeal from judgment of dismissal.

2. Fraud 🔑41

Complaint alleging that tenant was induced to deliver up housing accommodations to his damage in stated amounts by false representations in notice to quit given pursuant to OPA eviction certificate, based on same representation, that premises were required for occupancy of landlord's son and daughter-in-law stated a cause of action against landlord for damages for fraud and deceit. Civ. Code, §§ 1709, 1710.

3. Administrative law and procedure ⚿501
Landlord and tenant ⚿278½
War ⚿4

Finding by OPA as basis for eviction certificate that premises were required for occupancy of landlord's son did not preclude recovery of damages by tenant for fraudulently inducing him to deliver up possession of premises by false representation as to such intended use, where such false representation was made to tenant after issuance of eviction certificate. Civ. Code, §§ 1709, 1710.

Appeal from Municipal Court of Los Angeles; Lucius P. Green, Judge.

Action by J. C. Nyulassie against P. Mozer, etc., to recover damages for fraud and deceit by which tenant was induced to deliver up possession of housing accommodations. From a judgment of dismissal plaintiff appeals.

Judgment reversed with instructions.

Kelsey Petterson, of Los Angeles, for appellant.

William Katz, of Los Angeles, for respondent.

STEPHENS, Judge.

[1] This is an action for damages by a tenant based upon fraud and deceit by which plaintiff was induced by the landlord to quit and deliver up possession of certain housing accommodations occupied by plaintiff. The trial court sustained a demurrer, without leave to amend, to plaintiff's amended complaint, and therefore all of the allegations thereof must, for our purposes, be taken as true.

They are, briefly, that defendant was the owner and plaintiff the tenant of said premises; that defendant obtained from the Rent Director, on October 1, 1946, a certificate relating to eviction by the terms of which defendant was authorized to pursue his local remedies for eviction of plaintiff four months from August 21, 1946, upon the sole condition, however, that the premises were to be used for the use and occupancy of Mr. and Mrs. Maurrie Mozer, son and daughter-in-law of defendant; that on October 17, 1946 defendant served plaintiff with a notice to quit and deliver up possession by December 21, 1946, stating it was required for the purpose above indicated, and reciting that it was given pursuant to certificate of the Office of Price Administration; that said representations concerning the intended immediate use were false and known by defendant to be false and were made with intent to deceive and defraud plaintiff; that in truth defendant at the time had no daughter-in-law and did not intend that his son would occupy said premises; that plaintiff believed and relied upon said representations and was induced thereby on or about December 21, 1946 to quit and deliver up possession of said premises to defendant; that as a direct and proximate result of this fraud and deceit plaintiff was damaged (in certain alleged amounts).

[2] We are of the opinion that this complaint clearly sets forth a cause of action and that the trial court was in error in sustaining a demurrer thereto without leave to amend.

Section 1709 of the Civil Code provides that "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." Section 1710, Civil Code, says that "A deceit, within the meaning of the last section, is either: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; * * *."

In the case of Davis v. Schweikert, 1900, 130 Cal. 143, 62 P. 411, the Supreme Court had before it the following situation: Defendant Albert Schweikert leased to plaintiff certain property for a term of five years; this lease contained a provision that if during the term defendant should sell the property, the lessee would yield possession and deliver up the premises to lessor; after one year defendant Albert Schweikert wanted to get rid of plaintiff and in order to do so made a sham and fraudulent deed to his wife (codefendant); the latter then told plaintiff that she had bought the property and paid $6,000 for it and wanted possession; plaintiff believed this, and relying thereon, moved out and gave up possession; later he learned that the supposed sale was a pretended and fraudulent transaction and brought an action for damages. The Supreme Court in upholding a verdict in his favor said: "The lease conveyed to plaintiff the premises for the term of five years, subject to the condition expressly written in the lease that it should terminate upon the property being sold by the lessor. The covenant must be understood as meaning an actual bona fide sale, and not a fraudulent one. It was not contemplated, or, at least, the law does not contemplate, that the lessor could by a pretended fraudulent sale, made for the very purpose of defeating his lessee of his estate, avoid the lease, and thus take advantage of his own wrong. The plaintiff, therefore, having a conveyance subject to be defeated upon condition, is entitled and was entitled to the estate so conveyed, unless the defendant could and did show that the conveyance was made in good faith, and was such conveyance as contemplated in the lease. We think the evidence is amply sufficient to sustain the verdict."

The principles enunciated therein by the Supreme Court are applicable here. The basis of the action before us is the deceit practiced directly upon plaintiff, by the contents of the notice served upon him, and the fact that as a necessary step in the fraudulent plan defendant also deceived the Office of Price Administration in order to get the certificate does not alter the situation. Nor is plaintiff's right of action in any way changed by the fact that he is deprived of a right accorded him by statute rather than one based upon contract.

In the recent case of Rosenbluth v. Sackadorf, Dec. 1947, 190 Misc. 665, 76 N.Y.S. 2d 447, 450, the Supreme Court of New York had before it a case similar in most essentials to the case before us. Defendant had obtained a certificate of eviction from the OPA by false and fraudulent representations and thereafter by the same false testimony obtained a final order from the Municipal Court directing plaintiff to vacate by a certain date, which he did. Thereafter defendant rented the apartment to another tenant at a higher rental and plaintiff brought his action for damages in the Supreme Court. Upon motion to dismiss the complaint for legal insufficiency, the Court sustained the complaint. We quote from the opinion: "The misrepresentations made to the OPA and the court were in essence continuous and were but part of the whole picture of misrepresentation to the plaintiff, for defendants' ultimate motive was to defraud the plaintiff. Their liability to the plaintiff, as the person defrauded, is the same as if the false representations had been made directly to him. [In our case the misrepresentations were made directly to plaintiff.] Eaton Cole & Burnham Co. v. Avery, 83 N.Y. 31, 38 Am.Rep. 389; Ultramares Corporation v. Touche, 255 N.Y. 170, 179, 174 N.E. 441, 444, 74 A.L.R. 1139. * * *

"Assume that a landlord and tenant in a written lease agreed that the tenant must vacate, regardless of the expiration date of the lease, whenever the landlord chose to occupy the tenant's apartment. Assume, further, that the landlord gave notice to the tenant that he so desired it, but subsequently it developed that that was never his intention. Can it be denied that the tenant, having given up the balance of his term on the strength of such representation at substantial damage to himself, could not (sic) sue in fraud to recover such damage? [It will be noted that the court might well have cited Davis v. Schweikert, supra, in answer to his question.] It needs no argument to demonstrate that the same result must follow where the tenant has a statutory right, for to deprive one of such a right is no less redressable than to deprive him of a contractual right."

[3] We are not here concerned with the effect of an intervening determination by a court upon the truth of the representations, involved in that case but not in ours. In the case before us there is not only no determination thereof by a court, but even if it be argued that the finding by the OPA would present a similar situation (which we do not decide), an examination of the dates as hereinabove noted discloses that the false representations were made to plaintiff herein subsequently to the issuance of the certificate by the OPA. (See also, to the same effect, Reid v. Brown, Oct. 1946, 24 N.J. Misc. 350, 49

A.2d 311, by the District Court of New Jersey.)

We find no inconsistency between the holding in the case of Tranchina v. Arcinas, 1947, 78 Cal.App.2d 522, 178 P.2d 65, cited by respondents, and the views herein expressed, for in that case the gist of the action, that is, the wrong done to the plaintiff, was not the fraud practiced upon plaintiff, by which he was induced to quit as in the case at bar, but the "perversion of the writ of possession to a purpose forbidden by law" which "amounted to an actionable abuse of the process of the court." (78 Cal.App.2d at pages 524, 525, 178 P.2d at page 67.) Respondents also rely upon two cases by the United States District Court (E. Distr. of Penn.), Leidy et al. v. Connor et al., D.C., Mar. 1947, 70 F.Supp. 1022, and Fleming, Admr. v. Posternock, D.C., Mar. 1947, 71 F.Supp. 821. In both of those cases, however, the complaint of the tenant (complaint in intervention, in the latter) was based upon a supposed cause of action founded upon the statute itself. (Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 901 et seq.), and in each case the court held that such a suit was not provided for by the statute. The case of Thomsen v. Texon, 189 Misc. 972, 73 N.Y.S.2d 543, cited by appellant, was not only not followed, but was specifically rejected in a later decision by another court of the same jurisdiction in New York, Rosenbluth v. Sackadorf, supra. The decision of this court in Loos v. Greve[1] et al., Civ. A 6426 (Feb. 1947) (not published), relied upon by appellant, is not in conflict with our present ruling, for in that case, as pointed out in the decision, it appeared from the somewhat vague allegations of the complaint that plaintiff quit voluntarily after service of some sort of notice, the exact contents of which did not appear but which apparently entirely misconstrued the OPA certificate, and notwithstanding the fact that no steps had been taken to even terminate the tenancy, much less to evict the tenant. No representations made to the plaintiff appeared in that case.

The judgment dismissing plaintiff's complaint is reversed with instructions to overrule the demurrer, appellant to recover his costs of appeal.

SHAW, P. J., and BISHOP, J., concur.

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[1] No opinion for publication.

31 Cal.2d 848

In re GOLDER'S ESTATE.

GOLDER v. GOLDER.

S. F. 17521.

Supreme Court of California, in Bank.
May 21, 1948.

Rehearing Denied June 10, 1948.

1. Wills ⚷130

Writings which meet statutory requirements relating to holographic wills must have been executed with testamentary intent. Probate Code, § 53.

2. Wills ⚷130

Letter containing many personal matters in no way connected with testamentary disposition of property was not inoperative as a holographic will merely because assertedly dispositive words were found in postscript but such fact might be considered in determining intent, if language used did not clearly show the writer's purpose thereby to dispose of his property on his death. Probate Code, § 53.

3. Wills ⚷487(1)

Where words which may be construed as testamentary are used in informal document such as letter, and it is not entirely clear that writer intends thereby to control disposition of his property at his death, liberality is exercised in admitting extrinsic evidence to show intent. Probate Code, § 53.

4. Wills ⚷487(1)

In proceeding for admission to probate as a holographic will a letter addressed to writer's mother in California, commenting on unsettled conditions and stating that writer was trying to persuade wife and child to go to California to live, and reciting that there was enclosed for safekeeping the writer's bank stock, life insurance, and a letter of credit, and reciting in a postscript written in pencil that writer's insurance was made out to wife and that if writer should not come back from the war, he wanted his savings and stocks to go to mother, extrinsic evidence to show that intent was properly admitted. Probate Code, § 53.

5. Wills ⚷72, 130

Trial Court, in determining whether writer intended to make testamentary disposition of estate by letter addressed to mother could consider fact that no provision was made for writer's child or wife with whom he was then living, on friendly terms. Probate Code, § 53.

6. Wills ⚷130

Letter addressed by member of navy to mother, commenting on "unsettled conditions" and stating that writer was trying to persuade wife and child to go to California to live, that he was enclosing for safekeeping his bank stock, life insurance, and a letter of credit, and reciting in a postscript written in pencil that his insurance was made out to wife and that if he did not come back from the war, he wanted savings and stocks to go to mother was properly denied admission to probate as holographic will, in view of informal character of documents, lack of certainty in language used, and surrounding circumstances. Probate Code, § 53.

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Proceeding in the matter of the estate of William Henry Golder, deceased, by Margaret B. Golder, proponent, against Alyse V. Golder, contestant, for probate of instrument as will. Judgment refusing to admit the instrument to probate, and proponent appeals.

Affirmed.

Prior opinion, 185 P.2d 54.

L. L. James and Carl E. Day, both of San Francisco, for appellant.

J. Elwood Andresen of Oakland, for respondent.

GIBSON, Chief Justice.

The sole question in this case is whether a letter written by decedent William Henry Golder to his mother, appellant herein, constitutes a valid holographic will. We are of the opinion that the judgment of the trial court refusing to admit the document to probate must be affirmed.

The letter, dated December 13, 1941, was written while Golder was stationed in New York as a member of the United States Navy and was received by his mother in

California a few days later. His wife Alyse, respondent herein, and their child were then living in Philadelphia. In the letter Golder said he was "lucky" in that he would be able to be with his wife and child for Christmas. He commented on the "unsettled conditions" and stated that he was trying to persuade them to go to California to live. He told his mother that he was enclosing "for safekeeping" his bank stock, life insurance, and a letter of credit for $475 on a new automobile. The letter was signed "Your loving son, Bill."

Immediately below the signature was the following postscript: "P. S. I have a surprise coming for you and hope it works out. This is all I can tell you. *My insurance is made out to Alyse so should I get in this war and not come back I want my savings & stocks to go to you. Keep in touch with Alyse.—1516 Lehigh Ave., Phila. Pa.*"

The italicized portion of the postscript was written in pencil, whereas the body of the letter, the signature and the first two sentences of the postscript were written in pen and ink. Since the letter was received within a few days after its date, however, it would appear that the postscript was written about the same time as the body of the letter.

Golder was sent overseas in June of 1943, approximately a year and a half after the letter was written, and was killed in action in the Pacific on August 1, 1943.

The trial court, after hearing extrinsic evidence introduced for the purpose of showing decedent's intent, found and concluded that the document "is not the last will of said decedent for the following reasons: a. The said document is wholly lacking in testamentary character. b. The said document was not intended by decedent to be his last will. c. The said document was not executed in conformity with the law, by reason of the fact that it was undated and was not subscribed or signed."

[1, 2] Assuming, without deciding, that the writing met the requirements of section 53 of the Probate Code relating to holographic wills, it must also be shown to have been executed with testamentary intent. Estate of Button, 209 Cal. 325, 287 P. 964; Estate of Spitzer, 196 Cal. 301, 237 P. 739. The assertedly dispositive words are found in the postscript of a letter containing many personal matters in no way connected with the testamentary disposition of property. This fact would not make the letter inoperative as a will, but it is a factor which may be considered in determining the intent of the writer if the language used does not clearly show that it was his purpose thereby to dispose of his property on his death. Language similiar to that used here has been held to be dispositive where the character of the instrument and the surrounding circumstances have indicated a testamentary intent. Estate of Cook, 173 Cal. 465, 160 P. 553. On the other hand, a letter, in which much the same language was used as that employed here, was refused probate where no extrinsic evidence was offered to show intent because, when the letter was read as a whole, it appeared "that the deceased was contemplating matrimony rather than death." Estate of Henning, 186 Cal. 307, 308, 199 p. 39, 40.

[3, 4] When words which may be construed as testamentary are used in an informal document such as a letter, and it is not entirely clear that the writer intends thereby to control the disposition of his property at his death, the courts have been very liberal in admitting extrinsic evidence to show intent. Estate of Spitzer, 196 Cal. 301, 237 P. 739; Clarke v. Ransom, 50 Cal. 595; Estate of Pagel, 52 Cal. App.2d 38, 42, 125 P.2d 853; see Estate of Smith, Cal.Supp., 191 P.2d 413; Estate of Janes, 18 Cal.2d 512, 515, 116 P.2d 438. Although the letter and the postscript in the present case apparently were written at about the same time, there is some indication that the entire postscript may not have been written at the same sitting since the first two sentences are in ink and the remainder is in pencil. It is not clear whether the "surprise" referred to in the first two sentences has any relation to Golder's expressed desire to provide for his mother which is contained in the following sentence. Nor can it be said with reasonable certainty whether the direction "Keep in touch with Alyse" indicates that

the realization of the wish expressed in the preceding sentence depended upon future action. If the sentence relied on as establishing testamentary disposition stood alone, the intent would be reasonably plain, but when read in context it cannot be said to require a finding as a matter of law that Golder intended thereby to control the disposition of his property at death and that nothing further was to be done to make the expressed wish operate as a will. The trial court therefore properly admitted extrinsic evidence for the purpose of showing intent.

The letter was written within a few days after war was declared, and Golder, who had been a member of the U. S. Navy for a number of years, was subject to being sent into a combat area. The record does not disclose how long he had been married to Alyse, but in 1941 their child Margaret was at least six years of age. Although he was then stationed in New York, he visited his wife and child in Philadelphia on weekends. Golder was later transferred to California, and at his request his wife and child followed in November of 1942. They established a home in San Leandro, near where he was stationed. Some time later Golder's mother came to live with them, and the wife moved out and went to live with her sister because she could not get along with his mother. Golder was transferred back to the East coast about April, 1943. In June of that year his wife went to Nevada to establish residence for the purpose of obtaining a divorce, but what, if any, steps were taken by her do not appear. As we have seen, Golder was killed in the Pacific in August, 1943.

The estate was valued between $2,500 and $3,000 and consisted of bank stock, a savings account in the sum of $288.62, a letter of credit for $475 on the purchase of an automobile, and some mechanic's tools. At the time the letter was written Golder had an insurance policy for $1,000 payable to his wife, or, in the event of her death, to his daughter, which was taken out in December, 1935, soon after the child was born. Sometime after the start of the war Golder took out a $9,000 policy in which his mother was named as beneficiary.

[5] In determining whether Golder intended to make a testamentary disposition of his estate by the letter of December 13, 1941, the trial court could, and no doubt did, take into consideration the fact that no provision was made for his child or his wife, with whom he was then living on friendly terms. The savings and stocks referred to in the letter constituted substantially Golder's entire estate, and if the expressed wish of Golder were held to be testamentary, it would mean that the child was left unprovided for by the will, although she might have a claim as a pretermitted heir. In the letter he made a number of references to his child and it would seem strange that he should ignore her if he were disposing of almost everything he had. Moreover, his mother, who is claiming as the legatee, was subsequently provided for as the beneficiary of a $9,000 insurance policy. The only insurance carried for the wife or child was the policy for $1,000, the proceeds of which were given to the child pursuant to an agreement between the wife and husband.

[6] In view of the informal character of the document, the lack of certainty in the language used when read with the letter as a whole, and the surrounding circumstances shown by the extrinsic evidence, we cannot say, as a matter of law, that the court was in error in concluding that the letter was not operative as a will.

The judgment is affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

SCHAUER, Justice.

I concur in the majority judgment and opinion here in accord with the same principle of appellate procedure which required my dissents in Isenberg v. Calif. Emp. Stab. Com., (1947), 30 Cal.2d 34, 47–48, 180 P.2d 11; Union Oil Co. v. Union Sugar Co., Cal.Sup., (1948), 188 P.2d 470; Estate of Smith, Cal.Sup., (1948), 191 P.2d 413; Adoption of Parker, Cal.Sup., (1948), 191 P.2d 420. To record continuity of reference and consistency of position it seems proper to point out that the majority opinion here, in the rule it applies, is consistent with the dissents and inconsistent with the majority opinions in the cases cited.

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31 Cal.2d 853

DOUGLAS AIRCRAFT CO., Inc., v. INDUSTRIAL ACC. COMMISSION et al.

L. A. 20415.

Supreme Court of California.

May 25, 1948.

Rehearing Granted June 21, 1948.

1. Workmen's compensation 🔑2016

Provision of Labor Code that no award of compensation shall be rescinded, altered, or amended after 245 weeks from date of the injury, creates a jurisdictional limitation upon Industrial Accident Commission to make an award altering, amending or rescinding its final orders with respect to a claim on which commission has already acted but commission may make a determination after that time has expired, providing application requesting such action is filed during the 245-week period. Labor Code, § 5804.

2. Workmen's compensation 🔑2017

Where award of compensation for total temporary disability left injured employee without any decision upon issue of permanent disability presented by employee's petition filed within the 245 weeks statutory period after which an award cannot be altered, amended, or rescinded, Industrial Commission on request for further hearing could award permanent disability more than 245 weeks following the injury. Labor Code, § 5804.

Workmen's compensation proceeding for permanent disability by Melvin C. Chaffee, employee, opposed by Douglas Aircraft Company, Inc., a self-insured employer. To review an award for permanent disability made by the Industrial Accident Commission, the employer brings certiorari.

Award affirmed.

Frederick E. Hines and John A. Dundas, both of Santa Monica, and Patrick H. Ford, of Los Angeles, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondents.

EDMONDS, Justice.

Douglas Aircraft Company, a self-insured employer, by writ of certiorari is seeking the annulment of an award for permanent disability made by the Industrial Accident Commission in favor of an injured employee.

In 1941, Melvin C. Chaffee sustained injury arising out of and in the course of his employment. Four years after his injury, Chaffee applied for compensation benefits, explaining that medical treatment, including two operations had been furnished by the employer up to that time. The application stated that it was filed "To determine the permanent disability rating as a result of the above operations." In April, 1946, which was 251 weeks after the injury, Chaffee was awarded $19.57 per week for total temporary disability.

No rehearing was sought as to this award. Shortly after it became final and 261 weeks after the injury, Chaffee filed a "Request for Further Hearing," seeking a determination of the issue of permanent disability. Hearings were had and in June, 1947, the commission issued a "Supplemental Award" giving Chaffee $19.57 per week for 189 weeks based upon a 47¼% permanent disability rating. Following the denial of the employer's petition for a rehearing, the Douglas company commenced this proceeding.

The petitioner takes the position, as it did in the petition for rehearing, that the commission acted without and in excess of its jurisdiction in awarding indemnity for permanent disability. Prior judicial decisions, it argues, have limited the jurisdiction of the Industrial Accident Commission to act to the 245-week period provided in Labor Code sections 5804 and

5410, the only exception being, as stated in Gobel v. Industrial Acc.Comm., 1 Cal.2d 100, 33 P.2d 413, that if the application is filed within 245 weeks, the commission may make its determination after that time has expired.

The answer of the commission is that since the employee filed his application for adjustment of claim, which included a request for permanent disability rating, within the time specified by the provisions of the Labor Code, there was jurisdiction to hold the final hearing and award permanent disability compensation more than 245 weeks following the injury. This conclusion is based upon the decision in the Gobel case, supra. As further justifying its award, the commission insists the employer erroneously assumes "that an injured employee whose condition during the 245 weeks following injury does not become so stationary as to justify a verified petition stating the exact limits of his permanent disability, loses his right to any compensation for such permanent disability."

[1] The jurisdiction of the commission is limited by section 5804 of the Labor Code which provides: "No award of compensation shall be rescinded, altered, or amended after 245 weeks from the date of the injury." This provision, by its terms, creates a jurisdictional limitation upon the commission to make an award altering, amending, or rescinding its final orders with respect to a claim on which it has already acted. Hanna, Industrial Accident Commission Practice and Procedure, 1943, p. 118. However, under the rule announced in the Gobel case, the commission may make a determination after that time has expired, providing the application requesting such action is filed during the 245-week period. Gobel v. Industrial Acc. Comm., supra. Both of the parties rely upon this construction of the statutory requirement, but they disagree upon the question as to whether or not Chaffee is entitled to its benefits.

The findings made in support of the first award included the statement: "Applicant's condition is not yet stationary and permanent, and jurisdiction is hereby reserved to determine extent of permanent disability, within 245 weeks from date of injury, upon request of any party in interest." More than 245 weeks had intervened between the time of the injury and the date of this finding. One construction of it is that the applicant had not sustained permanent disability. But it is equally reasonable to say that, because of the commission's erroneous computation of time, a determination in regard to the permanency of his injury was deferred.

[2] This action left Chaffee without any decision upon the issue of permanent disability presented by his petition filed well within the statutory period, and his "Request for Further Hearing" was based upon the commission's error in this regard. He there stated that the commission had failed to find on the issue of permanent disability, and the question remained open and undetermined. The award which followed the further hearing was the first decision of the commission upon that issue, and was jurisdictionally justified by the rule of the Gobel case.

The award is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

85 Cal.App.2d 497

WIRIN v. HORRALL et al.

Civ. 16340.

District Court of Appeal, Second District, Division 2, California.

May 17, 1948.

1. Pleading ⚷214(2)

A demurrer admits well-pleaded allegations of complaint.

2. Appeal and error ⚷917(2)

On appeal from a judgment of dismissal predicated upon sustaining of a demurrer, that plaintiff could prove all facts as alleged in the complaint would be assumed.

3. Searches and seizures ⚷7(10)

Persons lawfully within United States are entitled to use public highways and have a right to free passage thereon without interruption or search, unless a public officer authorized to search knows of probable cause for believing that the vehicle is carrying contraband or that the occupants thereof have violated some law. Const.Cal. art. 1, § 19; U.S.C.A.Const. Amend. 4.

4. Searches and seizures ⚷7(1)

All illegal searches and seizures are "unreasonable" under state and federal constitutional prohibitions against unreasonable searches and seizures Const.Cal. art. 1, § 19; U.S.C.A.Const. Amend. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Unreasonable Searches" and "Unreasonable Seizures".

5. Searches and seizures ⚷7(10)

Alleged action of city police on specified occasions in blocking off designated portions of city and stopping all persons and automobiles entering or leaving the blocked off area and searching them without first obtaining a search warrant and without having probable cause for believing the searched individuals to have violated some law or that automobiles were carrying contraband, would be unconstitutional as being "unreasonable searches and seizures". Const.Cal. art. 1, § 19; U.S.C.A.Const. Amend. 4.

6. Municipal corporations ⚷994

An action to obtain a judgment restraining and preventing illegal expenditure or waste of funds of a city may be maintained against any officer, agent, or other person acting in its behalf by a citizen resident therein who has within one year before the commencement of the action paid a tax to the city. Code Civ. Proc. § 526a.

7. Municipal corporations ⚷994

Citizen resident of city who had paid a tax to city within one year prior to filing of complaint could maintain an action against police officers to restrain officers from expending funds of city in blocking off areas of city and conducting illegal searches and seizures by searching all persons and automobiles entering or leaving such area without a search warrant and without reasonable cause to believe that searched citizens had violated any law or that searched automobiles contained contraband. Code Civ.Proc. § 526a; Const. Cal. art. 1, § 19; U.S.C.A.Const. Amend. 4.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by A. L. Wirin against C. B. Horrall and others to enjoin defendants from expending funds of the City of Los Angeles in blocking off designated areas of the city and stopping all persons and automobiles entering or leaving such areas and searching them without first obtaining search warrants. From a judgment of dismissal, plaintiff appeals.

Judgment reversed with directions.

A. L. Wirin and Fred Okrand, both of Los Angeles, for appellant.

Nathan Schoichet, of Los Angeles, amicus curiae, for appellant.

Ray L. Chesebro, City Atty. and Bourke Jones and Roger Arnebergh, Asst. City Attys., all of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from a judgment of dismissal predicated upon the sustaining, without leave to amend, of a demurrer to plaintiff's complaint by which it was sought to obtain an injunction restraining defendants from expending funds of the city of Los Angeles in conducting "police blockades", that is, blocking off designated areas of the city of Los Angeles and stopping all persons and automobiles entering or leaving such areas and searching them without first obtaining search warrants.

The material allegations of the complaint well pleaded are these, that:

I

Plaintiff is a citizen of the United States, of the state of California, of the city of Los Angeles, and a taxpayer of the city of Los Angeles, having paid a tax to the city within a year prior to the filing of the complaint.

II

Defendants are police officers of the city of Los Angeles.

III

Defendants acted in excess of their authority as police officers.

IV

Defendants expended illegally large sums of money of the city of Los Angeles by blockading large areas of said city and stopping all persons and automobiles entering or leaving said area without first obtaining a search warrant therefor,[1] and on other occasions, in addition to searching persons entering and leaving the blockaded areas, they, without search warrants, searched every person within the designated area.[2]

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[1] In paragraph III (1) of the complaint it is alleged as follows: "On March 14, 1947, the defendants conducted a 'police blockade' on the East side of the City of Los Angeles at seven (7) intersections, said intersections being Bailey and North Main Streets; First Street and Mission Road; Soto and Marengo Streets; Jefferson Blvd. and San Pedro Street; Washington Blvd. and Central Avenue; 103rd Street and Wilmington Road and 103rd Street and Central Avenue, from 9 o'clock to midnight. In addition to the defendants, approximately two hundred (200) police officers participated in said blockade, said police officers being divided up in seven (7) crews. Approximately thirty (30) police officers were stationed at each of said intersections. Said defendants, and said police officers, thereupon stopped every motor car entering into any of said intersections, or leaving any of said intersections; they questioned the occupants of said automobiles, ordered many of said occupants to leave their automobiles, searched said automobiles thoroughly, including the glove compartments of said automobiles, and searched the trunk or baggage compartments located thereat; in addition, they searched the persons of a large number of the occupants of said automobiles; a large number of the persons so stopped and/or searched, by the defendants were not arrested, or detained further; a number of the persons so stopped, searched and detained were arrested but were thereafter released by the defendants after extended detention, and without being brought before a magistrate without unreasonable delay or at all.

"Said defendants had no search warrants and said searches were not pursuant to any search warrant; the conduct of the defendants above set forth was without the consent of, and against the will of, the persons treated as hereinabove described."

[2] In paragraph III (4) and (5) of the complaint it is alleged as follows: "On the evening of June 5, 1947, the defendants blockaded, pursuant to a 'police blockade' the entire area of the City of Los Angeles, bounded by Main Street, Central Avenue and 4th and 6th Streets; they questioned every person within that area; they searched said persons, ordering a large number of them to remove their shoes or themselves removing said shoes of said persons by physical force; they questioned said persons and fingerprinted them; all automobiles entering and leaving said area were stopped, the occupants questioned and cars searched; they searched every bar, cafe and rooming house in said area; of the large number of persons detained, approximately three hundred and fifty (350) persons were booked or arrested. In other respects, the conduct of the defendants was as set forth in paragraph (1) hereinabove.

"(5) On the evening of June 19, 1947, the defendants conducted a raid of all bars along West Pico Blvd. from Flower Street to Alvarado Street; approximately one hundred (100) police officers participated in said raid or raids; one hundred and fifty (150) persons were arrested; only sixteen (16) however, were jailed. The persons arrested were questioned by the defendants and searched in a so-called 'field station', specially set up by the defendants in the Georgia Receiving Hospital on Georgia Street, Los Angeles. In other respects, the conduct of the defendants was as set forth in paragraph (1) hereinabove."

V

Defendants publicly announced that they intend to continue to conduct "police blockades" as hereinabove set forth at times and places unannounced unless enjoined by court order.

VI

The acts of defendant constitute a violation of (1) the Fourth Amendment to the Constitution of the United States, and (2) Article I, section 19, of the Constitution of the State of California.

Defendants filed a demurrer to the foregoing allegations of the complaint on the ground that they did not constitute sufficient facts to state a cause of action. This demurrer was sustained without leave to amend and a judgment of dismissal entered thereon.

Questions Presented for Determination

First: *Did the facts as alleged in the complaint state a cause of action?*

This question must be answered in the affirmative and is governed by these pertinent rules of law:

[1, 2] (1) A demurrer admits all the allegations of the complaint which are well pleaded, and it must be assumed on appeal from a judgment predicated upon the sustaining of a demurrer that plaintiff could prove all the facts as alleged in the complaint. (Kleiner v. Garrison, 82 Cal.App. 2d 442, 187 P.2d 57; Abroms v. New York Life Ins. Co., 53 Cal.App.2d 764, 772, 128 P.2d 391. See also cases cited in 21 Cal. Jur., 1925, p. 96, sec. 62.)

[3] (2) Persons lawfully within the United States of America are entitled to use the public highways and have a right to free passage thereon without interruption or search, unless a public officer authorized to search knows of probable cause for believing that the vehicle is carrying contraband or that the occupants thereof have violated some law. (U.S.Const., amend. IV; Cal.Const. art. I, sec. 19; Carroll v. United States, 267 U.S. 132, 154, 45 S.Ct. 280, 285, 69 L.Ed. 543, 552, 39 A.L.R. 790.)

[4] (3) All *illegal* searches and seizures are "unreasonable" under the provisions of Amendment IV of the Constitution of the United States, and Article I, section 19, of the Constitution of the state of California. (See cases cited in 56 Corpus Juris, 1932, p. 1162, sec. 14, Searches and Seizures, note 17; p. 1164, sec. 17; p. 1165, sec. 22, note 1.)

Amendment IV of the Constitution of the United States reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution of the State of California reads in part as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." (Constitution of 1849, art. I, sec. 19.)

Mr. Chief Justice Taft, in considering the Fourth Amendment of the Constitution of the United States with reference to unlawful search and seizure of automobiles, in Carroll v. United States, supra, thus stated the rule: "But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

The reasons for the adoption of the Fourth Amendment of the Constitution of the United States and Article I, section 19 of the Constitution of the State of California must be continually borne in mind if we are to preserve the individual liberties of citizens of this country and state. To safeguard the rights and liberties set forth in our federal and state constitutions, such rights must be strictly enforced, otherwise we will gradually whittle away our liberties and destroy our form of government with the inevitable result that there will be substituted a despicable form of totalitarianism. Such form of government has always been abhorrent to our people.

The object to be attained by the adoption of the constitutional provisions above set forth is best expressed by Judge Cooley in his monumental work on Constitutional Limitations: "It was the peculiar excellence of the common law of England that it recognized the worth, and sought especially to protect the rights and privileges, of the *individual man.*" (Italics added. Vol. I, Cooley's Constitutional Limitations, 8th Ed. 1926, p. 73.) This statement is equally applicable to the Constitutions of the United States and the State of California. This end is best accomplished by insuring that "The provisions prohibiting unreasonable searches and seizures 'should receive a liberal construction, so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers.'" (Cooley's Constitutional Limitations, supra, p. 617.)

In discussing the unlawful search and seizure provisions in the Fourth Amendment of the Constitution of the United States, Mr. Justice Bradley in Boyd v. United States, 116 U.S. 616, 629, 6 S.Ct. 524, 531, 29 L.Ed. 746, 750, says:

"Then after showing that these general warrants for search and seizure of papers originated with the Star Chamber, and never had any advocates in Westminster Hall except *Chief Justice* Scroggs and his associates, *Lord* Camden proceeds to add:

"'Lastly it is urged as an argument of utility that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery, and perjury, that are more atrocious than libeling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.'

"After a few further observations, His Lordship concluded thus: 'I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of opinion that the warrant to seize and carry away the party's papers in the case of a seditious libel is illegal and void.'

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of *Lord* Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other.

"Can we doubt that when the fourth and fifth amendments to the constitution of the

United States were penned and adopted, the language of *Lord* Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true *criteria* of the reasonable and 'unreasonable' character of such seizures?"

[5] Applying the above stated rules to the facts of the instant case we must assume that each of the facts set forth above is true.[3] Therefore defendants (1) stopped automobiles and searched them and (2) stopped individuals and searched them, without having probable cause to believe that the automobiles contained contraband or that the individual citizens had violated any law.

These acts were contrary to the provisions of the Fourth Amendment of the Constitution of the United States and Article I, section 19 of the Constitution of the State of California,[4] and therefore, since the acts were illegal, the searches and seizures were unreasonable[5] and prohibited by the foregoing constitutional provisions.

In view of these facts it is evident that defendants were wasting and unlawfully expending funds of the city of Los Angeles, and plaintiff as a taxpayer of such city had a right to have such illegal acts enjoined. The complaint stated a cause of action.

Second: *Does plaintiff have the right to maintain the present action as a taxpayer of the city of Los Angeles?*

This question must also be answered in the affirmative and is governed by this rule:

[6] An action to obtain a judgment restraining and preventing illegal expenditure or waste of funds of a city may be maintained against any officer, agent, or other person acting in its behalf by a citizen resident therein who has within one year before the commencement of the action paid a tax to such city. (Sec. 526a, C.C.P.; Brown v. Boyd, 33 Cal.App.2d 416, 423, 91 P.2d 926.)

[7] It is apparent that if defendants acted as alleged their acts were unlawful and beyond the scope of their authority. Therefore they were illegally expending and wasting the public funds of the city of Los Angeles in (a) using the equipment of the police department of the city in illegal and unauthorized acts and (b) expending the time of the paid police officers of the city of Los Angeles in performing illegal and unauthorized acts. It is clear that if defendants acted as alleged, and we must for the purpose of this opinion assume they did, their acts were ultra vires.

This opinion is not to be taken as a criticism of defendants or of the police department of the city of Los Angeles, which we believe is endeavoring to properly enforce the laws of the state of California and of the city of Los Angeles. However proficient the law enforcing agency may be it does not by virtue thereof acquire ascendency over the law. In a free government it must constantly be borne in mind that each and every individual, no matter what his state of wealth or official position, is subject to the constitution adopted by the people and the laws made pursuant thereto, and that where a violation of law necessarily follows, acts of executive and administrative officials are not given validity on the theory that "the end justifies the means".

Judge Irving Lehman of the Court of Appeals of New York, in an address before the New York Bar Association in 1930, speaking anent this subject, well expresses the American Judicial concept. He said: "They [the police] regard themselves in a sense as soldiers engaged in a warfare against crime, and in that warfare they sometimes apply the maxim of 'inter arma, silent leges.' In the din of war the voice of law is drowned. We have complacently accepted that maxim in warfare against external and avowed enemies. I fear that many complacently accept it as a necessary incident of what we choose to call the warfare of the State against crime.

"We are told that the police should not be hampered in conscientious efforts to bring to justice those who break the law.

* * *

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[3] Rule (1), supra.

[4] See rule (2), supra.

[5] See rule (3), supra.

"Perhaps the police should be permitted to arrest suspects and postpone arraignments before a magistrate until they have exhausted attempts to extract admissions or confessions of guilt. Perhaps the police should be permitted to use what we euphemistically call the 'third degree' or other modern and scientific substitutes for the rack and thumbscrew. If so, the Constitution and the statutes should be changed, but so far no one has had the temerity to suggest such changes.

"Of course, no such suggestions would receive serious consideration. They would strike too deep at the roots of all our cherished traditions and ideals, but suggestions that the courts should not hamper public officers by restricting them to the use of lawful methods seem to many of our citizens in accord with practical common sense. Our boasted guarantees of liberty, it would seem, are so precious that they must be kept for special occasions and not subjected to the wear and tear of daily use. *Not so may the courts treat these guarantees. In a court of law no argument based on expediency can ever justify a lawless invasion of a legal right."* [6] (Italics added.)

In view of our conclusions it is unnecessary to discuss other issues argued by counsel.

The judgment is reversed with directions to the trial court to overrule the demurrer and allow defendants a reasonable time within which to file an answer if they be so advised.

MOORE, P. J., and WILSON, J., concur.

85 Cal.App.2d 559

MONTGOMERY et ux. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 16285.

District Court of Appeal, Second District, Division 2, California.

May 19, 1948.

1. Alteration of instruments 🔑17

Deed, altered without knowledge, consent or approval of grantors after it had been signed by them and transmitted to escrow holder, was void.

2. Escrows 🔑14(1)

Where a deed is placed in escrow by the grantor with instructions to holder to deliver it to grantee upon compliance by latter with instructions, delivery of deed by escrow holder before the grantee has complied with instructions conveys no title.

3. Deeds 🔑44, 54

A void instrument, such as an undelivered or forged deed, does not convey anything and cannot be made the foundation of a good title.

4. Alteration of instruments 🔑17

Where escrow holder changed description in deed in violation of express instructions of grantors deed would be considered an undelivered and forged instrument.

5. Principal and agent 🔑150(2)

A principal is not bound by unauthorized act of his agent unless he had knowledge of agent's violation of his authority. Civ. Code, § 2310.

6. Escrows 🔑14(1)

As a depositary, an escrow holder is required to obey instructions of parties as to delivery of property deposited with him, and if the subject is personal property, the escrow holder would be answerable in damages for violation of his instructions.

7. Escrows 🔑14(1)

Where deed was absolutely void and conveyed no title to grantees because escrow holder violated his instructions and changed legal description without authority of grantors, grantors could recover property through action to quiet title or by action to rescind upon returning consideration paid by grantee, and escrow holder would be liable in damages for costs and expenses incurred by grantors in recovering their title, but not for value of the property.

Appeal from Superior Court, Los Angeles County; Henry H. Willis, Judge.

Action by Austin H. Montgomery and wife against Bank of America National Trust & Savings Association, a national banking association, for damages for alleged alteration of a deed held in escrow by defendant. From the judgment, plaintiffs appeal.

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[6] N.Y. Law Journal, Feb. 28, 1930.

Judgment affirmed.

Robert E. McGurl, of Los Angeles, for appellants.

Hugo A. Steinmeyer, G. L. Berrey and Geo. L. Beckwith, all of Los Angeles, for respondent.

WILSON, Justice.

This is an action to recover damages from defendant by reason of the alteration of a deed signed by plaintiffs conveying a portion of a lot and placed by them in escrow with defendant, whereby the description was changed after the deed was placed in escrow so as to cover the entire lot. Plaintiffs appeal from a judgment in favor of defendant.

Prior to December 1, 1945, plaintiffs were the owners in fee of Lot 27 of Tract 5822, having a frontage of 100 feet on Dickens Street. On the east half of the lot is a 5-room house having the street address 14277 Dickens Street. The west half of the lot is vacant. Between the east and west halves of the lot there are three trees.

By an instrument dated December 12, 1945, plaintiff A. H. Montgomery leased to Jean Manning "the dwelling house and its appurtenances situated at 14277 Dickens Sherman Oaks" for one year beginning January 1, 1946. On December 13, 1945, Mr. Montgomery signed an option granting to Mrs. Manning the right to purchase the "premises located at 14277 Dickens Avenue, Sherman Oaks" for the sum of $10,500. Thereafter Mr. and Mrs. Manning went into possession of the house under the lease. On January 2, 1946, Mr. Montgomery received in the mail a letter from defendant enclosing escrow instructions and a grant deed in blank, neither of which contained a description of any property whatsoever. Thereupon Mr. Montgomery inserted in the escrow instructions, in the place designated for the description of the property, the following words and figures: "Property referred to in this escrow being the East half of Lot 27 together with the buildings and improvements thereon erected, being house No. 14277 Dickens Avenue, Sherman Oaks." He inserted in the deed after the words "described as" the following: "Property being the East half of Lot 27 together with the buildings and improvements thereon erected, being house No. 14277 Dickens Avenue, Sherman Oaks." He then forwarded the escrow instructions and deed by mail to Mrs. Montgomery, who at the time was visiting in New York. About five days later the documents were returned by Mrs. Montgomery to her husband, both deed and escrow instructions having been signed by her. Mr. Montgomery then signed both papers and sent them to the escrow department of defendant's Sherman Oaks branch. Mr. Montgomery did not thereafter enter the bank nor did he talk to any of its agents or employees concerning the deed or the escrow instructions. Mrs. Montgomery never saw the deed nor the escrow instructions after she mailed them in New York to her husband and she did not at any time enter the bank and did not discuss the matter of the escrow or of the deed with any of defendant's agents or employees.

On January 30, 1946, there was recorded in the office of the County Recorder of Los Angeles County a grant deed purporting to have been executed by Mr. and Mrs. Montgomery to Mr. and Mrs. Manning in which the property purported to have been conveyed was described as "Lot 27 of Tract 5822." On January 30 the escrow department of defendant paid to Mr. and Mrs. Montgomery the sum of $10,500 less deductions for existing encumbrances and liens.

During the period from December 31, 1945, the date on which the escrow was opened by Mr. and Mrs. Manning, and January 30, 1946, the date of payment by defendant to plaintiffs, as above mentioned, the Mannings and the Montgomerys at no time saw or talked to each other. About the middle of March, 1946, Mrs. Montgomery inquired at the tax collector's office for the tax bill on the west half of Lot 27 and was informed that the Mannings appeared as record owners of the entire 100-foot lot. Whereupon plaintiffs went to defendant's Sherman Oaks branch and demanded an explanation from its employees as to why the entire lot had been transferred.

The settled statement on appeal recites the evidence as follows: The escrow officer, Dewey R. McVey, and the escrow clerk, Charles Rogers, of the Sherman Oaks branch bank testified that on December 30, 1945, Mr. and Mrs. Manning asked to open an escrow concerning the property under the terms of their option and were unable to supply the legal description but told Rogers that the property was located at 14277 Dickens Avenue; that Rogers, under the direction of McVey, prepared the escrow instructions in duplicate and placed upon the first page the words "Legal description to be handed in at a later date. Property known as 14277 Dickens Avenue, Sherman Oaks"; that on the second or reverse page, which required the sellers' signatures, the description was left blank; that Mr. and Mrs. Manning signed the purchasers' instructions on the first page, and thereafter the escrow clerk prepared the grant deed from the Montgomerys to the Mannings but did not insert any description in the blank provided therefor; that he mailed the deed and the escrow instructions to Mr. Montgomery, and both papers were returned to him signed by the Montgomerys; that thereafter he obtained the lot and tract number of the property and the book and page of the map in which it was recorded but that he did not erase the description placed in the deed by Mr. Montgomery nor did he insert the altered or changed description which appeared in the deed at the time of its recordation. The escrow officer, McVey, testified that he had no independent recollection of the transaction other than that he had signed the letter transmitting the deed and escrow instructions to Mr. Montgomery, and that after the deed had been returned he placed his notarial seal and signature thereon. It should be noted that although Mrs. Montgomery was in New York and Mr. Montgomery was in Los Angeles, several miles distant from Sherman Oaks, and the escrow officer had never seen either of the parties, he certified over his signature and official seal as a notary public that they both personally appeared before him and acknowledged the execution of the deed. This was in violation of section 1185 of the Civil Code and is declared to be a misdemeanor by section 6203 of the Government Code, formerly section 167 of the Penal Code. McVey further testified that the escrow clerk, Rogers, admitted several months prior to the trial that he must have altered the deed by erasing the description placed in it by Mr. Montgomery and inserting the description that it bore at the time it was recorded. The evidence is conclusive that the deed was altered after it was received in defendant's escrow department at the Sherman Oaks branch.

[1, 2] Since the deed was altered without the knowledge, consent or approval of plaintiffs, after it had been signed by them and transmitted to the escrow holder, it was void. Where a deed is placed in escrow by the grantor with instructions to the holder to deliver it to the grantee upon compliance by the latter with the instructions, the delivery of the deed by the escrow holder before the vendee has complied with the instructions conveys no title. Promis v. Duke, 208 Cal. 420, 425, 281 P. 613; Drinkwater v. Hollar, 6 Cal.App. 117, 121, 91 P. 664; Brown v. Wilson, 89 Cal. App. 764, 766, 265 P. 351; Los Angeles City High School Dist. of Los Angeles County v. Quinn, 195 Cal. 377, 383, 234 P. 313.

The escrow instructions were introduced in evidence. On the page signed by the Mannings there was inserted the words and figures "Lot 27 of Tract 5822, Sheets 1 and 2" above the words "Legal description to be handed in at a later date" originally appearing therein. Plaintiffs did not approve the change. On the reverse page, which was signed by plaintiffs, no alteration was made. Plaintiffs' instructions are in evidence and they still refer to and direct the delivery of a deed covering the east half of the lot upon payment of $10,500 into the escrow by the grantees. The money was deposited by the purchasers within the time required by the option and by the escrow instructions, but their instructions called for a deed to the entire lot. The escrow holder having altered the deed so as to cover the entire lot instead of the east half which plaintiffs intended to convey the latter's escrow instructions were not complied with and the deed therefore conveyed no interest whatsoever in the property to the purchasers.

[3, 4] A void instrument such as an undelivered or a forged deed does not convey anything and cannot be made the foundation of a good title. Trout v. Taylor, 220 Cal. 652, 656, 32 P.2d 968. The deed in question in this action is an undelivered instrument by reason of its having been recorded contrary to the express instructions of plaintiffs. It is a forged instrument by reason of the unauthorized alteration in the description after it had been signed by the grantors.

[5] It is not necessary to discuss the question whether an escrow holder is an agent or a trustee. In whatever capacity defendant was acting it was without authority to deliver the deed to the grantees covering the entire lot. Hildebrand v. Beck, 196 Cal. 141, 146, 236 P. 301, 39 A.L.R. 1076. A principal is not bound by the unauthorized act of his agent unless he had knowledge of the agent's violation of his authority. Civil Code, sec. 2310; Hildebrand v. Beck, supra, 196 Cal. page 147, 236 P. 301. Brown v. Rouse, 104 Cal. 672, 676, 38 P. 507.

[6] If the subject of this action were personal property defendant would be answerable in damages. As a depositary, an escrow holder is required to obey the instructions of the parties as to delivery of property deposited with him. Trask v. Garza, 51 Cal.App. 739, 743, 197 P. 807; Jones v. Title Guaranty & Trust Co., 178 Cal. 375, 380, 173 P. 586.

[7] Since the deed is absolutely void and conveyed no title to the grantees plaintiffs may recover the property through an action to quiet title or by an action to rescind upon returning the consideration paid by the Mannings. Since no title passed by the deed plaintiffs are able to recover the property and the escrow holder, though admittedly at fault in having altered the deed without authorization, is not liable in damages for the value of the property which plaintiffs did not intend to convey. Defendant's liability is limited to the costs and expenses that may be incurred by plaintiffs in recovering their title.

Judgment affirmed.

MOORE, P. J., concurs.

McCOMB, J., deeming himself disqualified, did not participate in the foregoing opinion.

85 Cal.App.2d 623

PEOPLE v. ARGUILIDA.

Cr. 2059.

District Court of Appeal, Third District, California.

May 24, 1948.

1. Assault and battery 🔑92

Evidence sustained conviction for an assault with a deadly weapon. Pen.Code, § 245.

2. Assault and battery 🔑92

In prosecution for assault with a deadly weapon, evidence sustained jury's determination that small pocket knife was a "deadly weapon." Pen.Code, § 245.

See Words and Phrases, Permanent Edition, for all other definitions of "Deadly Weapon".

3. Criminal law 🔑778(11), 1172(2)

In prosecution for assault with deadly weapon, evidence that defendant ran away from scene of affray, followed by two others and an officer, and that defendant was found about a block away partially concealed behind screen door of a store, justified instruction on subject of flight, but in any event giving of instruction was not prejudicial. Pen.Code, § 245.

4. Criminal law 🔑824(3)

In prosecution for assault with a deadly weapon, defendant could not complain because of trial court's failure to instruct that jury had right to convict defendant of a lesser offense, where defendant made no request for such an instruction. Pen.Code, § 245.

◆

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

John Arguilida was convicted of having committed an assault with a deadly weapon, and he appeals.

Affirmed.

Chas. H. Epperson, of Stockton, for appellant.

Fred N. Howser, Atty. Gen., and Doris Mair, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

In an information filed in San Joaquin County, Arguilida was charged with a violation of section 245 of the Penal Code, in that he committed an assault upon one Hillario Unayam, a human being, with a deadly weapon, to wit, a pocket knife. A jury convicted him, he made a motion for a new trial and a motion for referral to the Probation Officer, both of which were denied, and be appealed from the judgment and the order denying a new trial, urging as grounds for reversal that the evidence is insufficient to support the verdict, that the corpus delicti was not established, that the court misdirected the jury, and that the verdict is contrary to the law and the evidence.

The evidence shows that the victim of the assault was stabbed in the chest, while standing outside the Filipino Recreation Center in Stockton, conversing with friends, they having left the Center when closed about 1:00 a. m. As a result of his injuries Unayam was hospitalized for about a week. Appellant argues that the witnesses failed to identify him as the assailant; that their testimony only shows that someone reached over Unayam's shoulder and stabbed him, and that none of the witnesses saw the knife with which the injuries were inflicted.

Unayam testified on direct examination that Arguilida stabbed him, and he identified the defendant in the court room; but he stated he did not see the knife. On cross-examination, while he said that defendant was near him on the sidewalk leaning against the building, and he reiterated his former statement that defendant stabbed him, in reply to the question of defendant's counsel, "Somebody in the crowd just reached over your shoulder and stabbed you, isn't that right?", he said yes.

Frank Valdez, called as a witness by the prosecution, testified, however, that defendant did the stabbing, though he did not see any knife. There was also testimony that defendant ran away from the scene of the affray, followed by two Filipinos and an officer, that he was found about a block away partially concealed behind the screen door of a store, and that upon his apprehension at that place a pocket knife with "something red" upon it "near the jaws" was found on his person.

[1] Defendant's testimony in defense was brief, and consisted merely of a denial of the commission of the stabbing, the ownership or possession of the knife, or that he had concealed himself behind the screen door at the time of his apprehension by police officers. It cannot be said, therefore, that the verdict does not find support in the evidence, and conflicts in the testimony were resolved against defendant by the jury.

[2] Defendant argues also that the knife with which the stabbing was done was not a deadly weapon, because it was a small one, and because the evidence does not show the injury sustained by the victim to have been severe. But there was evidence that Unayam bled profusely, that he was taken to a hospital, and detained there for a week.

As for what constitutes a deadly weapon, the court said in People v. McCoy, 25 Cal. 2d 177, 188, 153 P.2d 315, that while a knife is not inherently a dangerous or deadly instrument as matter of law, it may assume such characteristics, depending upon the manner in which it is used, and that there arises a mixed question of law and fact which the jury must determine under proper instructions from the trial court. And in that case the conviction of assault with a deadly weapon was affirmed though the victim was not actually injured by the knife which was in the hands of her assailant and with which he threatened her.

In People v. Russell, 59 Cal.App.2d 660, 665, 139 P.2d 661, the use of a nail file with which defendant inflicted a jagged wound in his victim's face was held sufficient to support a charge of assault with a deadly weapon. Also see People v. Cook, 15 Cal.2d 507, 516, 517, 102 P.2d 752; People v. Macias, 77 Cal.App.2d 71, 174 P.2d 895.

[3] It is next urged by appellant that the trial court erred in instructing the jury on the subject of flight. It is not contended that the instruction was in itself faulty, but it is argued that there was no evidence of flight. We think that the evidence hereinabove set forth fully justified the instruction; but at any event it has not been made to appear that the giving of same resulted in prejudice to appellant. People v. Russell, supra, 59 Cal.App.2d at page 664, 139 P.2d 661; People v. Hall, 220 Cal. 166, 173, 30 P.2d 23, 996.

[4] Finally, appellant asserts that the trial court erred in failing to instruct the jury that it had a right to convict the defendant of lesser offenses. Concededly he made no request for such an instruction and he may not complain that none such was given. People v. Ramirez, 21 Cal.App.2d 466, 468, 69 P.2d 913; People v. Dozier, 35 Cal.App.2d 49, 60, 94 P.2d 598; People v. Petters, 29 Cal.App.2d 48, 51, 84 P.2d 54; People v. Welsh, 7 Cal.2d 209, 211, 60 P.2d 124. Also, in People v. McCoy, supra, 25 Cal.2d at pages 193, 194, 153 P.2d 315, it was said that it was not error to refuse an instruction on simple assault where the evidence was of such a nature that if the defendant was guilty at all he was guilty of the higher offense charged.

We find no ground for reversal of the judgment imposed, wherefore the said judgment and the order denying a new trial are affirmed.

We concur: PEEK and THOMPSON, JJ.

85 Cal.App.2d 565

RIVERSIDE RANCHO CORPORATION v. COWAN.

Civ. 16459.

District Court of Appeal, Second District, Division 2, California.

May 19, 1948.

Rehearing Denied June 3, 1948.

Stipulations ⚿14(12)

Where stipulation provided that it should not affect issues on appeal, plaintiffs waived their right to urge dismissal of defendant's appeal on ground that questions involved had become moot because defendant had accepted benefits under the judgment.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Riverside Rancho Corporation, Serge S. Besoyan and Hasmik Besoyan against E. Stewart Cowan and the Bank of America Trust & Savings Association to enjoin the sale of certain property pursuant to provisions of a trust deed. From an adverse judgment, E. Stewart Cowan appeals, and the plaintiffs move to dismiss the appeal.

Motion to dismiss denied.

Steiner A. Larsen and H. Spencer St. Clair, both of Los Angeles, for appellant.

Nathan Newby, Jr., Newby, Holder & Newby, and Nathan Newby, all of Los Angeles, for respondents.

McCOMB, Justice.

Respondents move to dismiss this appeal on the ground that (1) the questions involved have become moot, and (2) appellant has accepted benefits under the judgment, has acquiesed in it, and is therefore estopped to appeal therefrom.

Chronology Here Involved

(1) On August 12, 1946, respondents (plaintiffs herein) filed an action (No. 518224) against appellant (defendant herein) and the Bank of America Trust and Savings Association to enjoin the sale of certain property, pursuant to the provisions of a trust deed.

(2) On June 20, 1947, a judgment was entered in action No. 518224, in which it was decreed: "It is further ordered, adjudged and decreed that the principal amount of said note for $68,443.99 shall be and is hereby reduced to the sum of $24,190.59; and said reduced principal amount shall be payable according to the terms of said note, in three equal annual installments of $8,063.53 each, on the 5th day of each twelfth month, the first installment

having been due on the 5th day of January, 1947. And said defendant, her agents and employees, are hereby enjoined from enforcing the payment of said note for any sum in excess of said reduced amount of $24,190.59, and interest thereon."

(3) When respondents failed to pay the first installment of $8,063.53, as ordered in the judgment, a notice of default was recorded by the trustee.

(4) On August 22, 1947, the parties entered into a stipulation reading as follows:

"It is hereby stipulated by and between the parties hereto, through their respective counsel, that the plaintiffs herein shall pay to the defendant, E. Stewart Cowan, forthwith the following amounts: $8,063.53, being the first installment due on the note secured by the second trust deed which is the subject of this action; $1,124.16, being interest due on said note to and including August 22nd, 1947; $571.10 for and on behalf of the trustee's costs and fees in connection with the foreclosure sale; making a total of $9,758.79.

"It is further stipulated and agreed that in consideration thereof, judgment shall be entered herein in favor of the plaintiffs and against the defendants as follows:

"1. That it be adjudged that the Notice of Default recorded in Riverside County on March 18th, 1947, in Book 828, Page 62 of official records of said County was, and is, ineffective and cancelled, and that a new Notice of Default must be recorded before any legal sale of said property described in said trust deed can be made.

"2. That the defendants be enjoined from making any sale of said property in pursuance of said Second Trust Deed until three months shall have elapsed after the recording in Riverside County California of a new Notice of Default, provided any default then exists.

"It is further stipulated and agreed that no judgment shall be based upon this Stipulation until the sum of $9,758.79 shall have been delivered to E. Stewart Cowan, or her attorneys, and further, that *the execution of this Stipulation shall in no manner be construed to affect the issues on appeal in Superior Court action No. 518-224.*" (Italics added.)

On the same date a judgment was entered in action No. 533,310 pursuant to the terms of the foregoing stipulation, and respondents paid to appellant, pursuant to said stipulation, the sum of $9,758.79.

(5) On January 6, 1948, appellant, respondents not having paid the installment due January 5, 1948, filed a notice of default and election to sell under the deed of trust.

(6) On March 20, 1948, appellant caused the record on appeal to be filed in the present action.

This is the sole question presented for our determination:

Under the foregoing facts, have respondents waived their right to urge the dismissal of the appeal on the grounds that the questions involved have become moot, since appellant accepted benefits under the judgment, and acquiesed in it, thereby being estopped on appeal to urge error in the judgment?

This question must be answered in the affirmative. In the last paragraph of the stipulation entered into by the parties on August 22, 1947, appears this statement: *"the execution of this Stipulation shall in no manner be construed to affect the issues on appeal in Superior Court action No. 518-224."* (Italics added.)

It is clear from this provision of the stipulation that the parties intended to maintain the status quo even though appellant received from respondents a portion of the money adjudged to be due her by the judgment in action No. 518-224, and that respondents intended to and did waive their right to urge that the appeal should be dismissed because appellant had accepted benefits under the judgment.

In view of the fact that respondents have waived their right to urge a dismissal of the appeal on the grounds set forth above, the cases of Walnut Irrigation Dist. v. Burke, 158 Cal. 165, 110 P. 517, Turner v. Markham, 152 Cal. 246, 92 P. 485, First Nat. Bank v. Wakefield, 138 Cal. 561, 72 P. 151, Moore v. Morrison, 130 Cal. 80, 81, 62 P. 268, Mortgage Guarantee Co. v. Kolkey, 30 Cal.App.2d 629, 86 P.2d 1073, Cal. Pac. Title etc. Co. v. California M. etc. Syn. 17 Cal.App.2d 353, 61 P.2d 1181, Hild

v. Justice's Court, 11 Cal.App.2d 235, 53 P.2d 763, 55 P.2d 198, Bley v. Board of Dental Examiners, 101 Cal.App. 666, 282 P. 19, Nelson v. Nelson, 153 Cal. 204, 94 P. 880, In re Baby, 87 Cal. 200, 25 P. 405, 22 Am.St.Rep. 239, Morton v. Superior Court, 65 Cal. 496, 4 P. 489, and People v. Burns, 78 Cal. 645, 21 P. 540, are not applicable to the present situation.

For the foregoing reasons the motion to dismiss is denied.

MOORE, P. J., and WILSON, J., concur.

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85 Cal.App.2d 572

CONTRA COSTA COUNTY et al. v. PAASCH, County Clerk.

Civ. 13824.

District Court of Appeal, First District, Division 2, California.

May 20, 1948.

Schools and school districts ⚷97(4)

Alleged irregularity in election authorizing issuance of union high school district bonds, in that third publication of notice of election was made in same calendar week as election and did not comply with statute requiring publication for three successive calendar weeks prior to election, was cured by subsequent validating act, since notice given would have satisfied all constitutional requirements. Education Code, § 7402; St.1948, p. 147, §§ 5, 8(a).

Mandamus proceeding by the County of Contra Costa and another against W. T. Paasch, as County Clerk of Contra Costa County and ex officio clerk of the board of supervisors of Contra Costa County, to compel the respondent to sign certain Richmond Union High School District bonds.

Peremptory writ of mandate issued.

Francis W. Collins, Dist. Atty. and Charles L. Hemmings, Deputy Dist. Atty., both of Martinez, for petitioners.

Orrick, Dahlquist, Neff, Brown, & Herrington, by Wm. H. Orrick, Jr., all of San Francisco, for respondent.

DOOLING, Justice.

This is a proceeding in mandamus to compel respondent to sign certain Richmond Union High School District bonds in the principal sum of $3,980,000.

At an election held in the district on February 10, 1948 for the purpose of submitting the question of the authorization of these bonds to the voters the vote was 12,050 in favor of the issuance of the bonds and 1,613 against their issuance.

The only asserted irregularity in the conduct of this election, and because of which respondent has refused to sign the bonds, is a claimed lack of compliance with section 7402 of the Education Code which requires the publication of a notice of such election in a newspaper of general circulation published in the county in which the district is situated "at least once in each calendar week for three successive calendar weeks prior to the election." The publications of the notice in this case were in the "Richmond Daily Independent", concededly a newspaper of general circulation published in Contra Costa County in which the affected district is situated. They were made on January 26, February 2 and February 9, 1948. Since February 9 fell in the same calendar week as the date on which the election was held the publication was probably not a literal compliance with the requirement that it be "for three successive calendar weeks *prior to* the election." See County of Sonoma v. Sanborn, 1 Cal.App.2d 26, 36 P.2d 419, 421. We need not decide that question in this case for the reason that at its 1948 session the legislature enacted Senate Bill No. 4 which, in the manner customary in such acts, purports to validate proceedings theretofore taken by any public body under color of any law for the authorization of any public bonds. Sec. 5. This bill was signed by the governor on April 29, 1948 and as an emergency measure immediately became effective. Section 8 (a) of this act contains the following language:

> "This act shall be limited to the correction of defects, irregularities, omissions, and ministerial errors in carrying out statutory provisions which the Legislature originally could have omitted from the law under which such acts or proceedings were taken, provided that this act shall also operate to supply such legislative authorization as may be necessary to validate any such proceedings heretofore taken which the Legislature could have supplied or provided for in the law under which such acts or proceedings were taken."

By the quoted proviso it will be seen that the legislature has expressly undertaken to supply, insofar as lies in its power, retroactive authorization for any proceedings which it "could have supplied or provided for in the law under which such acts or proceedings were taken."

This court as recently as September 1946, in City of Pacific Grove v. Irwin, 76 Cal. App.2d 46, 172 P.2d 357, had occasion to examine the limits within which procedure not strictly in compliance with the statutory requirements for holding elections for the authorization of the issuance of public bonds could be subsequently validated by the legislature. The conclusion which we there stated at page 49 of 76 Cal.App.2d, 172 P.2d at page 359, applies equally to this case:

> "It is beyond argument that the legislature could have satisfied this constitutional requirement (that of Art. XI, sec. 18, Calif. Const.) by providing in advance for the precise procedure followed by the city council in calling this particular election, and under the rule last above quoted it may with equal force ratify it after it has been taken."

A statute providing in advance for the published notice of the election which was actually given would have satisfied all constitutional requirements. That being so it was well within the legislative power to validate it afterwards.

It is conceded that the proceedings looking to the issuance of these bonds was in all other respects regular and, the single claimed deviation from the statute having since been effectively validated, **it is ordered** that a peremptory writ of mandate issue as prayed.

GOODELL, Acting P. J., and GRIFFIN, Justice pro tem., concur.

PEOPLE v. BEMIS et al. *

Cr. 4205.

District Court of Appeal, Second District, Division 2, California.

May 19, 1948.

Rehearing Denied May 28, 1948.

Hearing Granted June 17, 1948.

1. Criminal law 🔑**1144(13)**

On appeal from conviction, evidence would be viewed in the light most favorable to the people.

2. Criminal law 🔑**535(2)**

Proof of the corpus delicti plus proof of the confession of a defendant is sufficient evidence to sustain a conviction.

3. Criminal law 🔑**538(3)**

Where sufficiency of evidence to establish corpus delicti was not questioned by defendant, evidence of defendant's confession to police officers that defendant had broken into a cafe and taken therefrom money, cigarettes, whisky, and keys, sustained conviction of burglary in the second degree.

4. Criminal law 🔑**698(1)**

By failing to object to the introduction of evidence in the trial court a defendant waives any objection thereto.

5. Criminal law 🔑**1036(1)**

An objection to the introduction of evidence may not be made for the first time on appeal.

6. Criminal law 🔑**1036(1), 1044**

Whether trial court erred in permitting witnesses to answer questions would not be considered on appeal from conviction wherein no objections were interposed or motion made to strike out the answers.

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* Subsequent opinion 202 P.2d 82.

7. Criminal law ⚷696(7)

Where trial court ruled in defendant's favor on motion to strike out only part of an answer, the balance of the answer was properly permitted to stand in the record.

8. Criminal law ⚷369(1)

Where charge relative to robbing a cafe other than the cafe defendant was convicted of robbing was dismissed, defendant could not urge as error the admission of testimony of police officer wherein a conversation officer had with defendant was related in which defendant denied participation in robbery of cafe concerning which charge was dropped.

9. Criminal law ⚷406(6)

Conversation had between police officer and defendant in which defendant admitted robbing cafe constituted an admission of defendant against his interest which was properly received in evidence in burglary prosecution.

10. Criminal law ⚷1037(1, 2)

Whether statement of district attorney in argument to jury constituted prejudicial error would not be considered, where defendant neither objected to the alleged misconduct nor requested trial court to instruct jury to disregard it, although harmful effects thereof, if any, would have been obviated by appropriate instruction.

11. Criminal law ⚷814(15)

In burglary prosecution where there was no testimony of an accomplice or of an alleged accomplice, no instruction on testimony of an accomplice was necessary.

12. Criminal law ⚷1038(3)

Error cannot be predicated upon failure to give a cautionary instruction pertaining to an admission or confession of a defendant in absence of a request for such instruction in the trial court.

13. Criminal law ⚷1038(3)

Where defendant did not request a cautionary instruction pertaining to admission or confession of defendant, defendant waived right to assign as error failure to give cautionary instruction.

14. Criminal law ⚷824(4)

In burglary prosecution, failure to instruct upon subject of alibi on court's own motion was not error in absence of any request therefor.

15. Criminal law ⚷824(5)

Where defendant did not request an instruction upon the distinction between a voluntary and involuntary confession, failure of trial court to instruct on its own motion on the subject was not prejudicial error.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Harlan C. Bemis was charged with an offense, and Donald E. Hudson was convicted of burglary in the second degree, and second-named defendant appeals.

Judgment and order denying motion for new trial affirmed.

Robert H. Green, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of burglary in the second degree after trial by jury, defendant appeals. There is also an appeal from an order denying his motion for a new trial.

Facts

[1] The evidence being viewed in the light most favorable to the people (respondent) and pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732, the evidence discloses that during the month of June, 1947, defendant broke into a coffee shop located at 754 South Union Street, Los Angeles, which was owned by Mrs. Eleanor Beck, and took from the cafe $125.00 in cash, a quantity of Old Taylor liquor and some keys.

Questions Presented for Determination

1. *Pertaining to the evidence*

(i) *Was there substantial evidence to support the implied findings of fact of the jury upon which the judgment was predicated?*

This question must be answered in the affirmative and is governed by this rule of law:

[2, 3] Proof of the corpus delicti plus proof of the confession of a defendant is sufficient evidence to sustain a conviction of burglary. (People v. Meyers, 7 Cal.App. 2d 351, 354, 46 P.2d 282.) In the instant case defendant does not question the sufficiency of the evidence to establish the corpus delicti. This being conceded the evidence of defendant's confession to Officers Eggenweiler and Hooper that he had broken into the cafe and taken therefrom money, cigarettes, whiskey and keys, was sufficient evidence to sustain each and every implied finding of fact upon which the judgment was predicated.

(ii) *Did the trial court err in permitting witnesses to answer questions asked to which no objection was interposed, which answers included hearsay evidence?*

[4, 5] This question will not be considered for the reason that by failing to object to the introduction of evidence in the trial court a defendant waives any objection thereto. An objection to the introduction of evidence may not be made for the first time on appeal. (People v. Duran, 57 Cal.App. 2d 363, 370, 134 P.2d 305; Hurd v. Walker, 9 Cal.App.2d 525, 527, 50 P.2d 1074; 10 Cal. Jur.(1923) Evidence, p. 824, sec. 111. See also People v. Conterno, 51 Cal.App.2d 167, 169, 124 P.2d 610.)

[6] In the instant case defendant did not object to any of the questions asked, nor did he make a motion to strike out the answers. Hence under the rule above stated he has waived his right to urge in this court that it was error to admit such evidence.

(iii) *Did the trial court commit prejudicial error in permitting the following answer of Officer Hooper to remain in the record?*

"A. * * * We had not seen a copy of the crime report before Bemis [an alleged accomplice of defendant] had stated that they had burglarized this cafe on Union and that the defendant Hudson had been with him and helped him on it. All that we knew at that time was that there had been money taken. We had the bag that was found in the personal effects of Bemis—"

Appellant's counsel made the following motion relative to the foregoing answer:

"Mr. Harvey: I move to strike the statement 'We had the bag which was found in the personal effects of Bemis' as hearsay."

[7] This motion the court granted. Since the trial court ruled in defendant's favor on the only motion or objection he made relative to the foregoing answer, the balance of the answer was properly permitted to stand in the record.

(iv) *Did the trial court commit prejudicial error in admitting the testimony of Officer Eggenweiler wherein he related a conversation he had with defendant in which defendant denied participation in the robbery of another cafe, and also admitted robbing the cafe upon which the present conviction is predicated?*

[8, 9] The admissibility of such testimony may not be here urged as error for the reasons: (a) Defendant failed to object thereto, and (b) the charge relative to the robbing of another cafe was dismissed as to defendant, and the balance of the testimony constituted an admission of defendant against his interest which was properly received in evidence. (People v. Simmons, 28 Cal.2d 699, 712, 172 P.2d 18; People v. Spencer, 78 Cal.App.2d 652, 655, 178 P.2d 520.)

2. *Pertaining to the alleged misconduct of the district attorney*

(i) *Was it prejudicial error for the district attorney in his argument to the jury to state:*

"Bemis [an alleged accomplice of defendant] wanted to break the window and Hudson didn't want to do that."

[10] This question will not be considered by us for the reason that defendant did not lay a proper foundation in the trial court for review of such question here. The rule is settled that if the alleged harmful misconduct of the district attorney could have been obviated by appropriate instructions of the trial court, a defendant may not predicate error in this court thereon in the absence of (a) assignment of such alleged misconduct as error, and (b) a request to the trial court to instruct the jury to disregard it. (People v. Ramirez, 21 Cal.App. 2d 466, 468, 69 P.2d 913; People v. Krug, 10 Cal.App.2d 172, 177 et seq., 51 P.2d 445 et seq.)

Defendant neither objected to the alleged misconduct nor did he request the trial court to instruct the jury to disregard it, although the harmful effect thereof, if any, would have been obviated by an appropriate instruction. Hence the foregoing rule is applicable.

3. *Pertaining to the Instructions*

(i) *Did the trial court commit prejudicial error in failing, on its own motion, to instruct the jury:*

(a) *As to the manner in which they should consider the testimony of an accomplice?*

(b) *That evidence of an admission of a defendant should be viewed with caution?*

(c) *On the law relative to "alibi"?*

(d) *On the distinction between a voluntary and involuntary confession?*

[11] This question must be answered in the negative for the reasons that:

(a) In the present case there was no testimony of an accomplice or of an alleged accomplice. Therefore no instruction was necessary on the subject. The cases of People v. Warren, 16 Cal.2d 103, 107, 104 P.2d 1024, and People v. Dobkin, 74 Cal.App. 2d 269, 271, 168 P.2d 729, relied on by defendant, are here inapplicable for in each of the cases cited a witness who was an accomplice testified. As heretofore stated, in the instant case an accomplice did not testify. Likewise the case of People v. Putnam, 20 Cal.2d 885, 890, 129 P.2d 367, presented by defendant is inapplicable. Such case had nothing to do with the testimony of an accomplice but was a sex case involving the question of the necessity of giving a cautionary instruction pertaining to the testimony of the prosecuting witness.

[12, 13] (b) Error cannot be predicated upon the failure of the trial court to give a cautionary instruction pertaining to an admission or confession of a defendant in the absence of a request for such an instruction in the trial court.(People v. Fowler, 178 Cal. 657, 663, 174 P. 892. See also cases cited in 7 New California Digest, McKinney (1945), Criminal Law, p. 440, sec. 817.) In the present case defendant did not request a cautionary instruction upon this subject. Therefore he has waived the right to urge that it was error for the trial court not to give such an instruction. It is to be noted that in People v. Koenig, 29 Cal.2d 87, 94, 173 P.2d 1, the failure to give a cautionary instruction such as the one here involved, when not requested in the trial court, was held not to constitute prejudicial error.

[14] (c) It is not reversible error for the trial court to fail to give an instruction upon the subject of "alibi" on its own motion in the absence of any request therefor. (People v. Whitson, 25 Cal.2d 593, 603, 154 P.2d 867. See also cases cited in 7 New California Digest, McKinney (1945) Criminal Law, p. 416, sec. 780.) In the present case defendant failed to request an instruction on the subject of "alibi".

[15] (d) It is not prejudicial error for the trial court to fail to give on its own motion an instruction upon the distinction between a voluntary and involuntary confession. (People v. Scofield, 203 Cal. 703, 709, 265 P. 914.) Defendant did not request such an instruction in the present case, hence it was not error for the trial court not to give one on the subject.

Conclusion

In view of the fact that defendant has failed to direct our attention to any prejudicial error occurring in the trial court, the judgment and order are and each is affirmed.

MOORE, P. J., and WILSON, J., concur.

85 Cal.App.2d 660

SNOOK & WELLS, Inc. v. HOLMES et al.

Civ. 3724.

District Court of Appeal, Fourth District, California.

May 25, 1948.

As Modified on Denial of Rehearing June 14, 1948.

Hearing Denied July 22, 1948.

1. Quieting title ⚿44(3)

In quiet title action by lessor of oil lands against assignee and trustee for benefit of creditors of lessee, evidence sustained finding that defendant had defaulted without justification under lease requiring drilling of oils, and was without valid claim, either on its own behalf or that of creditors of lessee to the lands in question justifying forfeiture under lease and quieting title in the lessor.

2. Quieting title ⚿46

In quiet title action by lessor of oil lands against assignee and trustee for benefit of creditors, where third parties continued operation of oil production after forfeiture under lease, court did not err in failing to determine who was entitled to money accumulated from sale of oil during operation after forfeiture, where third parties were not parties to the action, and issue was not raised by pleadings, but appeared incidentally in evidence received.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Snook & Wells, Inc., against Marion B. Holmes and others and King Lumber Company, trustee, etc., to quiet title to oil land. From the judgment defendant King Lumber Company, a corporation, trustee, etc., appeals.

Judgment in accordance with opinion.

Calvin H. Conron, Jr., and Siemon, Maas & Siemon, all of Bakersfield, for appellant.

Harvey, Johnston, Baker & Palmer, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to quiet title to 20 acres of land containing two oil wells. On March 18, 1937, the plaintiff leased this property to Marion B. Holmes who, with the consent of the plaintiff, immediately subleased it to U. S. Pumping Equipment Company. Two oil wells were drilled on the property during 1937.

By two instruments dated April 19, 1938, and September 20, 1938, the U. S. Pumping Equipment Company assigned all of its interest in these leases to King Lumber Company as trustee for the benefit of certain named creditors, including King Lumber Company. Under the terms of these instruments the King Lumber Company was empowered to operate the two oil wells or to sell the leasehold interest, to reduce the expenses of operation, to pay off the creditors, and to return any remaining balance to the U. S. Pumping Equipment Company.

In September, 1938, this plaintiff brought an action to cancel the lease held by U. S. Pumping Equipment Company and to have its interests in the property declared forfeited. The King Lumber Company was joined as a defendant with an allegation that it claimed to own a derrick on the property. On October 7, 1938, the King Lumber Company filed a disclaimer in that action. Subsequently, the court found that the U. S. Pumping Equipment Company had fully complied with the terms of its leases and entered a judgment in its favor.

From 1940 until June, 1946, one Zellers was in charge of operating these two oil wells under various arrangements with the King Lumber Company, as trustee. In 1943, Zellers bought the claims of all of the creditors involved in this trust, with the exception of one claim for less than $100. He paid 10¢ on the dollar for each of these claims except that of King Lumber Company, for which he paid about 45¢ on the dollar. About the first of June, 1946, Zellers sold all of these claims to Mrs. Elmer Patterson and B. H. Patterson. At that time the King Lumber Company executed an agreement with Zellers and with the Pattersons. This agreement recited that Zellers was the present owner of all of the claims referred to in the trust agreements of April 19, 1938, and September 20, 1938, and that these claims then totaled $7,703.50. It was then provided that the King Lumber Company would continue the operation of the trust for the benefit of the Pattersons as owners of the claims, that it authorized the Pattersons to operate and control the leasehold interests in the name of the trustee with the same force and effect as though they were the trustee, and that the Pattersons would guarantee the King Lumber Company against any liability on account of such operations. The plaintiff herein was asked to give its consent to this transfer and arrangement, but refused in writing to do so.

On May 31, 1946, the plaintiff served notice of default on all interested parties, pursuant to the terms of the lease, giving notice that unless a third well was started, or in lieu thereof ten acres of the property was quitclaimed, within thirty days, the plaintiff would terminate the lease. A third well was not started and a quitclaim deed was not furnished within the time prescribed by the notice and the lease, although such a quitclaim was tendered after this action was commenced.

This action was filed on September 10, 1946, in the ordinary form of a quiet title action. Among others, Holmes, the U. S. Pumping Equipment Company, the King Lumber Company as a corporation and as assignee and trustee, and the Independent Oil Producers Agency, to whom the oil produced was sold, were made defendants. The Pattersons were not joined as defendants.

The King Lumber Company answered asserting its right under the leases and under the trust assignments of April 19, 1938, and September 20, 1938, and denying the allegations of the complaint in conflict therewith. As a separate defense it was alleged that this defendant has been and is in possession of the property and operating the same; that it has produced and marketed large quantities of oil therefrom; that it has accounted to the plaintiff for its proportion of the proceeds, which plaintiff has accepted with full knowledge of the facts; and that it has expended large sums in improving the premises. The prayer was that it be adjudged the owner of the lessee's estate in and to said premises insofar as the ten acres upon which the two wells are located are concerned.

The other defendants defaulted or disclaimed with the exception of the defendants Taylor, whose interests are not material here, and the action proceeded to trial on the issues raised by the answer of the King Lumber Company. It appeared that the U. S. Pumping Equipment Company had forfeited its charter some years before because of nonpayment of taxes.

The action was first tried on March 21, 1947. On April 7, 1947, a minute order was entered ordering that plaintiff's title be quieted as against all of the defendants with the exception of the King Lumber Company as trustee; that said trustee is relieved of the forfeiture; that plaintiff's title is subject to the assignment of the sublease to this trustee insofar as the ten acres are concerned; and that this assignment is declared valid.

The plaintiff then moved to reopen the case for the purpose of determining the amounts, conditions and all other matters pertaining to any trustee capacity on the part of King Lumber Company, for the benefit of creditors under the unrecorded assignments which had been pleaded by it, for a complete accounting of these things, and for such other and further inquiry as might be just and equitable in order to determine the interest, if any, of the King Lumber Company in these premises. On April 14, 1947, the court granted this motion and at the same time entered a judgment in favor of the plaintiff as against all defendants, with the exception of King Lumber Company as trustee.

A further hearing and trial proceeded on May 16, 1947, both oral and documentary evidence being received. At the beginning of this hearing the court stated that the motion to reopen the case had been granted to take evidence on the amount of the indebtedness, and expressed the opinion that it was proper to go into what had been done since the assignments were made, how much the debts amounted to, and possibly to consider whether the court had power to terminate the trust. Counsel for the King Lumber Company objected to the taking of an account upon the ground that it was not within the pleadings and that the necessary parties therefor were not before the court. Evidence was then admitted showing that during the operation of the trust the total gross production of the two wells amounted to $33,181.03; that at the time this trust was created the claims of the creditors amounted to $6,329.94; that when these claims were sold by Zellers to the Pattersons they amounted to $7,703.50; and that during 1946 and 1947 proceeds of the production to the amount of $4,483.44 were held and impounded by the Independent Oil Producers Agency on account of this litigation. It does not specifically appear how this impounding was brought about but apparently the Independent Oil Producers Agency has withheld the money because it was made a defendant in this action. Expert testimony was also received that the reasonable operating profits of the property during the years the trust has been in charge would be $17,353.70. No attempt was made by the plaintiff to go further into showing what the individual accounts were or to take an accounting as between the trustee and the creditors. Some evidence was offered by the trustee showing what money has been received and for what it had been expended, from which it appears that from May, 1938 to April 22, 1947, there was an account balance of $686.47 and that during the last two years of that period $147.12 was paid to creditors. Mr. Patterson then testified as to his purchase of the rights of creditors which had previously been assigned to Zellers, and that he had operated and was continuing to operate the wells. Counsel for the trustee then offered to produce his accountant to give his summary of what is reflected in the various documents introduced in evidence. The court stated that this was unnecessary as he was not doubting the figures already in evidence and then said: "I opened this up for the effect, if any, this accounting might have on the deal, and whether somebody had some equities or something coming, and we will have to consider that."

In the findings it was recited that since the court was not informed, by the earlier evidence, as to the nature and extent of the interest of the King Lumber Company as trustee or as assignee for creditors, it had reopened the case for further trial and hearing in order to determine the nature of such interest as trustee for creditors or otherwise, to have accounting thereof, and for such other and further inquiry as might be just and equitable in order to determine the interest, if any, of that defendant in any capacity. Findings were then made in favor of the plaintiff. Among other things, it was found that the King Lumber Company was a party to the assignments and trust agreements dated April 19, 1938 and September 20, 1938, respectively; that the plaintiff is the owner under its original lease of all rights in the property in question; that each and every claim of the defendants adverse to the plaintiff is without any right whatever and that none of the defendants has any right, title or interest of any nature whatsoever in said premises or any part thereof; that it is not true that the King Lumber Company has any valid claim arising out of the lease from the plaintiff to Holmes or from the sublease from Holmes to the U. S. Pumping Equipment Company, or under the assignments and declarations of trust dated April 19, 1938 and September 20, 1939; and that any claim of the King Lumber Company in its corporate capacity or as assignee for creditors, or as trustee for any creditor under said assignments, is now and at the time of the filing of the action was wholly invalid.

In paragraph 8 of the Findings it was also found that on October 7, 1938, the King Lumber Company had filed in a former action its written disclaimer of any rights in the premises here involved; that since September 20, 1938, the King Lumber Company has abandoned its duties under the trust agreements and since that date has not and does not now operate, manage or control the operation of these wells but did and still continues to delegate its duties to others with the result that the total amount of creditors' claims listed to be paid under said assignments was not reduced; that King Lumber Company delegated its duties to others through oral or unrecorded written documents of which the plaintiff had no knowledge until the trial of this action; that it is not true that the plaintiff accepted anything produced on the premises with knowledge of the transactions between the King Lumber Company under these assignments and others to whom said trustee delegated its duties; and that the King Lumber Company in any capacity, has not expended any sum of money in reconditioning or increasing the capacity of any oil well situated on these premises.

Judgment was entered quieting the plaintiff's title with respect to the twenty acres as against any claim or interests of the King Lumber Company in any capacity, and enjoining that defendant or any of its assignees or anyone claiming under it from asserting any claim whatever to the premises involved or any part thereof. A motion for new trial was made and denied and the King Lumber Company as trustee and assignee for the benefit of creditors of U. S. Pumping Equipment Company has taken this appeal.

The appellant contends that it conclusively appears that the court reversed its first decision and entered a judgment to a contrary effect solely because the appellant, as trustee, had not been able to pay off the claims of the creditors from the net proceeds of the wells. While it is conceded that the findings do not indicate that a forfeiture was declared for this reason it is contended that this must be true since no other logical reason appears. It is then argued that this is not a sufficient reason for declaring a forfeiture; that although the court expressly reopened the case for the purpose of an accounting it failed to make or take such accounting; that the creditors and real parties interested in any accounting were not parties to the action or before the court; that the disclaimer filed in the former action did not operate to divest the trustee of title; that the respondent was not a proper party to a proceeding to terminate the trust; that the trust could not be terminated merely because the creditors had not been paid; that even if the trust were terminated the trust estate would not revert to the plaintiff; and that the respondent had knowledge that assignments in trust had been made and that the appellant was operating under them.

These contentions are largely based on Paragraph 8 of the Findings. It may well be questioned whether the disclaimer filed by the King Lumber Company in the former action had any effect on the rights of the parties to this action. It was sued in that action in its corporate capacity, with an allegation that it claimed to own a derrick. Its disclaimer was filed for the purpose of that action, and no judgment was entered in favor of the plaintiff therein. While there is some evidence that the King Lumber Company had improperly delegated some of its powers as trustee during a portion of the time, the finding that it had at no time managed, controlled or operated the trust estate goes too far and is not fully supported by the evidence. However, these findings were not necessary to the decision and may be regarded as surplusage. There was no finding that the trust was terminated, or that because thereof the trust estate reverted to the plaintiff. While there is some evidence that the respondent had knowledge over a considerable period that these wells were being operated under some arrangement for the benefit of creditors, the further findings that until about the time of the trial it had no knowledge of the contents of the unrecorded instruments establishing the trust, and that it had not accepted its share of the proceeds from these wells with knowledge of the various transactions between the King Lumber Company and others under the trust assignments, are fully supported by the evidence. It further appears that the King Lumber Company had not, in any capacity, expended any money in improving these wells other than as its agents and assignees may have used a portion of the proceeds from the wells for that purpose.

Regardless of the materiality of the matters found in Paragraph 8 of the Findings the other findings, properly supported by the evidence, are sufficient to support the court's conclusion and judgment. It appears, without conflict, that the appellant while acting as trustee had failed to drill a third well or to quitclaim ten acres of the property as required by the terms of the lease, that notice requiring such performance within thirty days, as provided for in the lease, was served, and that neither of these things was done within the required time. While some attempt was made to excuse the delay in tendering a quitclaim deed, based on a doubt as to the description of the portion to be quitclaimed, on the absence of an officer of the trustee corporation whose signature was required, and on the fact that an attorney went on his vacation, the evidence amply sustains the court's conclusion that the notice to remedy the default had not been complied with and the court's findings that it is not true that the King Lumber Company then had a good or valid claim arising out of the leases in question and the two unrecorded assignments to it for the benefit of creditors, and that it is true that any claim of the King Lumber Company, in its corporate capacity or as assignee or as trustee for any creditor, is now and at the time of the filing of the action was invalid and groundless.

Another reason appears for the court's different decision after the second hearing, other than the mere fact that the appellant as trustee had not been able to pay the claims of the creditors. While the existence of a default and the failure to remedy the same after notice appeared at the first hearing, it rather clearly appears that the court was at that time unwilling to declare a forfeiture which would have the result of shutting off the rights of innocent creditors who were apparently involved in a rather complicated and confused situation. It further appears that the case was later reopened because the trial judge felt that he was not sufficiently informed as to the actual situation, with respect to these creditors' claims and as to the extent and nature of the interest of the King Lumber Company, as trustee and as assignee for these creditors. The case was then reopened expressly for the purpose of hearing and determining the nature of the rights of the King Lumber Company as trustee for creditors or otherwise, "to have accounting thereon," and for such other and further inquiry as might be just and equitable in determining the claimed interests of the King Lumber Company in any capacity. The word "accounting" as there used was undoubtedly intended to refer to what the King Lumber Company had done and was doing, in connection with the determination of its claimed interests in this property, and not to a general accounting between the trustee and the beneficiaries of the trust. It was in that sense, and that sense only, that any sort of limited accounting was attempted and only for the purpose of bringing out the actual situation in order to assist in determining whether the claimed interests of the King Lumber Company, acting for the creditors, were just and equitable. The case was reopened for the purpose of bringing out the full facts in order to ascertain whether any equities actually existed which would make it unjust to others to enforce the forfeiture which would otherwise be appropriate.

On the rehearing it was brought out that while the trust had been created for the express purpose of reducing the costs of operating the wells and paying these creditors, the amount of the claims was larger after nearly nine years of operation than in the beginning. There was also evidence indicating that the claims could well have been paid under a proper handling of the wells. Moreover, it appeared that the trustee was taking little, if any, real interest in the matter and had in the meantime sold its own claim at a greatly reduced price to Zellers, who had acquired practically all of the other claims at 10¢ on the dollar. About three years later, Zellers sold these claims to other strangers, the Pattersons, who were not innocent purchasers since they were notified in advance that no consent thereto would be given and that any assignment of the creditors' claims must be taken at their own risk. The original creditors had passed out of the picture some years before, for some years Zellers had operated the property practically for the benefit of himself as sole beneficiary of the trust, and the Pattersons were then operating it purportedly under the trust but in practical effect as both trustees and sole beneficiary. The situation was one which would not only throw doubt on the past operation of the trust but which would naturally lend itself to a long continued and unnecessary continuance of the trust through the simple device of the operators of the trust failing and neglecting to pay themselves as the sole beneficiaries of the trust. When these facts were developed upon the second hearing, and the real situation was revealed, the equities appeared in a different light and it is not surprising that the trial court changed its decision.

[1] When all of the circumstances are considered the contentions made by the appellant are without merit. The findings of the ultimate facts, which are supported by the evidence, are sufficient to sustain the judgment and there was no failure to find on any material fact or issue which was in the nature of an ultimate fact or which was necessary either to a decision or to support the judgment as rendered. Under these views, it is unnecessary to consider further arguments of the appellant, which relate largely to conflicts in the evidence.

[2] Some contention is made that the court erred in not determining who is entitled to the money, something over $4000, which had accumulated from the sale of oil from these wells while they were operated by the Pattersons and which is apparently still held by the Independent Oil Producers Agency, to which the oil had been delivered. The Pattersons were not parties to this action and this issue was not raised by the pleadings but appeared incidently in the evidence received. While the court in this equitable action could well have determined this matter, bringing in the necessary parties in order to fully dispose of the entire matter in one action, no prejudice has resulted since another action covering this issue was filed by the Pattersons after the judgment here in question was entered. The respective rights of the Pattersons and this respondent can now more readily be determined in that other action and no reversible error here appears.

The judgment is affirmed except as to its effect, if any, on the rights or claims of others to the moneys impounded.

MARKS and GRIFFIN, JJ., concur.

85 Cal.App.2d 670

PATTERSON et al. v. SNOOK & WELLS, Inc., et al.

Civ. 3725.

District Court of Appeal, Fourth District, California.

May 25, 1948.

Rehearing Denied June 14, 1948.

Money received ⚿17(1)

In action by operator of oil lands under agreement with holder of leasehold interest against lessor to recover moneys expended in production of oil and for declaration of rights in proceeds of sale of oil produced after lease had been forfeited by acts of leasehold interest holder, complaint sufficiently stated a cause for relief to prevent unjust enrichment of lessor to extent of actual and necessary services and expenses of operators of the lands.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Mrs. Elmer Patterson and B. H. Patterson against Snook & Wells, Inc., and others to recover proceeds of sale of oil produced by plaintiffs under an agreement with holder of a leasehold to the lands in question and for other relief. From the judgment dismissing the complaint, plaintiffs appeal.

Judgment reversed with instructions.

Siemon, Maas & Siemon and Calvin H. Conron, Jr., all of Bakersfield, for appellants.

Harvey, Johnston, Baker & Palmer, of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is a companion case to that of Snook & Wells, Inc., v. Holmes et al., Cal. App., 193 P.2d 487. After judgment was entered in that case the plaintiffs herein brought this action. The complaint alleged the general facts as to how the plaintiffs acquired an interest in the oil wells, which facts have been sufficiently summarized in the other case. It is then alleged that since June 1, 1946, the plaintiffs have operated the property, have expended about $5000 for repairs and necessary supplies, and have produced and delivered over 5000 barrels of oil to the Independent Oil Producers Agency pursuant to existing contracts, the proceeds of which are being retained by that agency for such parties as may be adjudged to be entitled thereto; that the plaintiffs have expended additional money in the operation of these wells and for the preservation and protection of the property; and that the plaintiffs are entitled to certain personal property now on the premises and used in connection with the operation of the wells. The complaint also alleges certain other matters and things which were determined and concluded by the judgment in the other action. The prayer asks for a declaration of the rights of the parties, for the appointment of a new trustee in a certain event, that the plaintiffs be awarded 70% of the proceeds of the oil which are held by the Independent Oil Producers Agency, and for such other and further relief as is meet and proper in the premises. A demurrer was filed by Snook & Wells, Inc., which was mainly on the ground that the matters therein were included within, and concluded by, the judgment in the other action although ambiguity, uncertainty, misjoinder of parties and other issues are also raised thereby. The court sustained the demurrer without leave to amend and entered a judgment of dismissal, from which the plaintiffs have appealed.

As we noted in the decision in the other case, the issue as to who is entitled to the proceeds of the oil produced which is being held by the Independent Oil Producers Agency until it is determined to whom it should be paid, was not decided in the other action. Not only should that issue now be decided, but the complaint herein alleged facts which, if true, would seem to indicate that the appellants were entitled to some or all of that money. While the complaint covered other issues which were determined and concluded in the other action, an attempt was here made to also raise this issue. These appellants, having operated the wells during the litigation and produced the oil the proceeds of which are thus impounded, might well be entitled to recover the reasonable value and reasonable costs of their services in producing the oil in question. While this issue was not clearly expressed and set forth in the complaint, and while the form of the prayer is somewhat deficient in this regard, it sufficiently appears that an attempt was made to state a cause of action in this regard and the appellants should have been permitted to amend, especially since the matter had not been determined in the other action which was heard by the same judge, and since otherwise the appellants might be deprived of something to which they may have been entitled, and the respondents unjustly enriched by receiving the total proceeds of the oil produced during that period, without being charged with any of the costs of production. To the extent that the actual and necessary services and expenses of these appellants in producing this oil are covered by the amount which is impounded, they may have a valid claim to reimbursement from that fund.

The judgment of dismissal is reversed with instructions to permit the appellants to amend their complaint for this purpose.

MARKS and GRIFFIN, JJ., concur.

PEOPLE v. KEHOE.*

Cr. 2045.

District Court of Appeal, Third District, California.

May 19, 1948.

Hearing Granted June 17, 1948.

1. Larceny 🔑65

Evidence sustained conviction of grand theft of automobile. Pen.Code, § 487.

2. Automobiles 🔑355(10)

Evidence sustained conviction of driving an automobile without the owner's consent. Vehicle Code, § 503.

3. Indictment and Information 🔑191(5)

Offense of driving an automobile without the owner's consent is not an included offense within charge of grand theft of automobile, since one may be guilty of driving an automobile without owner's consent either with or without intent to steal automobile, while grand theft requires the felonious taking of the property of another. Pen.Code, § 487; Vehicle Code, § 503.

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* Subsequent opinion 204 P.2d 321.

4. Constitutional law ⇐265

One charged with grand theft of automobile and with driving an automobile without the owner's consent was not deprived of due process of law because district attorney chose to proceed under an information rather than by an indictment. Pen.Code, § 487; Vehicle Code, § 503.

◆

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

James J. Kehoe was convicted of grand theft and of driving an automobile without the owner's consent, and he appeals.

Affirmed.

James J. Kehoe, in pro. per.

Fred N. Howser, Atty. Gen., and Doris Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

By the first count of an amended information defendant was charged with a violation of section 487 of the Penal Code (grand theft), and by the second count thereof he was charged with a violation of section 503 of the Vehicle Code (driving a car without the owner's consent). Counts 3, 4, and 5 charged certain prior convictions, all felonies, for which defendant was alleged to have served terms of imprisonment. He pleaded not guilty to all counts but at the time of trial admitted the priors charged in counts 3, 4, and 5. His motion to strike count 2 of the amended information was denied as were his motions to dismiss and quash the amended information and for a directed verdict. The jury returned a verdict of conviction on the first two counts. At the time set for imposition of sentence he moved for an arrest of judgment and to set aside the verdict as to count 2 and for a new trial, all of which motions were denied. Appearing personally, he now appeals from the judgment and from the order denying his motion for a new trial.

The numerous questions raised by defendant, each of which are wholly without merit, are in fact but three general contentions: (1) That the evidence is insufficient to support the verdict of the jury, which resulted solely from alleged misconduct of the district attorney, (2) that the alleged violation of sections 503 of the Vehicle Code and 487 of the Penal Code constituted but one offense in that a violation of said Vehicle Code section is necessarily included within a violation of the Penal Code section, and (3) that he was entitled to a trial under an indictment by the grand jury rather than pursuant to an information filed against him by the district attorney.

The undisputed testimony as disclosed by the record is that on the evening of April 26, 1947, a 1941 Ford sedan owned by one Dale Kortie was stolen from the place where it was parked on a street in the city of Eureka. Neither Kortie nor one Nelson, from whom Kortie was purchasing the car, knew defendant or had given any one, including defendant, permission to drive the same. Several days later the defendant was apprehended in the city of Salinas at which time he was driving the Kortie car. In response to questioning by Salinas police officers defendant gave various and conflicting versions concerning his ownership and possession of the automobile. He was thereafter returned to Eureka by the sheriff of Humboldt county and trial ensued, resulting in his conviction as previously mentioned. The only evidence offered by defendant related to certain immaterial facts concerning his whereabouts on the evening the car disappeared and his conduct while being returned from Salinas to Eureka. He did not testify in his own behalf.

[1, 2] Our examination of the entire record, and in particular the remarks of the district attorney in his argument to the jury, has disclosed no "flagrantly prejudiced misconduct" as charged by defendant, or in fact any misconduct. Nor does the record disclose that it was only because of such alleged misconduct that the defendant was convicted. The uncontradicted fact of defendant's presence in Eureka at the time the car was stolen, his possession

of the car when apprehended, together with the numerous conflicting and contradictory statements made by him to police officers were sufficient to support a conviction of grand theft as charged in the first count of the information. People v. Wiley, 8 Cal.App.2d 135, 46 P.2d 817. Likewise the testimony of both Kortie and Nelson that defendant was driving the car without their consent together with the subsequent acts of defendant in utilizing the car as he did were sufficient to bring the crime within section 503 of the Vehicle Code and support a conviction on the second count as charged in the information. People v. White, 71 Cal.App. 2d 524, 162 P.2d 862; People v. Neal, 40 Cal.App.2d 115, 104 P.2d 555.

[3] Defendant's next contention that a violation of section 503 of the Vehicle Code is an included offense within the charge of grand theft as set forth in Penal Code section 487, is not well taken. "Both in substance and in form the offenses charged are distinctly different." People v. Jeffries, 47 Cal.App.2d 801, 807, 119 P.2d 190, 194. Under section 503 of the Vehicle Code a person may be guilty of the crime therein denounced even though he intends only to deprive the owner of its possession either with or without intent to steal the car. However, grand theft requires the felonious taking of property of another.

[4] The final contention made by defendant, that he was deprived of due process of law in that the district attorney chose to proceed under an information rather than by an indictment brought by the grand jury, also must be determined against him.

The identical question was presented in Hurtado v. People of the State of California, 110 U.S. 516, 4 S.Ct. 111, 122, 28 L.Ed. 232. There the court in approving the substitution of the proceeding by information for the grand jury indictment as adopted by the legislature of this state, stated that:

"* * * as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial, conducted precisely as in cases of indictments."

The judgment and order appealed from are affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

85 Cal.App.2d 482

ARMSTRONG v. ARMSTRONG (two cases).
Nos. 13531, 13532.

District Court of Appeal, First District, Division 2, California.

May 17, 1948.

Rehearing Denied June 16, 1948.

Hearing Denied July 15, 1948.

1. Divorce 🔑4

Under Civil Code, § 133, authorizing court to enter final divorce judgment nunc pro tunc as of date when final judgment could have been given, such a judgment may be made effective as of a date before enactment of such code section, notwithstanding provisions of section 3, declaring that no part of Code is retroactive unless it expressly so declares, in light of fact that section 133 was given a retroactive construction and thereafter Legislature amended and re-enacted section 133 without denying retroactive effect. Civ.Code, §§ 3, 133.

2. Statutes 🔑225¾

When Legislature re-enacts a statute which has been judicially construed, there is a strong presumption that it adopts construction placed on statute by the courts.

3. Divorce 🔑162

Evidence adduced in husband's action for an annulment on ground that, at time he married second wife, his final decree of divorce from first wife had not been entered, although more than a year had passed between entry of interlocutory decree and remarriage, justified judge in entering, on his own motion, final decree of divorce from first wife nunc pro tunc as of time when it first could have been entered. Civ.Code, § 133.

4. Divorce ⚿162

Where final judgment of divorce could have been entered in January, 1925, the fact that it was actually entered in 1927, after one of the parties thereto had remarried in April, 1925, did not so finally adjudicate rights of parties that a nunc pro tunc judgment could not thereafter be entered as of January, 1925. Civ.Code, § 133.

5. Courts ⚿92

Where two independent reasons are given for a decision, neither one is to be considered mere "dictum".

See Words and Phrases, Permanent Edition, for all other definitions of "Dictum".

6. Constitutional law ⚿96

Where husband's final judgment of divorce from his first wife could have been entered before his remarriage, but was actually entered after his remarriage, and second wife believed marriage to be valid, husband could not complain that nunc pro tunc judgment entered on court's own motion in divorce case, thereby validating second marriage, deprived him of vested rights by giving second wife a community property interest in property acquired by community, since second wife already had a quasi-community property right equal in extent to that of a legal wife.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Harris, Judge.

Action by Fred G. Armstrong against Mary S. Armstrong for annulment, wherein defendant cross-complained for divorce, or, if the marriage was illegal, for her quasi-community rights. From an order allowing temporary alimony, attorney's fees, and costs to defendant, and from the action of trial judge on his own motion in entering nunc pro tunc a final decree of divorce in an action entitled Fred Gibson Armstrong against Marie Hansen Armstrong as of a date prior to plaintiff's marriage to defendant, plaintiff appeals.

Affirmed.

Jos A. Brown and Harry Gottesfeld, both of San Francisco, for appellant.

Matthew J. Dooley, of San Francisco, for respondent.

DOOLING, Justice.

Two appeals are here presented: One from a final decree of divorce entered on March 11, 1947, nunc pro tunc as of January 25, 1925, in the action entitled Fred Gibson Armstrong v. Marie Hansen Armstrong; and the other from an order allowing temporary alimony, attorney's fees and costs to defendant in the action entitled Fred G. Armstrong v. Mary S. Armstrong.

Fred Gibson Armstrong married Marie Hansen on March 16, 1922, and obtained an interlocutory decree of divorce from her on January 24, 1924. Without the entry of a final decree of divorce Armstrong married the respondent on April 27, 1925. He procured the entry of a final decree of divorce from Marie Hansen Armstrong on January 20, 1927. Appellant Armstrong and the respondent Mary S. Armstrong lived together as husband and wife continuously from the date of their marriage in 1925 until 1946, when appellant commenced an action against respondent for an annulment of their marriage on the ground that at the time they were married he was still the legal husband of Marie Hansen Armstrong.

Respondent filed a cross-complaint in which, in separate counts, she asked for a divorce if her marriage to appellant was valid and for her quasi-community rights in the property acquired by appellant and herself during the twenty-one years that they had lived together as husband and wife if their marriage was void. In the divorce action she moved the court for an order granting her temporary alimony, counsel fees and costs. On the hearing of this motion appellant testified that he entered into the marriage with respondent in 1925 in good faith believing that his divorce from Marie Hansen Armstrong became final automatically at the end of one year after the entry of the interlocutory decree of divorce, but that at the time the final decree was entered in 1927 his attorney advised him that his second marriage in 1925 was invalid and that he and respondent should have a second ceremonial marriage performed. This, however, was never done. The evidence is in conflict as to whether respondent was ever informed of the invalidity of her marriage, her testimony being that she believed her marriage to appellant to be valid at all times until the commencement of the action for its annulment. Counsel for respondent moved the court for a final decree of divorce nunc pro tunc as of January 25, 1925, in the action between appellant and Marie Hansen Armstrong. Upon objection of counsel for appellant that respondent had no standing to make such a motion in an action in which she was not a party the court of its own motion made the order for the entry of the final decree of divorce nunc pro tunc and the order expressly so recites. The order for temporary alimony, counsel fees and costs followed.

The nunc pro tunc decree appealed from was entered pursuant to Civil Code section 133, which reads:

> "Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed or entered, if no appeal has been taken from the interlocutory judgment or motion for a new trial made, the court, on the motion of either party thereto or upon its own motion, may cause a final judgment to be signed, dated, filed and entered therein granting the divorce as of the date when the same could have been given or made by the court if applied for. The court may cause such final judgment to be signed, dated, filed and entered nunc pro tunc as aforesaid, even though a final judgment may have been previously entered where by mistake, negligence or inadvertence the same has not been signed, filed or entered as soon as it could have been entered under the law if applied for. Upon the filing of such final judgment, the parties to such action shall be deemed to have been restored to the status of single persons as of the date affixed to such judgment, and any marriage of either of such parties subsequent to one year after the granting of the interlocutory judgment as shown by the minutes of the court, and after the final judgment could have been entered under the law if applied for, shall be valid for all purposes as of the date affixed to such final judgment, upon the filing thereof."

[1, 2] Appellant argues that such a decree cannot be made effective as of a date before the enactment of that code section. The courts have expressly held to the contrary. Macedo v. Macedo, 29 Cal.App.2d 387, 390, 391, 84 P.2d 552; Ringel v. Superior Court, 54 Cal.App.2d 34, 128 P.2d 558; Estate of Hughes, Cal.App., 182 P.2d 253. We are asked to overrule these decisions on the ground that they are inconsistent with Civil Code section 3, which declares that no part of the code is retroactive unless it expressly so declares. Whatever force this argument would otherwise have is nullified by the fact that the legislature amended and reenacted Civ.Code sec. 133 in 1941, approximately three years after the court in Macedo v. Macedo, supra, had expressly held that the section should be given retroactive effect. There is a strong presumption that when the legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts. Holmes v. McColgan, 17 Cal.2d 426, 430, 110 P.2d 428; Union Oil Associates v. Johnson, 2 Cal.2d 727, 734, 735, 43 P.2d 291, 98 A.L.R. 1499; 23 Cal.Jur. 795.

[3] The section expressly gives the court the power to enter the final decree nunc pro tunc "upon its own motion." The court, having heard the evidence concerning the failure to have the final decree entered before the second marriage, was amply justified in exercising this power given it by the legislature, presumably for the express purpose of meeting just such a situation.

[4, 5] It is further argued that the final decree having actually been entered in 1927 the rights of the parties became thereby finally adjudicated and that a nunc pro tunc decree could not thereafter be entered. Civ. Code sec. 133 was amended in 1941 to permit this very thing to be done and a similar nunc pro tunc decree was upheld in Estate of Hughes, supra, Cal.App., 182 P.2d 253. In that case the final decree was entered in 1944 and a later nunc pro tunc decree was entered in 1946 as of 1927. The argument that the decision of this point in Estate of Hughes is dictum because the court gave an alternative ground for its decision is not sound. "Where two independent reasons are given for a decision, neither one is to be

considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other." 7 Cal. Jur. 641; Gilgert v. Stockton Port District, 7 Cal.2d 384, 389, 60 P.2d 847.

[6] The final argument that the nunc pro tunc decree by validating respondent's marriage to appellant deprives him of vested rights by giving her a community property interest in the property acquired by the community is overcome by respondent's testimony that she at all times believed the marriage to be a valid one. We must presume in favor of the court's action that the trial judge found this testimony to be true. If so she already had a quasi-community property right equal in extent to that of a legal wife. Vallera v. Vallera, 21 Cal.2d 681, at pages 683, 684, 134 P.2d 761, and cases cited.

The only attack on the order for temporary alimony, counsel fees and costs is that they cannot be allowed to one not a legal wife. This fails with the affirmance of the nunc pro tunc decree.

The nunc pro tunc decree of divorce in appeal number 13,531 and the order for temporary alimony in number 13,532 are, and each of them is, affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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85 Cal.App.2d 617

ALLEN et al. v. ROBINSON et al.

Civ. 7457.

District Court of Appeal, Third District, California.

May 24, 1948.

Hearing Denied July 22, 1948.

1. Automobiles 🔑181(1)

"Willful misconduct", rendering motorist liable for guest's injury, is intentional doing of something which should not be done or intentional failure to do something which should be done in operation of automobile, under circumstances disclosing express or implied knowledge that injury to guest will be probable result.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

2. Negligence 🔑11

"Willful misconduct" depends on facts of particular case and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts with knowledge or appreciation of fact that danger is likely to result therefrom.

3. Automobiles 🔑245(24)

Whether motorist was guilty of willful misconduct, rendering him liable for injuries to guest, in disregarding stop sign and entering street intersection at excessive speed, was question for jury.

4. Automobiles 🔑245(87)

Whether persons injured while riding as guests in automobile as result of driver's willful misconduct assumed risk of injury by riding with him was question for jury.

5. Automobiles 🔑245(87)

Whether guests in automobile, colliding with another automobile as result of driver's willful misconduct in disregarding stop sign and entering street intersection at excessive speed, were guilty of contributory negligence in failing to warn driver of existence of such sign, was question for jury.

◆

Appeal from SuperiorCourt, San Joaquin County; George F. Buck, Judge.

Action by Mildred Allen and another against Clayton W. Robinson and another for personal injuries sustained in an automobile collision. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Russell A. Harris, of Sacramento, for appellant.

J. B. Freeman, of Stockton, for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment entered after a jury verdict in favor of plaintiffs Mildred Allen and her fifteen year old daughter, June Allen, which awarded damages to plaintiffs for injuries sustained by them while riding as guests in an automobile owned by defendant Melvin W. Robinson and driven by his seventeen year old son, defendant Clayton W. Robinson, with his father's consent, which injuries were attributed to wilful misconduct on the part of Clayton W. Robinson which resulted in a collision of his car with another at an intersection. On this appeal from the judgment three grounds for reversal are urged, the first that the evidence is insufficient to show wilful misconduct on the part of Clayton W. Robinson; the second that plaintiffs assumed the risk of injury by riding with said defendant under the circumstances of the case; and the third, that plaintiffs were guilty of negligence which contributed proximately to their injuries.

The evidence in the case, which appellants concede must, on this appeal, be considered in the light most favorable to plaintiffs, shows that on the evening of September 26, 1946, between 6:00 and 6:30 p.m., Clayton Robinson, who for the sake of brevity will hereinafter be referred to as the appellant, called at the home of plaintiffs with whom he was already intimately acquainted. Mrs. Allen thereupon requested him to drive her and her daughter to the home of a Mr. and Mrs. Gimlen who resided at the north end of Sanguinetti Lane in rural Stockton, and, on the way, to stop at an address on Grant Street. Appellant agreed and the parties left the Allen home, all three occupying the one seat of appellant's Ford roadster. On the way to the Grant Street address, and while traveling on Market Street in the city of Stockton, appellant began racing with another car, and traveled at the rate of from 45 to 50 miles per hour, first the one and then the other car surging ahead. During this race Mrs. Allen requested appellant to slow down, but he disregarded her request. They arrived at the Grant Street address without further incident, whereupon Miss Allen alighted to perform her errand, after which the parties resumed their way to Sanguinetti Lane, their course taking them along Wilson Way to Harding Way and thence to Sanguinetti Lane. On Wilson Way appellant traveled "pretty fast"—45 to 50 miles per hour—and as they approached a red light Mrs. Allen again requested appellant to slow down. He disregarded this warning until he was almost upon a car ahead of him, when he applied his brakes and skidded to a stop. Thereafter they pursued their way along Wilson Way to its intersection with Harding Way where traffic signals were in operation. Appellant's conduct at this point was described by Jesse Gunkel, who was waiting in his car for a change of lights, as follows: "Well, there was a Model A roadster pulled in to the right on us, crowded in, as soon as the light changed, why, he left out just like he was going to a fire or something * * * he whipped around the other cars. * * *" Shortly thereafter this witness reached the scene of the accident; and he testified that the Ford roadster above referred to was the one involved in the collision.

Leaving Wilson Way appellant entered Sanguinetti Lane at a speed of 35 miles per hour. Sanguinetti Lane was paved to a width of 18 to 20 feet and had no sidewalks. He proceeded north thereon toward its intersection with Alpine Road where there was a stop sign facing appellant's car. Appellant traveled on the lane at a speed of between 50 and 60 miles per hour and Mrs. Allen again requested him to "please slow down." Again he disregarded the request until, about 75 feet from the stop sign, he took his foot off the gas throttle but did not apply his brakes or stop. He entered the intersection at about 35 miles per hour and collided with a westbound car driven by Lloyd K. McBride which had entered the intersection but had stopped on seeing appellant's car approaching. Appellant's car traveled from 75 to 100 feet after the collision before it came to rest in a ditch.

Appellant testified that he did not see the stop sign on Sanguinetti Lane, nor know of its existence. There were reflectors on the sign and Mrs. Allen testified that she saw it when they were about 200 feet from it. Her daughter testified that she also saw it when they were about a half a block therefrom. Photographs of the intersection introduced by appellants show this sign to have been a large one which must have been plainly visible. June Allen also testified that not long prior to the day of the accident she had traveled with appellant in his car on Sanguinetti Lane, at which time appellant had stopped at this stop sign.

From the foregoing it is apparent that appellant not only passed through the stop sign but that he entered the intersection at a speed of approximately 35 miles per hour. Plaintiffs admittedly did not warn appellant of the existence of the stop sign; and, as before stated, he testified that he did not see it nor know of it. However, the jury were not compelled to accept appellant's testimony in this connection, and could well have decided from the evidence that he saw it but disregarded it.

Does the evidence, then, support a conclusion that appellant's conduct was wilful misconduct?

[1] A definition of "wilful misconduct," followed and approved in many later cases, is contained in Turner v. Standard Oil Co., 134 Cal.App. 622, 626, 25 P.2d 988, 990, as follows:

"'Willful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something that should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result."

[2] This court adopted the same definition in Hagglund v. Nelson, 23 Cal.App.2d 348, 352, 73 P.2d 265, and a hearing in the Supreme Court was denied. In that case Norton v. Puter, 138 Cal.App. 253, 258, 32 P.2d 172, 174, in which the Supreme Court denied a hearing, was quoted as follows:

"Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom."

[3] In Bechtold v. Bishop & Co., Inc., 16 Cal.2d 285, 105 P.2d 984, failure to stop at a stop sign was held to constitute wilful misconduct. Also, a disregard of stop signs and speed were deemed to constitute "wilful misconduct" in Gibson v. Easley, 138 Cal.App. 303, 32 P.2d 983, where, as here, the driver was earnestly admonished by his guest to drive more slowly. Speed and disregard of stop signs were also held "wilful misconduct" in Browne v. Fernandez, 140 Cal.App. 689, at page 697, 36 P.2d 122, 126, in which Justice Spence in his concurring opinion (hearing in Supreme Court denied by a divided court) said:

"Disregarding conflicts, there was evidence in this case to show that despite the admonition of his guests, appellant Mabie disregarded the stop sign, proceeded into the intersection at a speed of approximately 25 miles per hour, and then speeded up his car in an effort to beat the two on-coming cars which were traveling along the highway. Conceding the case to be a close one, I believe that the jury could properly infer from the evidence presented that there was the requisite intent and that there was the requisite knowledge of probability of injury to his guests to constitute willful misconduct."

Speed under the circumstances of time and conditions of the highway was also held to constitute "wilful misconduct" in Van Fleet v. Heyler, 51 Cal.App.2d 719, 125 P.2d 586; and in De Loss v. Lewis, 78 Cal.App.2d 223, 225, 177 P.2d 589, 590, the court said:

"'Therefore,' as said in Hastings v. Serleto, 61 Cal.App.2d 672, 682, 143 P.2d 956, 961, 'the question of whether the defendant driver herein intentionally drove his automobile with a wanton and reckless disregard of the possible result of such driving or whether he intentionally drove his automobile with a knowledge, express or implied, that serious injury would be a probable (as distinguished from a possible) result thereof, is essentially one of fact for determination by the fact finder.'"

In Rawlins v. Lory, 44 Cal.App.2d 20, 23, 111 P.2d 973, the course of conduct of the driver of the car involved in an accident was held properly considered in arriving at a determination as to whether he was chargeable with wilful misconduct, such conduct being designated as "skylarking."

[4] As for appellants' contention that plaintiffs assumed the risk of injury by riding with appellant, this, again, was a question for the jury; and appellants so recognized it in one of their requested instructions which was given by the trial court. See Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 507, 55 P.2d 870; Shields v. King, 207 Cal. 275, 277 P. 1043; Van Fleet v. Heyler, supra, 51 Cal.App.2d at pages 733, 734, 125 P.2d 586.

[5] Regarding the third argument, that plaintiffs were guilty of contributory negligence because they did not warn the driver of the existence of the stop sign, that, also, presented a question for the jury. Shields v. King, supra; Cate v. Fresno Traction Co., 213 Cal. 190, 201, 2 P.2d 364; Meyers v. Southern Pacific Co., 63 Cal.App. 164, 168, 218 P. 1022; Tice v. Pacific Electric Ry. Co., 36 Cal.App.2d 66, 71, 96 P.2d 1022, 97 P.2d 844.

During the trial defendants presented, progressively, motions for a nonsuit, for a directed verdict in their favor, for judgment notwithstanding the verdict, and for a new trial, urging on each motion that the evidence was insufficient. Said motions were denied, thus indicating that the trial court, which heard the evidence, was satisfied with its sufficiency.

We agree with its conclusion, and the judgment is, therefore, affirmed.

PEEK and THOMPSON, JJ., concur.

HENRY v. GENERAL FORMING, Ltd., et al. (MARSALISI, Third-Party Claimant).*

Civ. 16250.

District Court of Appeal, Second District, Division 2, California.

May 19, 1948.

Rehearing Denied June 7, 1948.

Hearing Granted July 15, 1948.

1. Automobiles 🔑32

Provision of the Vehicle Code that application for original registration of a vehicle "shall" be made by the owner to the Motor Vehicle Department is mandatory. Vehicle Code, §§ 16, 143.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall".

2. Action 🔑4

When a party who is culpable is compelled to disclose the fact that the transaction on which his claim is predicated involves a violation of the law, the courts will leave him in the same position in which he found himself at outset of litigation.

3. Contracts 🔑138(1)

Where defendant being sued on note sold third party his right to buy a new automobile, and third party secretly furnished defendant with money to buy the automobile, and defendant, with third party's aid, committed a misdemeanor by filing application for registration of automobile by falsely stating that he was the sole and legal owner thereof, and plaintiff caused an attachment to be levied on the automobile as defendant's property, court would not assist third party in establishing his claim to automobile. Code Civ. Proc. § 689; Vehicle Code, §§ 16, 143, 230; Pen.Code, § 659.

◆

Appeal from Superior Court, Los Angeles County; Paul Vallee, Judge.

Action on a note by John M. Henry, doing business under the fictitious name of Century Aircraft Company, against General Forming, Ltd., a corporation, Kenneth L. Morehouse, and others, wherein the plaintiff caused an attachment to be levied on an automobile as the property of Kenneth L. Morehouse, and wherein Charlie Marsalisi filed a third-party claim seeking possession of the automobile on ground that he was the owner thereof. From an order decreeing that the third-party claimant had no right, title or interest in the automobile as against the plaintiff's claim, the third-party claimant appeals.

Order affirmed.

John L. Bisher, Jr., of Los Angeles, for third-party claimant and appellant, Charlie Marsalisi.

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* Subsequent opinion 200 P.2d 785.

Thomas W. Hughes, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal from an order of the trial court decreeing that third party claimant (appellant) had no right title or interest in and to an automobile as against the claim of plaintiff (an attaching creditor of defendants) at the time of the levy of a writ of attachment upon said automobile.

These are the undisputed facts:

On March 21, 1947, plaintiff filed an action against defendants to recover for failure of defendants to pay a promissory note. On or about April 8, 1947, defendant Morehouse was notified by the Howard Automobile Company that his name had come up on their list for a Buick automobile, and he was entitled to buy the same. Said defendant did not have the money to buy the car. However, at about this time he met an agent of third party claimant and told him that he had a right to buy a new Buick, but did not have the money to pay for it. The agent took defendant Morehouse to third party claimant where Mr. Morehouse offered to sell his right in the automobile to third party claimant for $200.00. This offer was accepted by third party claimant and he gave $200.00 to Mr. Morehouse.

On or about April 19, 1947, third party claimant handed Mr. Morehouse a cashier's check payable to the Howard Automobile Company for the full purchase price of the automobile and told Mr. Morehouse to register the car in his own name. Arrangements were then made between them that the interest of third party claimant was not to be known to the Howard Automobile Company or the Motor Vehicle Department. On the same day two agents of third party claimant accompanied Mr. Morehouse to within half a block of the Howard Automobile Company where they waited while Mr. Morehouse went to the automobile agency, gave it the certified check, signed a registration certificate in which he gave his name and stated that he was the sole owner of the automobile. He then drove the automobile from the agency to where the two agents of third party claimant were waiting and delivered it to them.

On April 28, 1947, plaintiff caused an attachment to be levied upon the automobile as the property of defendant Morehouse. On said date the sheriff of Los Angeles county took it into his possession pursuant to the writ of attachment. Immediately thereafter third party claimant, pursuant to the provisions of section 689 of the Code of Civil Procedure, filed a third party claim seeking possession of the automobile upon the ground that he was the owner thereof. The trial court decided adversely to his contention.

This is the sole question necessary for us to determine:

Where a third party claimant counsels and aids a defendant in violating a provision of the Motor Vehicle Code of California regarding the registration of a motor vehicle, is he entitled to have the courts of this state aid him in establishing title to an automobile, possession of which he has obtained pursuant to a contract involving a violation of the motor vehicle code?

[1, 2] This question must be answered in the negative and is governed by these pertinent rules of law:

(1) Application for the original registration of a vehicle "shall be made by the owner" to the Motor Vehicle Department upon a form which shall contain among other things "(a) the full name and business or residence address of the owner, and of the legal owner if any." (Sec. 143, Vehicle Code.) "Shall" as used herein is mandatory. (Sec. 16, Vehicle Code.)

(2) It is a misdemeanor for any person to violate any provision of the Vehicle Code. (Sec. 230, Vehicle Code.)

(3) Any person who counsels or aids another in the commission of a misdemeanor is guilty of a misdemeanor. (Sec. 659, Penal Code.)

(4) When a party who is culpable is compelled to disclose the fact that the transaction upon which his claim is predicated involves a violation of the law, the courts will leave the offender against the law in the same position he finds himself at the outset of the litigation. (Kyne v. Kyne, 16 Cal.2d 436, 438, 106 P.2d 620;

Asher v. Johnson, 26 Cal.App.2d 403, 404, 411 et seq., 79 P.2d 457; Duntley v. Kagarise, 10 Cal.App.2d 394, 397, 52 P.2d 560. See also 17 Corpus Juris Secundum, 1939, Contracts, § 272, p. 656.

[3] Applying the above stated rules to the facts of the present case it is undisputed that third party claimant counseled and aided defendant Morehouse in violating the provisions of Section 143 of the Vehicle Code.[1] Defendant Morehouse committed a misdemeanor in filing the application for registration of the motor vehicle by falsely stating therein that he was the sole and legal owner thereof.[2] Third party claimant by counseling and aiding[3] defendant Morehouse to violate section 143 of the Vehicle Code committed a misdemeanor.[4]

It is conceded by third party claimant that the procedure that was followed in this case was the only way by which he could obtain the Buick automobile.[5] Therefore, since in order to establish his title to the automobile it was necessary for him to disclose the fact that there had been a violation of law counseled and aided by him, he was precluded from obtaining any assistance from the courts of this state in establishing his alleged claim to the property in controversy, and the trial court properly left the parties in the same position that they were in when the third party claim was filed.[6]

In view of our conclusion no useful purpose would be served in discussing such cases as Boles v. Stiles, 188 Cal. 304, 204 P. 848; Willard H. George, Ltd. v. Barnett, 65 Cal.App.2d Supp. 828, 150 P.2d 591, and Goodman v. Anglo-California Trust Co., 62 Cal.App. 702, 217 P. 1078, relied on by third party claimant wherein there was no illegality in the contract which constituted the basis of the suit.

The order is affirmed.

MOORE, P. J., and WILSON, J., concur.

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85 Cal.App.2d 568

HAMMOND LUMBER CO. v. BOARD OF SUP'RS OF HUMBOLDT COUNTY et al.

3 Civ. 7479.

District Court of Appeal, Third District, California.

May 19, 1948.

1. Counties 🔑47

The power of board of supervisors to act under authority delegated to it by legislature must be measured by applicable statutes.

2. Schools and school districts 🔑24(1), 32, 44

A school district is for a public purpose, and, therefore, may be created, altered or abolished at will of legislature acting either directly or indirectly through a local board of supervisors to which exercise of such power has been delegated. Education Code, §§ 3761, 3762.

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[1] See rule 1, supra.

[2] See rule 2, supra.

[3] Defendant Morehouse testified as follows:

"Q. Did he [third party claimant] advise you to go ahead and put it in your name? A. Well, he said well, I guess he said to transfer the record, to clear the record, I believe that is the way he spoke, it would have to go in my name, just to clear the record, I don't know exactly.

"Q. He went ahead and told you to put it in your name, to clear the records. A. That's right."

* * * * * *

"Q. By Mr. Hughes: Then I understand you did sign the application for registration of the car in your name? A. Yes, sir.

"Q. That was under instruction of Mr. Marsalisi [third party claimant] to do so, to clear the records, is that correct? A. Yes, sir."

[4] See rule 3, supra.

[5] Mr. Marsalisi, third party claimant, testified as follows:

"You were buying the option of Mr. Morehouse for the car, and the car was to be paid for by you, and you advised Mr. Morehouse to follow through and put it in his name and after these papers were through, and the pink slip came back, the car would be transferred to you, is that correct? A. That is the way they do it, I mean, it has got to be delivered to the man that put up the order."

[6] See rule 4, supra.

3. Certiorari ⚷9

The writ of certiorari is not one of right, and it will not issue as a matter of course, but must rest in sound discretion of court, and it will be denied where the granting thereof would work an injustice.

4. Schools and school districts ⚷42(2)

Where newly created high school district had been organized for nearly a year and was operating as such prior to application for writ to review annexation order of board of supervisors and no facts were alleged by petitioner to excuse delay, the quashing of writ of review on ground of laches was not an abuse of discretion. Education Code, §§ 3761, 3762.

◆

Appeal from Superior Court, Humboldt County; Delos A. Mace, Judge.

Proceeding by Hammond Lumber Company against the Board of Supervisors of the County of Humboldt, and others to review an order of the Board of Supervisors annexing certain territory to a high school district. From a judgment granting a motion to quash writ of review, the petitioner appeals.

Affirmed.

Huber & Goodwin, of Eureka, for appellant.

Carl L. Christensen, Jr., Dist. Atty. of Humboldt County, and Emery F. Mitchell, Deputy Dist. Atty. of Humboldt, both of Eureka, for respondents.

PEEK, Justice.

This is an appeal from the judgment of the Superior Court of Humboldt County sustaining respondents' demurrer without leave to amend and granting their motion to quash the writ of review previously granted.

By its petition in said court petitioner sought a writ of review to determine the jurisdiction of the board of supervisors to order the annexation of the Patrick's Point, Stone Lagoon and Orick Elementary School Districts to the Arcata Union High School District under Education Code sections 3761 and 3762.

Section 3761 provides: "A majority of the electors residing in any school district contiguous to a high school district, in the same or adjoining counties, as shown by the affidavits of one or more of the petitioners, may present to the superintendent of schools, who has jurisdiction over the high school district, a petition for the annexation of the school district to the high school district. The petition shall be accompanied by an agreement signed by a majority of the members of the high school board of the district to which annexation is desired, and by a majority of the trustees of the school district, consenting to the annexation and setting forth the terms of the annexation. The superintendent of schools shall, after verifying the signatures and finding them sufficient, transmit the petition and agreement to the board of supervisors of his county with his recommendations."

Section 3762 provides: "After receiving the petition together with the recommendations of the superintendent, the board of supervisors may make an order annexing the school district to the high school district upon the terms agreed upon."

The alleged grounds for contesting the annexation were (1) that the Stone Lagoon and Orick elementary school districts were not contiguous to the Arcata Union High School District, (2) that the petition for annexation of the Patrick's Point District was not signed by a majority of the resident electors in said district as required by statute and in fact was opposed by a majority of the electors, and (3) that one petition containing the signatures of twelve resident electors of the Patrick Point District did not include an affidavit attending to its sufficiency, also as required by said section 3761.

In addition to their demurrer to said petition on the ground that it did not state facts sufficient to constitute a cause of action or to authorize the issuance of the writ, respondents filed a motion to quash the writ, likewise on the ground that said petition did not state facts sufficient to authorize the issuance thereof; that petitioner was guilty of laches; that the petition for review was not the proper remedy, and that there was a misjoinder of parties. The trial court sustained the demurrer without leave to amend and quashed the writ on the grounds that the proceedings of the board culminating in its order of annexation were not judicial in character and therefore not subject to review by certiorari, and that appellant was barred by laches, both of which conclusions appear to be well founded.

[1] It has long been the rule in this state that the power of a board of supervisors to act under the authority delegated to it by the legislature must be measured by the applicable statutes. Antelope Val. U. H. S. Dist. v. McClellan, 55 Cal.App. 244, 203 P. 147. Analyzing the two sections in question herein in the light of such rule, it appears that the first (3761) merely provides for the presentment of a petition, in accordance with certain provisions therein set forth, to the county superintendent of schools who shall verify the signatures, and if found to be sufficient, transmit the petition to the board of supervisors with his recommendation, and under the provisions of the following section (3762) the board in its discretion may order the annexation in accordance with the terms of the petition.

From such examination of said sections it is immediately apparent that the procedural scheme approved therein has none of "the usual elements of a judicial proceeding, the notice, the hearing, the taking of evidence, and the judgment." Imperial Water Co. v. Supervisors, 162 Cal. 14, 19, 120 P. 780, 782. All that is contemplated is that a discretionary order may be made either approving or rejecting the recommendation of the county superintendent of schools.

[2] It cannot be denied that a school district is for a public purpose and therefore may be created, altered or abolished at the will of the legislature acting either directly or indirectly through a local board of supervisors to which the exercise of such power has been delegated. Antelope etc. v. McClellan, supra. As was stated in the case last cited, in the first instance this power is of legislative origin, but whether exercised by the legislature or by the board of supervisors it still is a legislative act to be measured by the statutory enactment in question. In this regard it should be noted that said section 3761 is substantially the same as former section 1734 of the Political Code, as amended by statutes of 1909, under which the Antelope Valley case arose.

[3, 4] Lastly appellant complains of the action of the trial court in invoking the doctrine of laches. Inasmuch as the writ of certiorari is not one of right it will not issue as a matter of course but must rest upon the sound discretion of the trial court, and as this court stated in Swars v. Council of the City of Vallejo, 64 Cal. App.2d 858, 865, 149 P.2d 397, it will be denied where the granting thereof would work an injustice. See also 14 C.J.S., Certiorari, § 66, page 212 and 4 Cal.Jur. 1062. Here it appears from the order of the trial court that the newly created high school district had been organized for nearly a year and was operating as such prior to the application for the writ; that no facts were alleged by petitioner to excuse this delay in the prosecution of the writ, and that counsel for petitioner had actual knowledge of the order, having been before the board when it was made. Under these circumstances we cannot say that the order of the trial court, in so far as the question of laches is concerned was such an abuse of discretion as to warrant intervention by this court.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

85 Cal.App.2d 595

HELLMAN et al. v. MAHER.

Civ. 16180.

District Court of Appeal, Second District,
Division 1, California.
May 24, 1948.

1. Appeal and error ⟹1008(1)

Whether motorist was contributorily negligent, so as to preclude recovery for damage sustained in collision with defendant's automobile at street intersection, was a question of fact for trial court.

2. Automobiles ⟹244(36)

Evidence sustained finding that negligence of motorist approaching from right was the proximate cause of collision with another automobile at street intersection, so as to render such motorist liable for damage to other automobile and injury to passenger therein.

◆

Appeal from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by Bryce Hellman, a minor, by Joel Hellman, his guardian ad litem, and others, against Lucille B. Maher, also known as Lucile Benedict, for personal injuries and property damage sustained in automobile collision. From judgment in favor of plaintiffs and order denying her motion for new trial, defendant appeals.

Appeal from order denying a new trial dismissed and judgment affirmed.

Lloyd J. Seay, of Los Angeles, for appellant.

Joseph W. Aidlin and Louis R. Stein, both of Los Angeles for respondents.

YORK, Presiding Justice.

From a judgment awarding the minor plaintiff $1,500 for personal injuries sustained in an automobile collision, and awarding the parents of said minor $596.26 on account of medical care and attention for the minor and for repairs to their automobile, defendant prosecutes this appeal.

Appellant's sole contention is that the trial court erred in denying her motion for a nonsuit, because respondent Bertha Hellman was guilty of contributory negligence as a matter of law.

It appears from the record herein that on the morning of May 17, 1944, respondent Bertha Hellman was driving a 1939 Buick sedan in a northerly direction on Gardner Street, in the City of Los Angeles, taking four children to school; that her son, respondent Bryce Hellman, was sitting beside her on the front seat, and her daughter was sitting in the rear with the other two children, who had just been picked up on Gardner Street less than a block from the scene of the collision, i.e., the intersection of Gardner Street and Rosewood Avenue.

Appellant was operating a 1934 Chevrolet and was traveling west on Rosewood. The impact between the left front fender of appellant's car and the rear right fender of respondent's automobile occurred at a point six feet south of the north curb line of Rosewood and fifteen feet east of the west curb line of Gardner, both streets being thirty feet wide. As a result of the collision, respondent's car skidded sidewise and turned over, coming to rest on the west side of Gardner about sixty feet north of the point of impact.

Respondent Bertha Hellman testified that when she first observed appellant's car, it was "about half way down the street (black)"; that this was "after I got into the intersection," to wit, when the back of her own car was south of the south line of Rosewood and the front end thereof was within the intersection; that said witness was going about fifteen miles an hour, and when she saw appellant's car, she "stepped on the gas" and went straight ahead. This witness also testified that when the collision occurred "most of" her car had crossed the north curb line of Rosewood; that her car "rocked back and forth from the left to the right and then it turned completely around and the engine of the car faced south; and it turned over on its left side against the curbing," finally coming to rest "in front of the second house from the corner."

Appellant testified that she was approximately twenty-two feet east of the intersection when she first saw respondents' car which was then about on a line with the extention of the southerly curb line of Rosewood, "before it got right to the intersection." Also, that at the time of the impact, part of respondents' car was "definitely in

Rosewood Avenue." To the following question propounded by the trial judge: "You mean at the point of impact part of it was in the intersection and part of it was beyond the north boundary line of Rosewood?" this witness replied: "Yes, that is my recollection, yes."

Police Officer Seymour testified that there were approximately fifty feet of skid marks where one of the wheels of appellant's car skidded prior to the impact; that no skid marks were left by respondents' car; all that it showed there were brush marks made after the impact; that traffic approaching the said intersection from the east traveling west on Rosewood could observe traffic coming north on Gardner for a distance of approximately fifty feet south of the intersection; that with respect to traffic on Gardner approaching the intersection traveling north, the visibility of automobiles going west on Rosewood would be about the same, i. e., fifty feet.

Said officer, in response to a subpena deces tecum, brought with him the official police report of the instant accident, from which the statements made to him at the scene of the collision by appellant and respondent Bertha Hellman, were read into the record, to wit:

Appellant Maher: "I was westbound on Rosewood at approximately 25 miles per hour, and as I approached within fifty feet of the intersection of Gardner I noticed a northbound car on Gardner going very fast. I applied my brakes and tried to turn right or north on Gardner to avoid an accident, but I was unable to do so. My left front fender struck the right rear fender of the northbound car, causing it to skid sideways and turn over and travel approximately seventy feet north of where we hit.

I travel this street every day and I am very careful when I come to this intersection. This is my skid mark on the street * * * from the time I applied my brakes until I struck the car."

Respondent Bertha Hellman: "I was northbound on Gardner at approximately 15 miles per hour, having just picked up two little girls to take to school. When I had just about crossed the intersection of Rosewood a westbound car traveling 40 miles per hour struck the right rear of my car, turned it around and causing it to go over on its side.

"I first observed this car when I was crossing the intersection but I could not stop prior to its stopping my car, so I continued on in an attempt to get out of its road."

While appellant admits that the question of contributory negligence is ordinarily a question of fact to be determined by the trier of facts, she urges that under certain circumstances it becomes a question of law, in support of which she quotes from the recent case of Louie v. Hagstrom's Food Stores, Cal.App., 184 P.2d 708, 713, to wit:

"It is elementary law that contributory negligence becomes a question of law when, and only when, from the facts, reasonable men can draw but one inference, and that an inference that points unerringly to the negligence of plaintiff contributing to the injury. In all other cases the question of contributory negligence is one of fact for the jury. (Citing authorities.)"

As to this issue, appellant asserts that the facts herein presented indicate "that plaintiff driver of the automobile was grossly negligent when she approached the intersection where the accident occurred and by not looking to see if there were any cars approaching the intersection"; hence that "defendant's motion for a nonsuit made at the conclusion of plaintiffs' case should have been granted."

Respondent Bertha Hellman was asked on direct examination "just prior to reaching that intersection had you made any stop?" to which she replied:

"Yes, I did.

"Q. Where had you stopped? A. I stopped in the middle of the block to pick up two little girls that I usually took to school.

"Q. How far was your stopping point from that intersection? A. It was in that block.

"Q. That is, just south of the intersection? A. Yes * * *

"Q. Will you tell us when you first observed the defendant's car as you approached the intersection? A. After I got into the intersection. * * *

"Q. Well, approximately how much of your car would you say was headed into the intersection? A. About seven or eight feet of the car. * * *

"Q. Where was the defendant's car at that time? * * * A. It was about halfway in that short street, about half way down the street.

"Q. How fast were you driving at the time * * * that you first saw the defendant's car? A. Well, I was going about fifteen miles an hour.

"Q. What did you do after you saw the defendant's car? A. I stepped on the gas.

"Q. When did you first know there was a collision? A. After I had passed the intersection. * * * After the whole front of my car had passed, I was about here (indicating) and I felt the impact of her car hit us, but I thought our car had completely passed it at the time. * * * most of the car had already passed * * *.

"Q. Did you continue to drive straight ahead after you saw the defendant's car, or did you swerve in any direction? A. I went straight ahead."

At the time the motion for nonsuit was made on behalf of appellant, in addition to the hereinabove quoted testimony of respondent Bertha Hellman, there was also evidence that as appellant approached within fifty feet of the intersection, she noticed respondents' car "northbound on Gardner going very fast."

[1] In this state of the evidence, it was open to debate whether respondent Bertha Hellman's conduct was that of a reasonably prudent person under like circumstances. Therefore, a question of fact was presented and the denial of appellant's motion for a nonsuit was proper.

[2] The record discloses sufficient substantial evidence to support the findings of the trial court to the effect that the negligence of appellant was the proximate cause of the collision and the resulting injuries.

For the reasons stated, the judgment appealed from is affirmed. The appeal from the order denying motion for a new trial is dismissed.

DORAN and WHITE, JJ., concur.

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85 Cal.App.2d 486

LICHTENSTEIN v. SUPERIOR COURT, IN AND FOR MARIN COUNTY, et al.

Civ. 13761.

District Court of Appeal, First District, Division 2, California.
May 17, 1948.

1. Pleading 🔑354(2)

In action by husband to quiet title to impounded monies received for sale of property as against wife's claim of community property, where defendant's claims were fully asserted by answer, court erred in denying motion to strike cross-complaint for separate maintenance relying on repetition of allegations in answer to tie in with complaint. Code Civ.Proc., § 442.

2. Prohibition 🔑9

Prohibition will not lie to regulate issues in a pending cause and confine them to a particular scope or to test correctness of rulings on motions to strike out the whole or any part of the pleading filed in a cause over which court has complete jurisdiction.

3. Courts 🔑1

"Jurisdiction" is power or authority to hear and determine a cause and does not depend upon regularity of the exercise of that power, or upon rightfulness of decision there made.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

4. Courts 🔑1

If lower court has power to make a correct determination of a particular issue, it has power to make an incorrect decision subject only to appellate review.

5. Prohibition 🔑3(1)

A remedy is not "inadequate" merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of the extraordinary writ of prohibition.

See Words and Phrases, Permanent Edition, for all other definitions of "Inadequate Remedy".

6. Prohibition ⚷9

Prohibition would not lie to restrain trial court from erroneously hearing issues raised by cross-complaint for separate maintenance filed in a declaratory action to quiet title to impounded monies alleged to be separate property as against wife's contention that they were community funds where court otherwise had complete jurisdiction. Code Civ.Proc. § 442.

◆

Prohibition proceeding by Joy Lichtenstein against Superior Court of the State of California, in and for the county of Marin, and Honorable Edward I. Butler, Judge of Superior Court, to restrain respondent from trial of issues raised by a cross-complaint for separate maintenance filed in an action to quiet title to impounded monies.

Writ denied in accordance with opinion.

Martinelli, Gardiner & Riede, of San Rafael, for petitioner.

Harold Jos. Haley, of San Rafael, for respondents.

GOODELL, Justice.

The petitioner seeks by prohibition to restrain the trial of the issues raised by a cross-complaint filed in a suit pending in the respondent court. That suit, brought by petitioner against his wife, Theresa Lichtenstein, and Marin Title Guaranty Co. for declaratory relief, arose out of the following situation: a dispute developed respecting a savings account of $9,000 or thereabouts, standing in petitioner's name, he claiming it as his separate property and his wife contending that it is community property. They were bound by a contract to sell their home in San Rafael but Mrs. Lichtenstein insisted that before the sale was consummated the question as to the character of the $9,000 account had to be settled or that an agreement should be drawn which would protect her out of the proceeds of the sale in the event the $9,000 fund should be held to be community property. Such an agreement was entered into on September 13, 1947 and pursuant thereto one-half of the net proceeds, or $11,002.74, was paid to Mrs. Lichtenstein as her separate property. $6,502.73 of the other half was paid to petitioner as his separate property and $4,500 of his half was impounded with the title company wherewith to settle the wife's community half of the $9,000 account should it be determined that the fund was of community character.

The petitioner then filed the suit for declaratory relief to have the question settled, and when his wife answered she filed a cross-complaint for separate maintenance on the ground of extreme cruelty. Petitioner demurred thereto on both general and jurisdictional grounds and moved to strike it from the files on the ground that it was not within the provisions of section 442, Code Civ.Proc. and was sham and irrelevant. The demurrer was overruled and the motion denied.

The petitioner contends that if the court proceeds to try the issues raised by the cross-complaint it will be acting in excess of its jurisdiction.

It is self-evident that if in the main case the $9,000 savings account is held to be community property the $4,500 now impounded for Mrs. Lichtenstein's protection will be hers, but it is difficult to see how any fact within the range of the separate maintenance case can conceivably help her prove that the savings account is community property or disprove that it is separate property. The issues triable under that pleading relate to Mrs. Lichtenstein's support in the future. The issues in the declaratory relief case relate to a savings fund long since accumulated in which her rights, if she has any, have been vested for a long time.

The cross-complaint contains the allegations usually found in a complaint for separate maintenance. It asks for suit money, attorney's fees, permanent maintenance and costs.

It contains, however, the following allegation: "That there is the sum of $4500.00 on deposit with Marin Title Guaranty Company which sum this Cross-Complaint alleges to be community property of herself and said Cross-Defendant and that this Cross-Complainant is entitled to be adjudged the sole owner of said funds and entitled to the exclusive possession and control thereof as her separate property by virtue of that certain agreement in writing executed by said parties on September 13, 1947, * * *" All this is alleged in the answer and with considerably more detail and particularity.

The main case is nothing more nor less than a suit to quiet petitioner's title to the impounded $4,500 (based on the claim that the $9,000 savings account is his separate property) and it is a familiar rule that in such suits there is no necessity whatever for a cross-complaint when the defendant's claims and contentions are asserted in the answer. (22 Cal.Jur. p. 160, sec. 37). For this reason the repetition of the allegation in the cross-complaint (See Brooks v. White, 22 Cal.App. 719, 721, 136 P. 500) can scarcely be relied on as constituting a tie-in with the complaint or the subject matter thereof.

[1] We are satisfied that the cross-complaint has no place in the main case and that the court erred in denying the motion to strike. But so assuming, the question remains whether such error can be corrected by the remedy now sought.

[2] The petitioner cites several cases decided on appeal, holding that cross-complaints in those cases were improper, but no case is cited where any court has held that by a writ of prohibition such pleadings can be controlled or ruled out in a piece of litigation then under way in a trial court. We have discovered no such case. On the contrary the law seems to be settled (21 Cal.Jur. p. 603) that "The writ cannot be used for the purpose of regulating the issues in a pending cause and confining them to a particular scope, or to test the correctness of rulings on motions to strike out the whole or any part of a pleading filed in a cause over which a court has complete jurisdiction."

[3] In 21 Cal.Jur. p. 583 it is said, "Jurdiction is power or 'authority to hear and determine a cause.' It does not depend upon the regularity of the exercise of that power or upon the rightfulness of the decisions there made, and the writ of prohibition is not, as a consequence, available to restrain or correct error,—to regulate or control procedure * * *"

[4] In Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287, 109 P.2d 942, 946, 132 A.L.R. 715, the court restates the familiar rule that "If the lower court has power to make a correct determination of a particular issue, it clearly has power to make an incorrect decision, subject only to appellate review and not to restraint by prohibition."

In County of Sutter v. Superior Court, 188 Cal. 292, 295, 296, 204 P. 849, 850, the Court expressed doubt whether the trial court "did not manifestly err" in its action, but then went on to say that "we do not think these questions can be raised by a proceeding in prohibition. * * * Even if an order made as an incident in the progress of a case involves the question of jurisdiction, prohibition cannot be invoked to annul the order or stop proceedings under it."

[5] In the recent case of Rescue Army v. Municipal Court, 28 Cal.2d 460, 466, 171 P.2d 8, 12, the court said: "A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of the extraordinary writ of prohibition. [Citations.] Experience has shown that most of the meritorious defenses are sustained and most of the unsubstantial constitutional or other objections are weeded out at the proper time on the proper showing during the trial or on appeal. These remedies are therefore considered adequate in the usual situations. If this were not so, then whenever jurisdiction is challenged prohibition would lie and the trial of the case would be interrupted until the reviewing court passed upon the intermediate question and appellate courts in many cases would be converted into nisi prius courts. Agassiz v. Superior Court, 90 Cal. 101, 103, 27 P. 49."

[6] The demurrer to the petition is sustained, the alternative writ discharged, and the petition for a peremptory writ denied.

NORSE, P. J., and DOOLING, J., concur.

85 Cal.App.2d 574

RALPH v. CLIFTON'S BROOKDALE, Inc.

Civ. 16243.

District Court of Appeal, Second District, Division 1, California.

May 20, 1948.

1. Appeal and error ⚷927(2)

On appeal from judgment of nonsuit, court will consider only evidence most favorable to plaintiff.

2. Negligence ⚷136(22)

In action for injuries to patron of defendant's restaurant as result of fall from second step of stairway, which she was descending, in exhibition room of restaurant basement, evidence of condition therein, particularly relating to adequacy of lighting, presented fact question for jury as to defendant's negligence.

◆

Appeal from Superior Court, Los Angeles County; Joseph M. Maltby, Judge.

Action by Ruth E. Ralph against Clifton's Brookdale, Inc., for personal injuries sustained in a fall from a stair step in defendant's restaurant building. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Fred M. Riedman, of Long Beach, for appellant.

Sidney A. Moss and Henry F. Walker, both of Los Angeles, for respondent.

DORAN, Justice.

In this action for damages for personal injuries alleged to be the result of defendant's negligence and tried before a jury, a motion for nonsuit was granted; from the judgment that followed plaintiff appeals.

It is contended on appeal that plaintiff "introduced sufficient evidence to make out a prima facie case," hence, "the court erred in granting defendant's motion."

The evidence introduced by plaintiff shows, in support of appropriate allegations in the complaint in substance to the same effect that, defendant operated a cafeteria or restaurant in Los Angeles; that in the basement was operated an attraction known as "Garden of Gethsemene" to which patrons of the restaurant were invited; pamphlets were distributed to customers for such purpose; the display was located in three adjoining rooms described in appellant's brief as follows:

"The area in which the said spectacle was operated by defendant consisted of a stairway reaching from the main level of the restaurant to a lower level, a first room, known as the 'Room of the Weavers', a second room known as the 'Grotto of the Rock', and the third room known as the 'Garden of Gethsemene'. The three rooms are so arranged that the invitee enters and passes thru the rooms in the order named. The 'Garden of Gethsemene' or last room of the series, houses the feature attraction of the exhibit, a statue of the Christ, located opposite and to the right of the entrance. The construction of the three rooms is of a nature to simulate stones throughout, including floors, benches or seats, and steps. Opposite to the figure of the Christ, and slightly to the left of the entrance to the said room is a narrow raised area, approached by means of two steps up from the level of the floor of the room, known as the 'Meditation Grotto'. The steps leading to the said 'Meditation Grotto' are constructed of, or in a manner to simulate, stone, and are irregular in that (a) the edge of each tread, over the riser, is irregular in contour, rather than a straight edge, and (b) each tread is deeper on the side to the left ascending, this feature being particularly emphasized in the second step up from floor level, which tread is approximately twice as deep on the left side as on the right side of said tread and (c) although the steps aforesaid constitute a part of the entrance to the 'Meditation Grotto' which extends ahead and somewhat to the left of the said steps the excess depth of the tread is on the inside of the curve to the left (or left hand side ascending), rather than on the outside (or right hand side ascending)."

The lighting is described as follows:

"* * * During the time plaintiff remained in the Garden of Gethsemene, prior to and including the time of plaintiff's fall aforesaid, illumination of the entire area, including the steps from which plaintiff fell, was intermittent, the chief source of light being a reflected loom or glow from the figure of the Christ during the period that figure was illuminated. During the periods in which the illumination of the said figure was discontinued, the entire area, including the stairway which was the site of the accident, was in such a darkened condition, that plaintiff was unable to see anything but darkness, and when the light on the figure was off, plaintiff was unable to distinguish objects around her."

The accident occurred, as described by appellant, as follows:

"* * * descended the stairway leading from the main restaurant level, and entered the first room, or Room of the Weavers, remaining in that room ten or fifteen minutes. Following instructions of attendant in the Room of the Weavers, plaintiff next entered the Grotto of the Rock, where she remained several minutes. Plaintiff next entered the Garden of Gethsemene where, after watching the intermittent illumination of the figure of the Christ for some time, she ascended the steps leading from the floor level of the Garden of Gethsemene up to the level of the Meditation Grotto, but did not enter the Meditation Grotto, instead she remained on the top step or landing, standing there for an undetermined period of time. Plaintiff then descended the same stairs on the right-hand side of the stairway, descending without incident until she reached the step next above the floor level, whereupon she missed the said step, stepped out on what she believed to be the floor level, fell, and suffered the injuries complained of. During the descent of said stairs, plaintiff had her eyes open, looked ahead, and could see only darkness."

[1, 2] It is well settled that in connection with an appeal such as the one here considered, the court is concerned only with a consideration of the evidence most favorable to the plaintiff; and in all of its phases and legal aspects. Here the evidence revealed a condition, in particular relating to the adequacy of the lighting, that clearly presented a question of fact for the jury's determination. With regard to the question of negligence, it might well have been decided either way, in which circumstances the court could have held the verdict supported by sufficient evidence. Viewing the evidence in the light of the law as pointed out above, it is obvious that the granting of defendant's motion for a nonsuit was error. See Martin v. Fox, 41 Cal.App.2d 925, 108 P.2d 29; Schultheiss v. Los Angeles R. R. Co., 11 Cal. App.2d 525, 54 P.2d 49.

For the foregoing reasons, the judgment is reversed.

YORK, P. J., and WHITE, J., concur.

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85 Cal.App.2d 529

VENTURA COUNTY et al. v. SOUTHERN CALIFORNIA EDISON CO.

Civ. 15994.

District Court of Appeal, Second District, Division 3, California.

May 18, 1948.

Hearing Denied July 15, 1948.

1. Negligence 🔑18

Under fire liability law, liability may be predicated not only upon direct and negligent commission of act of starting a fire, but also upon a negligent acquiescence in or failure to prevent known conditions, circumstances, or conduct which might reasonably be expected to result in starting of a fire. Gen.Laws, Act 2586, § 1.

2. Electricity 🔑16(4)

A company owning and operating both power and telephone lines which permitted a power transmission line to come into contact with telephone line, with result that fire was started in grass beneath the lines, thereby negligently allowed the fire to be set within fire liability law, so as to be subject to liability for expenses incurred by plaintiffs in fighting the fire. Gen.Laws, Act 2586, §§ 1–3.

3. Counties 🔑24
Municipal corporations 🔑73

The fire liability law imposing, on person negligently responsible for fire, liability for expenses incurred by third person in fighting the fire, does not violate constitutional provision prohibiting Legislature from imposing taxes for county or municipal purposes, even though county is a claimant under the law, since purpose thereof is not to secure revenue, but to compel reimbursement by person responsible for fire. Gen.Laws, Act 2586, §§ 1–3; Const. art. 11, § 12.

4. Negligence ⚷18

The fire liability law imposing upon person negligently responsible for fire liability for expenses incurred in fighting fire is not unconstitutional as constituting an unauthorized means of providing for support of the government, on theory that it imposed involuntary charge for performance of a purely governmental function by county in fighting fire. Gen.Laws, Act 2586, §§ 1–3.

5. Constitutional law ⚷48

A holding that legislation is invalid cannot be founded upon a mere difficulty of categorization, but rather must be based upon a clear, substantial, and irreconcilable conflict with fundamental law.

6. Statutes ⚷117(1)

The fire liability law imposing, upon person negligently responsible for fire, liability for expenses incurred by third person in fighting fire, is not invalid on ground that title stating that it was an act defining civil liability for failure to control fires did not meet constitutional requirement that subject of act shall be expressed in its title. Gen.Laws, Act 2586; Const. art. 4, § 24.

7. Statutes ⚷105(1)

The constitutional provision that subject of act must be expressed in title must be construed liberally to uphold legislation reasonably included within general subject indicated by title. Const. art. 4, § 24.

8. Statutes ⚷109

Where title readily suggests field of legislation encompassed by text of act, it cannot be deemed misleading or insufficient. Const. art. 4, § 24.

9. Statutes ⚷109

The details of liability imposed by a statute need not be expressed in its title, since it is not required that title to act should be an index to all its provisions, and, so long as provisions are cognate, attingent, and germane to subject matter of title, constitutional provision requiring subject of act to be expressed in title is not violated. Const. art. 4, § 24.

10. Constitutional law ⚷42

One may not urge the unconstitutionality of a statute unless his rights are adversely affected thereby.

11. Constitutional law ⚷42

A company against which action had been brought to recover expenses incurred in fighting and extinguishing fire, for which company was allegedly responsible and which spread to lands of others, was without standing to urge that fire liability law violated equal protection clause in not imposing liability where fire did not spread to property of other persons, since law treated alike all persons similarly situated, and company was not adversely affected. Gen.Laws, Act 2586, §§ 1–3; U.S.C.A.Const.Amend. 14.

12. Constitutional law ⚷243
Negligence ⚷18

The fire liability statute imposing on person negligently responsible for fire spreading to another's property liability for expenses incurred in fighting fire, but not imposing liability if fire is confined to property of person responsible therefor, does not deny equal protection of the laws. Gen.Laws, Act 2586, §§ 1–3; U.S.C.A. Const.Amend. 14.

◆

Appeal from Superior Court, Ventura County; Charles F. Blackstock, Judge.

Action by the County of Ventura and the Ventura County Fire Protection District against the Southern California Edison Company to recover expenses incurred by the plaintiffs in fighting and extinguishing a fire allegedly caused by negligent construction and maintenance of transmission and telephone lines by the defendant. Judgment for the plaintiffs, and the defendant appeals.

Judgment affirmed.

Gail C. Larkin and E. W. Cunningham, both of Los Angeles, and Sheridan, Orr, Bates & Barnes, of Ventura, for appellant.

M. Arthur Waite, Dist. Atty., of Ventura, and Donald D. Roff, Deputy Dist. Atty., of Ojai, for respondents.

Fred N. Howser, Atty. Gen., and E. G. Funke and Walter S. Rountree, Deputy Attys. Gen., amici curiae on behalf of respondents.

SHINN, Acting Presiding Justice.

The trial court's findings in this case are not challenged by appellant, Southern California Edison Company. In substance, the following facts were found to be true: On September 23, 1944, in Orange Canyon, Ventura County, a power transmission line carrying a 66,000 volt current came into contact with a telephone line and telephone pole, thereby causing a fire in the grass beneath the lines which spread into and burned over a large area of adjoining ranchland before being brought under control. The Southern California Edison Company owned and operated both the power and telephone lines, the latter running along parallel to and directly beneath the power line. Contact between the two lines came about when the lower south conductor of the power line, which spanned Orchard Canyon between towers over 2700 feet apart, stretched and sagged in the center so that it touched the telephone wire and pole erected at the highest point on the floor of the canyon midway between the transmission towers an directly under the low point of the span of the transmission line. The trial court found the cause of the fire to be the negligent construction and maintenance of the transmission and telephone lines by the Edison Company.

Plaintiffs, the county of Ventura and the Ventura County Fire Protection District, brought this action to recover from the Edison Company the expenses incurred by plaintiffs in fighting and extinguishing the fire, basing their right of recovery upon the Fire Liability Law, Deering's Gen. Laws, 1944, Act 2586. The case was consolidated for purposes of trial with two other actions filed against defendant by persons whose property was damaged by the same fire. Judgment was rendered in favor of all the plaintiffs, but the defendant here appeals only from the judgment in favor of Ventura County and Ventura County Fire Protection District for a sum in excess of $2,000.

The following provisions of the Fire Liability Law, Deering's Gen. Laws, 1944, Act 2586, are pertinent to the issues presented: "Sec. 1. Acts giving rise to liability. Any person who: (1) Personally or through another, and (2) Wilfully, negligently, or in violation of law, commits any of the following acts: (1) Sets fire to, (2) Allows fire to be set to, (3) Allows a fire kindled or attended by him to escape to the property, whether privately or publicly owned, of another, is liable to the owner of such property for the damages thereto caused by such fire. § 2. Escaping fires. Any person who allows any fire burning upon his property to escape to the property, whether privately or publicly owned, of another, without exercising due diligence to control such fire, is liable to the owner of such property for the damages thereto caused by such fire. § 3. Expenses of fighting fires. The expenses of fighting such fires shall be a charge against any person made liable by this act for damages caused thereby. Such charge shall constitute a debt of the person charged and shall be collectible by the party, or by the federal, state, county, or private agency incurring such expenses in the same manner as in the case of an obligation under a contract, expressed or implied."

[1, 2] Appellant's initial contention is that the findings do not provide a basis of liability under section 3 of the Fire Liability Law, since they do not indicate that appellant did any act which would make it liable for damages under section 1. Appellant would construe the provisions of section 1 reading, "Any person who * * * negligently * * * sets fire to," etc., as requiring a finding that the fire was caused by defendant's direct and affirmative act of setting it, which act was either negligent in itself, or was done in a negligent manner, whereas the present findings show only negligent construction and maintenance which indirectly caused

the fire. The argument is inconclusive, for it fails to give due consideration to the second classification contained in the section: "Any person who * * * negligently * * * allows fire to be set," etc. In similar contexts, the word "allow" has been found to import knowledge of the operative facts accompanied by acquiescence in, or abstinence from preventing, the occurrence of the particular act or event, where a duty and power to prevent existed. Louisville & N. R. Co. v. Smith, 163 Ala. 141, 50 So. 241, 244; People v. Forbath, 5 Cal.App.2d, Supp., 767, 769; Luckie v. Diamond Coal Co., 41 Cal.App. 468, 477, 183 P. 178; Gulf Oil Corp. v. Lemmons, 198 Okl. 596, 181 P.2d 568, 570. Giving to the two above-quoted classifications a reasonable construction in harmony with the statutory purpose, it appears that liability under the first is predicated upon the direct and negligent commission of the act of starting a fire, and under the second, upon a negligent acquiescence in, or failure to prevent known conditions, circumstances, or conduct which might reasonably be expected to result in the starting of a fire. Appellant's failure to properly construct and maintain its equipment was found to be the proximate cause of the present conflagration. Negligence in this respect is clearly within the second classification of acts giving rise to liability for damages, for appellant, who must be charged with knowledge of the condition of its equipment, took no steps to prevent the occurrence of fire, which was the reasonably foreseeable consequence of that condition. Appellant thus may fairly be said to have negligently allowed the fire to be set in the adjoining ranchlands, and hence is subject to the provisions of section 3.

Appellant, however, claims that the statute is invalid, urging the following four grounds in support of the contention: (1) It imposes a tax in violation of Article XI, section 12 of the California Constitution; (2) it imposes a compulsory charge for performance of a purely governmental function; (3) its title fails to comply with Article IV, section 24 of the California Constitution; and (4) it denies equal protection of the laws **in violation of the** Fourteenth Amendment to the United States Constitution. These contentions will be considered in the order given.

[3] The pertinent provisions of Article XI, section 12, of the California Constitution state: "Except as otherwise provided in this Constitution, the Legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." Appellant maintains that "The purpose of the section is to relegate to the local boards the whole subject of county and municipal taxes for local purposes, and * * * the legislature has no power to impose any tax whatever, within those territories, for local purposes." San Francisco v. Liverpool etc. Ins. Co., 74 Cal. 113, 124, 15 P. 380, 384, 5 Am.St.Rep. 425. Recovery by the county in the present case is claimed to amount to a tax imposed by the legislature for the local purpose of fighting fires.

The clear intent of the Fire Liability Law is to require reimbursement by the wrongdoer for expenses incurred in the suppression of fire. This liability may be enforced by any person or agency entitled thereto, and not solely by the agencies of government. The purpose is not to secure revenue but to compel compensation by one who has by his wilful act, negligence, or violation of law, forced the expenditure of money by others. That this compensation is eminently fair and equitable seems clear from the fact that the expenses of fire fighting normally are beneficial to the wrongdoer in that they serve to limit the extent of the destruction and thereby mitigate the damages. The burden of suppressing a fire set to or allowed to spread to the property of another thus rests squarely upon him whose wilful or negligent acts or omissions necessitated that expense, and not upon the government or careful property owner. Compensation required to be made under these circumstances cannot be deemed a tax (Morgan's R. R. & Steamship Co. v. Louisiana, 118 U.S. 455, 461, 463, 6 S.Ct. 1114, 30 L.Ed.

237; City of New Orleans v. Hop Lee, 104 La. 601, 29 So. 214; Willis v. Standard Oil Co., 50 Minn. 290, 52 N.W. 652; Chicago, W. & V. Coal Co. v. People, 181 Ill. 270, 54 N.E. 961, 48 L.R.A. 554), and is therefore not within the scope of the constitutional prohibition contained in Article XI, section 12.

[4, 5] It is next contended that insofar as county or municipal agencies seek to enforce the liability prescribed by section 3, assuming that liability not to be a tax, it must be construed as an involuntary charge for the performance of the purely governmental function of extinguishing uncontrolled fires. Appellant takes the position that such a charge is beyond the legislative power since it is not included among the only valid means provided by law for the support of the government, namely, taxation, fines or penalties imposed in the exercise of the police power, and charges for special privileges granted and services rendered at the request of the person charged. A holding that legislation is constitutionally invalid, however, cannot be founded upon a mere difficulty of categorization, but rather must be based upon a clear, substantial, and irreconcilable conflict with the fundamental law, 5 Cal.Jur., Constitutional Law, sec. 44. We find no such conflict to exist in the present case. The additional liability for fire suppression expenses, being measured by the actual loss incurred, is substantially less onerous than the treble damages formerly recoverable for injuries due to negligent fires under section 3344, Political Code, and section 3346a, Civil Code. Those provisions were held to be a valid exercise of the state's police power in Kennedy v. Minarets & Western Ry. Co., 90 Cal.App. 563, 581, 266 P. 353, 360, where the court said: "The danger from fires in a dry country like California is so great as to justify the police power of the state in imposing treble damages, and in no country is the necessity for greater care being exercised against the spread of fires than in the San Joaquin Valley during the summer months where conditions are always favorable for extensive conflagrations and the absence of moisture rendering the extinguishment of fires, when once started, so difficult. All of these considerations justify the exercise of the police power of the state in imposing damages, such as to insure the reasonable care and precautions necessary under the conditions so existing." The present statute clearly finds its justification upon the same basis.

In support of its position, appellant cites Chicago v. Weber, 246 Ill. 304, 92 N.E. 859, 34 L.R.A., N.S., 306, 20 Ann.Cas. 359, and Ex parte Newberg, 140 Tex.Cr.App. 211, 143 S.W.2d 786. In the former case, a provision in a city ordinance requiring theater managers to employ city firemen to attend performances with a view to preventing fires, was held void on the ground that the city had no power to charge the theater managers with expenses incurred in performing the public duty of preventing fires. Although there is language in the opinion favorable to appellant, the case cannot be considered authority on the question here involved, for the only point decided was that the city charter did not confer power to enact the ordinance in question, and the court expressly found it unnecessary to pass on the constitutional validity of such an ordinance. It may be conceded that Ex Parte Newberg, supra, relying largely upon Chicago v. Weber, does hold a provision in a city ordinance requiring employment of city policemen in dance halls, to offend against the Fourteenth Amendment of the United States Constitution. The substantial weight of authority, however, is to the contrary, holding that such charges are a valid exercise of the police power. Tannenbaum v. Rehm, 152 Ala. 494, 44 So. 532, 11 L.R.A.,N.S., 700, 126 Am.St.Rep. 52; O'Neil v. Providence Amusement Co., 42 R.I. 479, 108 A. 887, 8 A.L.R. 1590; Chicago, W. & V. Coal Co. v. People, 181 Ill. 270, 54 N.E. 961, 48 L.R.A. 554; City of Hartford v. Parsons, 87 Conn. 412, 87 A. 736, Ann.Cas.1916A, 1182; City of New Orleans v. Hop Lee, 104 La. 601, 29 So. 214; Harrison v. Mayor and Council of Baltimore, 1 Gill., Md., 264. The persuasiveness of the majority view is augmented by the fact that in none of the cited cases, unlike the present one, was the charge for expenses dependent upon the fault of the person charged. A fortiori, section 3 of the Fire Liability Law, which imposes liability only where negligence, wilfulness, or violation of law are present, should be held valid.

Although statutes imposing liability for the cost of fire suppression are not uncommon (see 36 C.J.S., Fires, § 16, Page 819), neither the diligence of counsel nor the independent research of the court has disclosed any case in which such a statute has been declared unconstitutional, and in fact, the authorities are uniformly in accord that such statutes are within the police powers of the state.

Former section 18 of the California Forestry Act, Stats.1919, p. 234, contained all the essential language, and imposed substantially the same liability for the cost of fire suppression as section 3 of the present Fire Liability Law. In Paiva v. California Door Co., 75 Cal.App. 323, 333, 242 P. 887, where the constitutionality of this Forestry Act was in issue, the court conceded that imposition of liability in the absence of negligence or wilfulness might be invalid, but did not question the power of the legislature to provide for collection by federal, state, county or private owners of expenses incurred in fighting fires negligently or wilfully started. In First State Bank of Thompson Falls v. United States, 9 Cir., 92 F.2d 132, 135, a Montana statute similar to the Fire Liability Law was applied without question "in the light of its manifest purpose, to protect the state from the destructive holocausts to which her arid climate and her vast timber resources make her so liable." Cf. Adamson v. Greenwood Cemetery, 164 App.Div. 832, 150 N.Y.S. 467.

Recovery by state authorities of fire fighting expenses under Oregon statute was upheld, as against a claim of constitutional invalidity, in State of Oregon v. City of Marshfield, 122 Or. 323, 259 P. 201, 202, where the court stated: "There has been much legislation in recent years for the protection of the great forests in this state, Oregon ranks high in the lumber industry. It is not surprising that the Legislature declared a forest fire burning uncontrolled to be a public nuisance. Indeed, what greater menace to life and property could there be?" The court then ruled that "no constitutional question is involved. The fact that the reasonable cost of fighting the fire might exceed the value of defendant's land does not amount to taking of property without due process of law."

Similarly, in United States v. Chesapeake & Ohio Ry. Co., 4 Cir., 130 F.2d 308, 310, same case, 4 Cir., 139 F.2d 632, the federal government was held entitled to recover expenses, including the wages of its employees, incurred in fighting a fire, under the Virginia fire suppression cost law. The court was there of the opinion that the statute merely embodied a well recognized principle of the law of torts: "Damages for personal injuries received in an attempt to save property menaced by the negligence of another are recoverable from the wrongdoer. Illinois Central R. R. Co. v. Siler, 229 Ill. 390, 82 N.E. 362, 15 L.R.A., N.S., 819, 11 Ann. Cas. 368; 38 Am.Jur., Negligence, secs. 81, 77, 80; 22 Am.Jur., Fires, sec. 40; 2 Restatement, Torts (1934), sec. 445. The principle of liability for foreseeable consequences, upon which this rule is based, certainly permits the recovery of damages in the form of expenditures incurred in attempting to save property." 130 F.2d 308, 310.

The very argument offered here by appellant was in fact expressly rejected by the Supreme Court of Minnesota in State v. Phillips, 176 Minn. 472, 223 N.W. 912, 914, where, in reference to the Minnesota statute, M.S.A. § 88.75, the court said: "Defendant also contends that the provision making an occupant from whose premises a fire escapes liable for the damage caused by the fire and for the expense incurred in extinguishing it is 'an unwarranted exercise of legislative power.' * * * It is within the power of the Legislature to impose upon one who makes use of such a dangerous instrumentality as fire the duty to keep it under control at his peril, and to make him liable for all damage if it spreads to the property of others. Even where he is not responsible for the starting of a fire, if he knows of its existence upon his premises and by a reasonable effort could prevent it from spreading to other property, but fails to do so, he may be made liable for the damage resulting from its spreading. Farrell v. Minneapolis & R. R. Ry. Co., 121 Minn. 357, 141 N.W. 491, 45 L.R.A., N.S., 215; State v. City of Marshfield, 122 Or. 323, 259 P. 201. That the Legislature may impose liability for the expense incurred in fighting and extinguishing a fire as well as for the damage caused by it cannot be doubted." On principle and authority, therefore, we hold appellant's second argument of unconstitutionality to be without merit.

[6-9] Appellant's third proposition is that the title of the Fire Liability Law does not meet the requirements of Article IV, section 24 of the California Constitution, which states that "every Act shall embrace but one subject, which subject shall be expressed in its title." The title to the act reads, "An act defining the civil liability for failure to control fires." Stats. 1931, p. 1644. It is well settled that this provision of the Constitution must be construed liberally to uphold legislation reasonably included within the general subject indicated by the title. Estate of Wellings, 192 Cal. 506, 519, 221 P. 628; Heron v. Riley, 209 Cal. 507, 510, 289 P. 160; Matter of Lake, 89 Cal.App. 390, 395, 265 P. 325. Where the title readily suggests the field of legislation encompassed by the text of the act, it cannot be deemed misleading or insufficient. Hecke v. Riley, 209 Cal. 767, 775, 290 P. 451; People v. Jordan, 172 Cal. 391, 394, 156 P. 451; People v. French, 61 Cal.App. 275, 278, 214 P. 1003. The details of the liability provided for in the statute need not be expressed in its title, for "it was never expected that the title to an act should be an index to all its provisions, and so long as the provisions themselves are cognate, attingent, and germane to the subject-matter of the title, no violence is done to the Constitution." People v. Fryer, 175 Cal. 785, 793, 167 P. 382, 385; Abeel v. Clark, 84 Cal. 226, 229, 24 P. 383. The present act embraces the single subject of liability for fires, and we think its title is sufficiently indicative of that subject, within the rules laid down in the foregoing cases, to meet the constitutional requirement.

Appellant contends lastly that the statute violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. Appellant argues that section 3 of the Fire Liability Law refers to section 1 and section 2 for the definition of the persons made liable, and that section 3 therefore imposes liability only when expenses are incurred by the public agency in fighting a fire burning upon and causing damage to the property of a person other than the one who set it or allowed it to escape; but that it does not purport to make liable an owner who negligently or wilfully sets fire to his own property, so long as that fire is confined solely to his own property, regardless of the amount of fire fighting expense which may be incurred in suppressing it. The purpose of the statute, it is said, is merely to reimburse the governmental agency for expenses incurred in performance of the public duty of suppressing fires—a purpose equally applicable to all fires whether on the property of the wrongdoer or the property of others. On this basis, the statutory classification of persons made liable is claimed to be arbitrary, discriminatory, and unrelated to any substantial distinctions germane to the purpose of the law, and hence a denial of equal protection of the laws.

[10, 11] Appellant's position may not be sustained. It is a firmly established principle of law that one may not urge the unconstitutionality of a statute unless his rights are adversely affected thereby. 16 C.J.S., Constitutional Law, § 76. Under this rule, appellant would appear to have no standing to make the present contention, for its rights are in no way adversely affected nor discriminatorily prejudiced by section 3 of the Fire Liability Law. Conceding that section 3 incorporates by implication the terms of sections 1 and 2, it is clear that the statute treats in the same manner all persons similarly situated. Every owner of property, including appellant, is rendered immune from the statutory liability for fire suppression costs if the fire is confined to his own property, and is made subject thereto under specified conditions if the fire is not so confined. We therefore perceive no way in which the application of section 3 discriminates against appellant.

[12] Furthermore, contrary to appellant's contention, we are convinced that the classification made by the statute is a rational and justifiable one. Appellant's premise. that the purpose of the statute is merely to reimburse the governmental agency for the cost of fire fighting, confuses the means with the object. As we have shown above, the Fire Liability Law was validly enacted in the exercise of the police power. The liabilities imposed were designed to stimulate precautionary measures aimed at preventing the starting and spreading of fire, and thereby eliminate needless conflagrations destructive of property and dangerous to the safety and welfare of the public. Liability in the form of a compensatory recovery for fire fighting costs is merely one of the sanctions devised for the achievement of the larger purpose indicated by the statute as a whole. Appellant's premise is further vitiated by the fact that the liability is imposed in favor of any agency, whether public or private, incurring such expenses, and regardless of whether they were incurred voluntarily or in the performance of a public duty. We think the statute evinces an intention to make this additional liability as broad as the mischief it was designed to prevent. It may be presumed that every person will care for his own property in a reasonably prudent manner. The possibility of loss to himself as a consequence of wilful or negligent misuse of fire could conceivably be deemed by the legislature to be a sufficient deterrent to such conduct by an owner in respect to his own property. The presumption of care for one's own property does not necessarily extend to the property of another, and the legislature might have reasonably concluded that a more effective deterrent in the nature of a heavier liability was necessary in such cases. We, therefore, cannot say that the statutory classification of presons additionally liable for fire suppression costs under section 3 does not have a rational foundation nor bear a reasonable relationship to the object of the legislation. Accordingly, it does not constitute a denial of the equal protection of the laws. New York Rapid Transit Corp. v. New York, 303 U.S. 573, 578, 58 S.Ct. 721, 82 L.Ed. 1024; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 79, 31 S.Ct. 337, 55 L.Ed. 369; Ferrante v. Fish & Game Commission, 29 Cal.2d 365, 370, 372, 175 P.2d 222; 16 C.J.S., Constitutional Law, § 505, pages 998–1003.

The judgment is affirmed.

WOOD, J., and VALLEE, Justice pro tem., concur.

85 Cal.App.2d 454

In re ATWELL'S ESTATE.

KUCHEL v. ATWELL.

Civ. 16189.

District Court of Appeal, Second District, Division 3, California.

May 13, 1948.

Rehearing Denied June 10, 1948.

Hearing Denied July 8, 1948.

1. Statutes ⚷147

Where sections of the inheritance tax law were codified as sections of the Revenue and Taxation Code, the latter were to be construed as restatements and continuations of the prior sections and not as new enactments, and were to be construed as having the same purpose, object, and meaning as the prior sections. Revenue and Taxation Code, §§ 2, 13551 et seq., 13551, 13989.

2. Taxation ⚷895(7)

In fixing state inheritance tax on estate of deceased who left his widow as the sole beneficiary under his will, limited federal estate tax deduction was properly deducted from entire community estate and not, as contended by widow, from deceased's half of the community property after deduction of debts and ordinary expenses of administration. Revenue and Taxation Code, §§ 13551(b), 13989.

3. Internal revenue ⚷982

The federal estate tax is an "excise tax" and not a "property tax." 26 U.S.C.A. Int.Rev.Code, § 811(e) (2).

See Words and Phrases, Permanent Edition, for all other definitions of "Excise Tax" and "Property Tax".

4. Internal revenue ⚷7

The ultimate thrust of the federal estate tax is governed entirely by state law. 26 U.S.C.A.Int.Rev.Code, § 811(e) (2).

5. Taxation 🔑856

The state inheritance tax is on the net succession and is levied on what the beneficiary receives after lawful burdens and deductions during course of administration. Revenue and Taxation Code, §§ 13551(b), 13989.

6. Wills 🔑1
Descent and distribution 🔑1

The right to receive property by will or inheritance is not a natural right, but is a creature of the law.

7. Taxation 🔑856

The state may confer the privilege on heirs, of succeeding to property on the death of the owner, on condition that any portion of the property it specifies shall be contributed to the state as inheritance taxes, and may declare that no part of the federal estate tax shall be deducted in computing the state's inheritance tax. Revenue and Taxation Code, §§ 13551(b), 13989.

8. Statutes 🔑219

The contemporaneous and practical instruction of a statute by those whose duty it is to carry it into effect, while not controlling, is entitled to great respect and weight.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Proceeding in the matter of the estate of Joseph M. Atwell, also known as J. M. Atwell, deceased. From an order of the probate court fixing the inheritance tax on the deceased's estate in accordance with the contention of Thomas H. Kuchel, State Comptroller, Emma Atwell, deceased's widow, appeals.

Order affirmed.

Lawler, Felix & Hall, William T. Coffin and J. Phillip Nevins, all of Los Angeles, for appellant.

James W. Hickey, Chief Inheritance Tax Attorney, and Raymond G. LaNoue, Deputy Inheritance Tax Attorney, both of Sacramento, C. G. Kolts, of Los Angeles, and J. D. Lear, Asst. Deputy Inheritance Tax Attorneys, of Sacramento, for respondent.

VALLÉE, Justice pro tem.

The widow of Joseph M. Atwell appeals from an order of the probate court fixing the inheritance tax upon his estate. Atwell died testate on September 30, 1945. His widow is the sole beneficiary named in his will. There is no dispute as to the facts.

The question for decision is whether the limited deduction allowable under the Inheritance Tax Law on account of the federal estate tax should be deducted, as appellant contends, from the decedent's share of the community property, or, as respondent contends from the entire community estate. The essentials of the computations of the respective parties make for ready grasp of the problem.

The essentials of respondent's computation, approved by the probate court, are as follows:

Gross estate	$755,081.13
Deductions other than federal estate tax	23,307.06
Net estate after such deductions	731,774.07
Federal estate tax deduction..	75,283.47
Net estate after all deductions	$656,491.60
The widow's one-half under Revenue and Taxation Code, section 13551 (b)..........	$328,245.80
The taxable one-half.........	$328,245.80
The tax on $328,245.80.......	$ 21,312.12

The essentials of appellant's computation are as follows:

Gross estate	$755,081.13
Deductions other than federal estate tax	23,307.06
Net estate after such deductions	$731,774.07
The widow's one-half under Revenue and Taxation Code, section 13551 (b)..........	$365,887.03
The taxable one-half before federal estate tax deduction	$365,887.04
The federal estate tax deduction	75,283.47
The net taxable portion..	$290,603.57
The tax on $290,603.57.......	$ 17,924.32

Simply stated, appellant's contention is that one-half of the community property is not subject to any part of the federal estate tax.

The entire net estate was taxed under the federal estate tax law in the same manner as if it had been the separate property of decedent. 26 U.S.C.A. Int.Rev.Code, § 811(e) (2). The federal estate tax paid from the estate was $175,347.38. Under the Inheritance Tax Law the entire federal estate tax is not deductible in determining the net estate subject to inheritance tax. The deduction allowable on account of the federal estate tax is limited to what the federal tax would be if computed on the part of the estate which is subject to inheritance tax. Rev. & Tax. Code, sec. 13989. The deduction allowed on account of the federal estate tax was $75,283.47. It was computed by applying the federal rates to $365,887.04. This latter amount is one-half of the community estate after deductions other than the federal estate tax. In fixing the inheritance tax on the portion of the estate subject to tax, the allowable deduction on account of the federal estate tax paid was deducted from the entire community estate.

As we have seen, the one-half of the community property which belongs and goes to the widow was computed by respondent by deducting debts, expenses of administration, and the federal estate tax (as limited by Revenue and Taxation Code, section 13989), from the gross value of the estate and dividing the remainder by two. The probate court approved respondent's method of computation and fixed the tax accordingly. Appellant contends that no portion of the federal estate tax should be subtracted from the gross value of the estate, only debts and ordinary expenses of administration, and that then the remainder should be divided by two.

Estate of Coffee, 19 Cal.2d 248, 120 P.2d 661, is determinative of the controversy. In the Coffee case, the inheritance tax appraiser in his report added the total value of the estate subject to distribution by the probate court—$141,000—and the value of property held in joint tenancy by decedent and his wife—$68,500—making a total of $209,500. He then deducted therefrom commissions of the executrix, attorneys' fees, debts, expenses of administration, and "the federal estate tax," a total of $22,700. He computed the inheritance tax upon the difference—$186,800—after excluding $60,700 for the widow's share of the community property and deducting her statutory exemption. The widow objected to the report upon the ground that one-half of the community property was no part of the estate of the decedent within the meaning of the Inheritance Tax Law. The probate court sustained her objections and made an order fixing the tax. In computing the tax, as fixed in the order, the probate court took one-half of the value of the community property and added thereto the value of separate property of the decedent and property held in joint tenancy, and deducted therefrom debts, expenses of administration, and "the federal estate tax." The Controller appealed. On appeal the widow contended that upon the death of the husband one-half of the community property belongs to the wife and may not be used for any purpose in computing the inheritance tax. The Supreme Court reversed the order, holding, as we read the opinion, that the entire community property was subject to payment of debts, expenses of administration, and the federal estate tax. The court treated the federal estate tax as an expense of administration. In the opinion it was said, page 252 of 19 Cal.2d, page 664 of 120 P.2d: "It is clear, therefore, that the portion of the community property which belongs to the wife is the one-half which remains after the payment of the husband's debts and the expenses of administration apportioned between the community and separate property in accordance with the value thereof, and this is true even when the husband's share of the community, together with his separate property, is ample to pay those debts and expenses."

Appellant claims that the Coffee case is not determinative of the question before the court. She says that all that was held in that case was that the widow's share of the community property is one-half of what remains of the community estate after payment from the entire community estate of the debts of the decedent and the ordinary expenses of administration. The answer is that the court treated the federal estate tax as an expense of administration.

An examination of the record on appeal in the Coffee case confirms our view of what the court decided. It discloses that the Controller argued that "The theory of the allowance of deductions is that the amounts so allowed actually reduce the estate which is going to be received by the beneficiaries or transferees. It therefore is proper that the amount of the estate for tax purposes should be reduced by the amount in which the estate is actually reduced. * * * The expenses of administration, including funeral expenses, executor's and attorneys' commissions and federal estate tax deduction, are by statute placed in the same category as debts of the husband, since they also actually reduce the amount which the beneficiaries will really receive," citing subsections (b) (now Rev. & Tax.Code sec. 13986), (d) (now Rev. & Tax.Code sec. 13988), and (e) (now Rev. & Tax.Code sec. 13989, providing for the limited federal estate tax deduction) of subdivision (11) of section 2 of the Inheritance Tax Act of 1935, and Probate Code section 202. He relied for reversal upon those statutes and what is now Revenue and Taxation Code section 13551. The Controller also urged that "The amount of the federal estate tax deduction should be recomputed if the appellant's contentions are sustained—Since it was determined by the trial court in this matter that the state inheritance tax should be computed as if the wife's half of the community were not subject to any debts of the decedent, the federal estate tax deduction was computed on the same basis." He argued that "Furthermore, subsection (e) of subdivision (11) of section 2 of the Inheritance Tax Act expressly provides that the federal estate tax deduction is limited to a computation thereof made by the appraiser on his own valuations 'of that portion of such property only, the transfer of which is taxable under the provisions of this act. * * *' Therefore, if the deductions are made for the purposes of our act from the entire community and separate property, then the appellant concedes that the other deductions similarly should be made from the entire community and separate property for purpose of determining the federal estate tax deduction. The lower court in its order computed the federal estate tax deduction by taking the other deductions solely from the husband's half of the community and the separate property which gave a figure of $5,253.54. If this court should hold that the deductions are to be taken from the entire community and separate property, then the Controller concedes that the federal estate tax deduction will be correspondingly increased to the figure of $6,353.06." He then submitted a computation of the tax based upon deduction of the allowable federal estate tax from the entire community and separate property.

[1] There has been no substantial change in the statutory law since the decision in the Coffee case. The Inheritance Tax Law has been codified as Part 8, Division 2, of the Revenue and Taxation Code (Stats.1943, ch. 658, sec. 1, p. 2297, effective July 1, 1945). The controlling provisions of the Revenue and Taxation Code are sections 13551 and 13989. Revenue and Taxation Code section 13551 was formerly contained in section 1, subdivision (2) of the Inheritance Tax Act of 1935, as amended. Revenue and Taxation Code section 13989 was formerly contained in section 2, subdivision (11) of the Inheritance Tax Act of 1935, as amended. (Stats. 1935, ch. 358, as amended Stats. 1941, ch. 177.) Sections 13551 and 13989 are to be construed as restatements and continuations of the prior statutes and not as new enactments. They are to be construed as having the same purpose, object and meaning. Rev. & Tax.Code, sec. 2; Estate of Childs, 18 Cal.2d 237, 242, 115 P.2d 432, 136 A.L.R. 333; Forestier v. Johnson, 164 Cal. 24, 38, 127 P. 156.

[2] Independently of the Coffee case, construction of the applicable statutes inevitably leads to the conclusion that the probate court correctly held that the limited federal estate tax deduction is deductible

from the entire community estate and not, as appellant contends, from the decedent's half of the community property after deduction of debts and ordinary expenses of administration.

[3–5] The Internal Revenue Act of 1942 imposed the federal estate tax upon the entire community property held by the decedent and the surviving spouse, with exceptions not material here. 26 U.S.C.A. Int.Rev.Code, § 811(e) (2); Fernandez v. Wiener, 326 U.S. 340, 66 S.Ct. 178, 90 L.Ed. 116. It is an excise and not a property tax. It is a tax upon the surrender of old incidents of the property by the decedent and the acquisition of new ones by the survivor. It is merely measured by the value of the property to which these incidents attach. It does take the survivor's property to pay the tax. Fernandez v. Wiener, supra. Upon the death of the husband, the wife's half of the community property for the first time is brought into her full and exclusive possession and enjoyment, resulting in such an accession to her rights and privileges in respect of the property as to constitute a taxable event. 20 Cal.S.B.J. 394. The federal statute provides that the estate tax is a lien on the entire community property and that it shall be paid by the executor or administrator. 26 U.S.C.A.Int.Rev.Code, §§ 822, 827; United States v. Woodward, 256 U.S. 632, 635, 41 S.Ct. 615, 65 L.Ed. 1131. In California the federal estate tax is a charge against the gross estate in the same category as any other charge which the executor or administrator must pay. Young Men's Christian Association v. Davis, 264 U.S. 47, 51, 44 S.Ct. 291, 68 L.Ed 558; Wells Fargo v. Older, 50 Cal.App.2d 724, 123 P.2d 873. The ultimate thrust of the federal estate tax is governed entirely by state law. Riggs v. Del Drago, 317 U.S. 95, 98, 63 S.Ct. 109, 87 L.Ed. 106, 142 A.L.R. 1131. The inheritance tax is on the "net succession"; that is, it is levied on what the beneficiary receives after lawful burdens and deductions during the course of administration. Estate of Hite, 159 Cal. 392, 394, 113 P. 1072, 32 L.R.A.,N.S., 1167, Ann.Cas. 1912C, 1014; Estate of Miller, 184 Cal. 674, 679, 195 P. 413, 16 A.L.R. 694; Estate of Kennedy, 157 Cal. 517, 526, 108 P. 280, 29 L.R.A.,N.S., 428; Estate of Williams, 23 Cal.App. 285, 289, 137 P. 1067. In Young Men's Christian Association v. Davis, supra, referring to beneficiaries named in a will, it was said, page 51 of 264 U.S., page 292 of 44 S.Ct., 68 L.Ed. 558: "These donees do not pay the taxes [federal estate], any more than they pay the funeral expenses, the lawyers, the executors, and the testator's debts."

[6, 7] The right to receive property by will or inheritance is not a natural right, but is a creature of the law. Estate of Perkins, 21 Cal.2d 561, 569, 134 P.2d 231; Estate of Watkinson, 191 Cal. 591, 595, 217 P. 1073. The state may confer the privilege of succeeding to property upon the condition that any portion of the property it specifies shall be contributed to that state. The state may declare that no part of the federal estate tax shall be deducted in computing its inheritance tax. Estate of Watkinson, supra; Estate of Bowditch, 189 Cal. 377, 379, 208 P. 282, 23 A.L.R. 735.

Revenue and Taxation Code section 13551, which is a part of Chapter 3 of the "Inheritance Tax Law" concerning "Community Property," provides: "Upon the death of a husband: (a) At least one-half of the community property is subject to this part. (b) The one-half of the community property which belongs and goes to the surviving wife pursuant to Section 201 of the Probate Code is not subject to this part. (c) All of the community property passing to anyone other than the wife is subject to this part." The "part" referred to in subsections (a) and (b), is Part 8, "Inheritance Tax." Respondent repeatedly refers to that portion of the community property which belongs and goes to the surviving wife as "the community property exemption." It is not an exemption in any sense of the word. Whatever the amount may be and however it may be determined, it is simply property which belongs to the surviving wife which is not subject to tax. It does not necessarily follow that because, upon the death of the husband, one-half of the community property which belongs and goes to the wife is not subject to the Inheritance Tax Law, the state is precluded from saying that to determine what constitutes the one-half, the limited federal estate tax deduction shall first be deducted from the entire community estate. The inquiry is to ascertain what constitutes one-half of the community property which belongs and goes to the surviving wife under Probate Code section 201. Is it one-half of the entire community property severed immediately upon the termination of the community by the death of the husband, or is it one-half of the community property remaining after deduction of debts, expenses of administration, and other lawful charges, including the federal estate tax?

The history of Probate Code section 201 and 202 provides the answer to the inquiry. Prior to 1923, Civil Code section 1401 read: "Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband." Section 1402 then read: "Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband * * * In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration." Civil Code section 1401 was amended in 1923 to read: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of Section one thousand four hundred and two of this Code." Civil Code section 1402 was also amended to read: "Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to administration, his debts, family allowance and the charges and expense of administration * * *." The amendments of 1923 changed the law of community property in two vital respects only: They gave the wife the right of testamentary disposition as to one-half of the community property, a right she had not had previously; and they made her an heir of the husband as to the remaining community property if he had not disposed of it by will. Travelers Ins. Co. v. Fancher, 219 Cal. 351, 354, 26 P.2d 482; Estate of Phillips, 203 Cal. 106, 111, 263 P. 1017.

Civil Code sections 1401 and 1402 became Probate Code sections 201 and 202 in 1931 without substantial change in language. Section 202 reads: "Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this code; * * *." "Section 201, like its predecessor, is a statute of succession; section 202 is a legislative declaration that 'the community property' is chargeable with the husband's debts and is subject to the general provisions concerning the administration of the property of a decedent." Estate of Coffee, 19 Cal.2d 248, 251, 120 P.2d 661, 664.

The alterations in the statutes throughout their history have not varied the imposition upon the entire community property of the debts of the husband, expenses of administration, and lawful charges against the estate. Prior to 1923 the wording was: "* * * is equally subject to his debts, the family allowance, and the charges and expenses of administration." As amended in 1923, the language was: "* * * is subject to administration, his debts, family allowance and the charges and expense of administration." And Probate Code section 202 says: "* * * is subject to his debts and to administration and disposal under the provisions of Division III of this code." Division III is the law of "Administration of Estates of Decedents." It includes section 974, which provides that the federal estate tax "shall be paid by the executor or administrator out of the estate before its final disposition."

In Estate of Miller, 184 Cal. 674, 195 P. 413, 16 A.L.R. 694, the court quoted with approval from In re Roebling's Estate, 89 N.J.Eq. 163, 166, 104 A. 295, 296, where it was said that the federal estate tax "is payable by the executor as an administration expense." The federal estate tax is primarily a charge against the probate estate. Wells Fargo Bank v. Older, 50 Cal.App.2d 724, 725, 123 P.2d 873; Edwards v. Slocum, 2 Cir., 287 F. 651, 653, affirmed 264 U.S. 61, 44 S.Ct. 293, 68 L.Ed. 564; First Nat. Bank of Chicago v. Hart, 383 Ill. 489, 497, 50 N.E.2d 461; Farmers' Loan & Trust Co. v. Winthrop, 238 N.Y. 488, 496, 144 N.E. 769, certiorari denied 266 U.S. 633. In First Nat. Bank of Chicago v. Hart, supra, the court stated at page 464 of 50 N.E.2d: "It is sufficient to observe, however, that this State has no provision in its laws relating to the incidence of the burden of Federal estate tax and it must therefore fall directly upon the corpus of the estate and be considered an item of expense, such as debts, funeral expenses, and the like." The majority view is that the federal estate tax is an expense of administration. Corbin v. Townshend, 92 Conn. 501, 103 A. 647; People v. Northern Trust Co., 289 Ill. 475, 477, 124 N.E. 662, 7 A.L.R. 709; State v. First Calumet Trust & Savings Bank, 71 Ind.App. 467, 472, 125 N.E. 200; Bingham's Adm'r. v. Commonwealth, 196 Ky. 318, 329, 244 S.W. 781; Old Colony Trust Co. v. Burrell, Treasurer & Receiver General, 238 Mass. 544, 548, 131 N.E. 321, 16 A.L.R. 689, 693; State ex rel. Smith v. Probate Court, 139 Minn. 210, 166 N.W. 125; In re Roebling's Estate, 89 N.J.Eq. 163, 166, 104 A. 295; Tax Commission ex rel. Price v. Lamprecht, 107 Ohio St. 535, 548, 140 N.E. 333, 31 A.L.R. 985, 992; In re Knight's Estate, 261 Pa. 537, 539, 104 A. 765; 28 Am.Jur. sec. 3, p. 8, sec. 250, p. 124.

In Corbin v. Townshend, supra, 92 Conn. 501, 505, 103 A. 647, 649, the court, referring to the federal estate tax, said: "The executor or administrator must pay the tax out of the estate before the shares of the legatees are ascertained. It is an obligation against the estate and payable like any expense which falls under the head of administration expenses. The tax paid is no part of the estate at the time of distribution; it has passed from the estate, and the share of the beneficiaries is diminished by just so much. * * * The payment of the federal tax is an expense of the estate, as much so as any expense of administration. Until this charge is paid the executor cannot receive his discharge, nor can the beneficiary receive his share. Hooper v. Shaw, 176 Mass. 190, 57 N.E. 361."

In Hale v. Anglim, 9 Cir., 140 F.2d 235, 236, where California community property was involved, the court said: "By the death of appellant's husband the community was dissolved, and half of the *net* community property immediately became the property of appellant. Calif.Prob.Code, § 201; In re Estate of Coffee, 19 Cal.2d 248, 120 P.2d 661; In re Estate of King, 19 Cal. 2d 354, 363, 121 P.2d 716." (Italics added.)

One-half of the entire community property belongs and goes to the widow upon condition, the condition being that the property lawfully diverted during the course of administration, i.e., necessary for the payment of debts, expenses of administration, the federal estate tax, etc., shall be used for such purposes and shall not go to the widow. The property so lawfully diverted therefor never passes to the widow. Cf. Estate of Hite, 159 Cal. 392, 394, 113 P. 1072, 32 L.R.A.,N.S., 1167, Ann.Cas.1912C, 1014.

Appellant argues that application of Revenue and Taxation Code section 13989 compels the conclusion that the federal estate tax is not to be deducted from the entire community estate. Section 13989 reads: "Any amount due or paid the Government of the United States as a Federal inheritance or estate tax in the estate of any decedent is deductible from the appraised value of property included in any transfer subject to this part made by the decedent. The amount deductible is limited to an amount computed by the inheritance tax appraiser upon an application of the Federal Inheritance or estate tax exemptions and rates (commencing at the primary rates) in force at the date of the decedent's death to that portion of the decedent's property the transfer of which is subject to the tax imposed by this part, * * * and upon his own valuation of that portion." The argument is that application of the section involves three separate steps: "First: The determination of the part of the estate subject to the Inheritance Tax Law; Second: The computation of what the Federal estate tax would be on an estate equivalent to that part; and Third: The deduction of the amount so computed from the part of the estate subject to the Inheritance Tax Law"; that the parties have stipulated that the part of the estate subject to the Inheritance Tax Law consisted of the decedent's half of the net community estate, viz., $365,887.04, and second, that the federal estate tax payable on that amount is $75,283.47; that the third step necessarily follows,—deduction from the part of the estate subject to the Inheritance Tax Law of what the federal estate tax would be on an estate of that amount,—$365,887.04 minus $75,283.47, or $290,603.57. The contention is predicated upon the words "is deductible from the appraised value of property included in any transfer subject to this part made by decedent," found in section 13989. It is said that the deduction is to be made in its entirety from the value of the property "transferred" by the decedent; that the property "transferred" by the decedent is half of the entire community estate after the deduction of debts and ordinary expenses of administration. The argument is fallacious. It begs the question. It limits the deduction to "ordinary" expenses of administration. It assumes that the federal estate tax is not an expense of administration. As we have held, the federal estate tax is an expense of administration of the entire community estate.

If the language of section 13989 "deductible from the appraised value of property included in any transfer subject to this part made by the decedent" is held to mean what appellant says it means, the result would be to require that all debts, expenses of funeral and last illness, taxes and assessments, expenses of administration, and certain attorneys' fees, would be deducted only from the husband's half of the community property. The sections to be referred to are found in Article 2 of the Inheritance Tax Law under the heading "Deductions." Each of these sections provides that certain items are "deductible from the appraised value of property included in any transfer subject to this part made by the decedent"; section 13983—debts of decedent owed at date of death; section 13986—the funeral and last illness expenses; section 13988—the ordinary expenses of administration in the estate of the decedent; section 13987 says that state, county and municipal taxes and assessments "against the property included in any transfer subject to this part made by the decedent are deductible from the appraised value of the property"; section 13988.1 (1945) says that certain extra attorney's fees "are deductible from the appraised value of the property included in any transfer subject to this part." Appellant concedes that Estate of Coffee, 19 Cal.2d 248, 120 P.2d 661, held that debts and expenses of administration are deductible from the entire community estate and not from the decedent's half thereof. If appellant's construction of the words "subject to this part" were accepted, it would be necessary for us to depart from the admitted holding of the Coffee case. Appellant says that this result does not follow because of Revenue and Taxation Code section 13981, which provides: "This article [Article 2—"Deductions"] is a limitation on deductions allowable. It is not intended by this article to allow as a deduction anything that does not actually reduce the amount of an inheritance or transfer." The obvious purpose of this section is to limit allowable deductions to those specified in "Article 2." The inheritance or transfer upon the death of the husband leaving the wife surviving is that part of the husband's half of the community property which is distributed to the wife after deducting one-half of all allowable items. The deduction of the federal estate tax actually reduces the amount of the inheritance or transfer of the husband's half to the wife whether it is deducted from the entire community property or from the husband's one-half.

The parties submitted the controversy to the probate court on a stipulation of facts. Much of appellant's argument is grounded upon the false premise that the parties stipulated "that the part of the estate subject to the Inheritance Tax Law consisted of the decedent's one-half share of the net community estate, viz., $365,887.04." It is asserted that if the part of the estate transferred by the decedent consists of his one-half and it is $365,887.04, then that which belongs and goes to the widow is the same amount. The assumption is without foundation in the stipulation. The parties stipulated that $75,283.47, the amount allowable as the federal estate tax deduction, was correctly computed on a net estate of $365,887.04. Respondents did not stipulate that the one-half of the community property which belongs to appellant is $365,887.04 (Prob.Code, secs. 201, 202), or that said amount was the one-half of the community property which belongs and goes to appellant (Rev. & Tax. Code, sec. 13551(b), or that that amount "is subject to this part." —the Inheritance Tax Law. The stipulation expressly says that the sole issue "is whether the said credit of $75,283.47 should be deducted from the entire net community estate, to-wit: $731,774.07 as was done by said Inheritance Tax Appraiser in and by his Report or whether said credit should be deducted from Decedent's one-half of said net community estate, to-wit, $365,887.04, as contended by Objector in and by her said Objections." The figure, $365,887.04, as used in the stipulation, was solely a statement of what appellant contended was decedent's one-half of the net community estate.

Appellant leans heavily on Wittwer v. Pemberton, 188 Wash. 72, 61 P.2d 993, 994, 65 P.2d 218. In that case the court held that in computing the state inheritance tax the federal estate tax should be deducted from the decedent's half interest in the community estate and not from the community estate as a whole. There was no statute in the state of Washington, at the time, with respect to deductions. The decision as to the deduction of the federal estate tax was based upon the theory that "As the estate tax paid the federal government is a tax upon an inheritance, in a community estate such as that in the case at bar the amount paid the federal government should be deducted from the amount inherited, and not from the community estate as a whole." The decision as to the nature of the federal estate tax is out of line with the decisions of the Supreme Court of the United States and of nearly every court of last resort in the Union. It is contra to the opinion in Estate of Miller, 184 Cal. 674, 195 P. 413, 16 A.L.R. 694. At the time of the decision of the Miller case, California did not provide by statute for deduction of any part of the federal estate tax. In the Miller case it was held that the federal estate tax should be deducted, the court saying that it was not a succession tax, but an estate tax, not a tax on what comes to the beneficiaries or heirs. In the Washington case, because of the absence of statutory law, the court was free to conclude that the federal estate tax should be deducted from the decedent's one-half of the community estate. Here the question is governed by statute. The decision is of no value in the construction of California statutes. Grolemund v. Cafferata, 17 Cal.2d 679, 688, 111 P.2d 641; Estate of Reynolds, 169 Cal. 600, 603, 147 P. 268; Johnson v. Sanches, 56 Cal.App.2d 115, 118, 132 P.2d 853; Ahlborn v. Peters, 37 Cal.App.2d 698, 705, 100 P.2d 542.

[8] It appears that throughout the entire history of the administration of the Inheritance Tax Law in this state the State Controller and the Inheritance Tax Department (Rev. & Tax.Code, secs. 14731, 14732) have deducted the allowable federal estate tax deduction from the entire community property and not from the husband's half thereof. The construction so given the law, while not controlling, is most persuasive of the correctness of our conclusion. As stated in County of Los Angeles v. Frisbie, 19 Cal.2d 634, 643, 122 P.2d 526, 531: "The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect, while not controlling, is given great respect. People v. Southern Pacific Co., 209 Cal. 578, 290 P. 25; Riley v. Thompson, 193 Cal. 773, 227 P. 772; Riley v. Forbes,

193 Cal. 740, 227 P. 768; 23 Cal.Jur. 775, sec. 151. As was said in United States v. Philbrick, 120 U.S. 52, 59, 7 S.Ct. 413, 417, 30 L.Ed. 559: 'A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and since it is not clear that that construction was erroneous, it ought not now to be overturned.' "

We conclude that the probate court was correct in deducting the limited allowable federal estate tax deduction from the entire community property before the computation of the inheritance tax.

Order affirmed.

SHINN, Acting P. J., and WOOD, J., concur.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

32 Cal.2d 1

WELLS FARGO BANK & UNION TRUST CO. v. SUPERIOR COURT IN AND FOR MARIN COUNTY.

S. F. 17642.

Supreme Court of California, in Bank.
May 25, 1948.

1. Trusts 🔑363

Except for statute providing for retention of jurisdiction of the Superior Court sitting as a Probate Court of testamentary trusts after distribution, the court would have no jurisdiction in such cases, and under the statute, the jurisdiction of the court is limited to testamentary as distinguished from inter vivos trusts. Probate Code, § 1120.

2. Wills 🔑98

The doctrine of "incorporation by reference" cannot be applied without some showing that testator intended to incorporate the nontestamentary document in his will.

See Words and Phrases, Permanent Edition, for all other definitions of "Incorporation by Reference".

3. Wills 🔑98

It is neither necessary nor proper to apply the doctrine of incorporation by reference to a valid and operative inter vivos trust where the trustor has expressed no intention in the will or in the inter vivos trust agreement that the latter be incorporated in the will.

4. Wills 🔑98

Where inter vivos trust amendment provided for disposition of income from the trust as established by the trustor in his lifetime or increased by him under his will, and the will referred to the existing inter vivos trust and provided that the corpus of the trust amounted to $200,000 and that a sufficient sum was bequeathed to make up the difference between $200,000 and the value of the corpus at the time of testator's death, there was no intention that the inter vivos instrument be incorporated into the will under doctrine of "incorporation by reference".

5. Executors and administrators 🔑315(1)

Probate Court must determine at the time of the decree of the distribution the existence and validity of any trust created by will and extent of any interest that could pass to trustee under such will.

6. Executors and administrators 🔑314(11)

To determine the persons entitled to distribution and the extent of their interests Probate Court must interpret the will and determine whether an inter vivos trust agreement was part of the will. Probate Code, § 1021.

7. Executors and administrators 🔑315(6)

Where decree of distribution found that trust was an existing inter vivos trust and failed to specify the beneficiaries, purposes or disposition of the assets distributed to it, decree was conclusive as to rights of heirs, devisees and legatees, including trustee who was both a devisee and legatee, with respect to the existence, validity of and rights under any testamentary trust, and incidental matters which necessarily were involved in determination on those subjects.

8. Trusts 🔑270
Wills 🔑98

Where settlor created an inter vivos trust the existence of which was mentioned in his will which devised certain property to the trustee, trustor-testator intended that there should be a single trust administered as one unit rather than two trusts separately administered.

9. Trusts 🔑270

Whether trustor had created one trust or more than one depends primarily on expressions of his intention in the trust instruments.

10. Trusts 🔑270

There is no established principle of law or reason of policy that would justify the court in regarding a foundation as consisting of two trusts regardless of the intention of the trustor.

11. Courts 🔑475(4)

Where there existed a testamentary trust of which the Probate Court had jurisdiction after decree of distribution and an inter vivos trust, any question of trustee's powers and confirmation of sale of property should be addressed to the Superior Court as a court of equity.

12. Courts ⊂=475(4)

Where Probate Court lacks jurisdiction to determine an issue involving both testamentary and nontestamentary trusts, it is proper for Superior Court not sitting in Probate to take jurisdiction and fully determine the controversy.

◆

Petition by Wells Fargo Bank & Union Trust Company, trustee, Estate of Frederick Averill Robbins, deceased, for a writ of mandamus directed to the Superior Court of the State of California in and for the County of Marin, to compel the respondent sitting as a probate court to hear and determine a petition for an order confirming the sale of an interest in certain land that was distributed to the trustee under the will of Frederick Averill Robbins, deceased.

Peremptory writ denied and alternative writ discharged.

Heller, Ehrman, White & McAuliffe, Casper W. Weinberger and A. J. Treat, all of San Francisco, for petitioner.

Thelen, Marrin, Johnson & Bridges and Gordon Johnson, all of San Francisco, for respondent.

TRAYNOR, Justice.

Petitioner as trustee of a trust known as the "Robbins Foundation" has petitioned this court for a writ of mandamus to compel respondent court, sitting as a probate court, to hear and determine a petition for an order confirming the sale of an interest in certain land that was distributed to the trustee under the Will of Frederick Averill Robbins. The question before this court is whether the probate court has jurisdiction to hear the petition for confirmation of the sale of this interest in the land.

In 1916, Frederick Averill Robbins transferred certain property in trust to the Union Trust Company of San Francisco, predecessor of the Wells Fargo Bank and Union Trust Company, by a trust agreement under the terms of which the trustee was to use the income from the property to establish scholarships for certain students of the mechanical arts. The trust instrument provides that "The property constituting said fund shall be invested and reinvested by my trustee as in its discretion may seem to be for the best interests thereof * * * and my trustee shall also have full power and authority, subject only to confirmation of court, to sell the property composing said trust or fund * * *."

The trustor reserved the power of modification, and he made several modifications providing for the use of the income for certain charitable purposes, including the payment of part of the income to the "Board of Governors, Shriners Hospital for Crippled Children at San Francisco." Under the terms of the trust as last amended on March 6, 1931, the trust was to be known as the "Robbins Foundation," and the Wells Fargo Bank was named trustee. The trustor also directed in the 1931 amendment that "upon my death the entire net income from said trust as established by me in my lifetime, or increased by me, under the provisions of my Will, be paid over annually to the Board of Governors, Shriners Hospital for Crippled Children at San Francisco."

On the same day, the trustor also executed a will in which he named the Wells Fargo Bank as executor and left certain property to the bank as trustee for two other charitable trusts, one for the benefit of the First Presbyterian Church of Sausalito and the other for the benefit of the Women's Club of Sausalito. In addition the will provided for a bequest to the Wells Fargo Bank as trustee of the "Robbins Foundation" of an amount sufficient to increase the corpus of that trust to two hundred thousand dollars. After the death of the trustor, this will was admitted to probate and on January 26, 1934 an amended decree of distribution was filed distributing certain real and personal property, including the land involved in the present proceeding, as follows:

"To the Wells Fargo Bank & Union Trust Co., a corporation, as Trustee under a certain trust created by Frederick A.

Robbins during his lifetime and now designated as the Robbins Foundation * * * an undivided interest equal to 54.828% * * *.

"To the Wells Fargo Bank & Union Trust Co., a corporation, as Trustee for the uses and purposes in paragraph Thirteenth of said Will * * * an undivided interest * * * equal to 30.115% thereof, to have and to hold the same for the benefit of the Trustees of the First Presbyterian Church of Sausalito, Marin County, California; to invest and reinvest, or exchange * * * with full power and authority during the continuance of the trust to sell or exchange any part or portion of the securities at any time composing said fund * * *.

"To the Wells Fargo Bank & Union Trust Co., a corporation, as Trustee for the uses and purposes hereinafter set forth * * * an undivided interest * * * equal to 15.057% thereof, to have and to hold the same in trust for the uses and purposes as follows:

"To invest and reinvest, or exchange, * * * with full power and authority during the continuance of this trust to sell or exchange any part or portion of the securities at any time composing said fund * * * and to dispose of and distribute said trust fund and the proceeds thereof * * * to the Women's Club of Sausalito" for certain specified purposes.

On November 19, 1946, petitioner, "as trustee of the trusts created by the last will and testament of Frederick Averill Robbins" filed in respondent court a report of sale and a petition for an order confirming the sale of the real property in question together with a petition for instructions to the trustee under section 1120 of the Probate Code. In the report of sale and petition for confirmation thereof it was alleged that the property had been sold by the petitioner, as trustee of the three trusts, "subject to the confirmation of Court." The trustee alleged in the petition for instructions that the trustee was uncertain whether under the terms of the decree of distribution with respect to the trusts for the benefit of the Women's Club and the Presbyterian Church the trustee had power to sell the real property. The court heard the petition for instructions and determined that petitioner as trustee of the Women's Club trust and the Presbyterian Church trust had power to sell the interest of said trusts in the real property pursuant to the decree of distribution without confirmation of sale by the court. The court, however, dismissed for lack of jurisdiction the petition for an order confirming the sale of the interest of the "Robbins Foundation", on the ground that the Foundation is not a trust created by will.

[1] Probate Code section 1120 provides that "When *a trust created by will* continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall *retain jurisdiction for the purpose* of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution, or settling the accounts and *passing upon the acts of the trustee* and for the other purposes hereinafter set forth." (Italics added.) Although the probate court has broad powers under this section over the acts of the trustee of a trust created by will (See In re Estate of Smith, 4 Cal.App.2d 548, 552, 41 P.2d 565; In re Estate of Smead, 12 Cal.2d 20, 24, 82 P.2d 182), its jurisdiction over trusts after distribution is limited to trusts created by will. Except for the statute, the superior court, sitting as a probate court, would have no jurisdiction over trusts after the final decree of distribution (In re Estate of McLellan, 8 Cal.2d 49, 55, 56, 63 P.2d 1120), and the statute provides for such jurisdiction only when the trust has been created by will. The question arises therefore whether the petitioner as trustee of the "Robbins Foundation" held the interest distributed to it for the benefit of the Foundation as a trustee of a trust created by will or as a trustee of an inter vivos trust.

Jurisdiction of the probate court over the sale of this interest in the real property cannot be sustained on either of the two theories advanced: (1) that the whole of the "Robbins Foundation" trust was incorporated by reference into the will and thus after the trustor's death became a trust created by will; or (2) that the property distributed to the trustee of the "Robbins Foundation" under the trustor's will constitutes the corpus of a testamentary trust separate from the "Robbins Foundation" trust created by inter vivos agreement.

[2] In regard to the first theory, the question is not whether such an incorporation would be valid (See In re Estate of Willey, 128 Cal. 1, 8, 60 P. 471; cases collected Merrill v. Boal, 47 R.I. 274, 132 A. 721, 45 A.L.R. 843; 21 Cornell L.Q. 492), for that question, if pertinent, should have been determined during the probate proceeding. The question is whether the will or the decree of distribution provided for such an incorporation. The doctrine of incorporation by reference cannot be applied without some showing that the testator intended to incorporate the non-testamentary document into his will. In re McCurdy's Estate, 197 Cal. 276, 285, 240 P. 498; see, 1 Page on Wills, § 263; Atkinson on Wills, p. 336. In carrying out the general intention of the testator and the policy of the law against intestacy (see, Probate Code section 102) some courts interpret a reference to non-testamentary documents as indicative of an intention to incorporate by reference certain otherwise inoperative non-testamentary instruments into the testator's will. Arrington v. Brown, 235 Ala. 196, 178 So. 218, 220; In re Estate of Dimmitt, 141 Neb. 413, 425, 3 N.W.2d 752, 144 A.L.R. 704, 717; 41 Mich.L.Rev. 751, 752. No problem of invalidity or intestacy, however, is presented in the present case, and there is no reason for applying the doctrine of incorporation by reference in the absence of some showing that it would be in accord with the testator's intention. In many cases the trustor of an express trust may deem it inexpedient to incorporate the whole trust into his will. The trustor in the present case, for example, may have been advised that "The incorporation in a will of the terms of an independent trust is entirely gratuitous and may result in throwing the corpus of the trust into the general estate disposed of by the will, thereby unnecessarily subjecting the corpus of the trust to administration under the will with attendant administration costs and attorney's fees * * *." Rappoport, Integrating Instruments of Disposition, 78 Trusts and Estates 571, 577.

[3, 4] It is neither necessary nor proper to apply the doctrine of incorporation by reference to a valid and operative inter vivos trust when the trustor, as in the present case, expressed no intention in the will or in the inter vivos trust instrument that the latter be incorporated into the will. The expressed intention of the trustor in both documents was contrary to the theory that he intended to incorporate the trust into his will. He provided in the 1931 amendment to the inter vivos trust, on the same day that he executed his last will, for the disposition of the income from the "Robbins Foundation" trust, "as *established* by me *in my lifetime or increased* by me *under* the provision of *my will*." (Italics added.) In his will he provided as follows:

"During my lifetime I have established a certain trust fund * * * now designated as 'Robbins Foundation.' Said trust fund and the earnings thereof are to be used by the said Wells Fargo Bank & Union Trust Co. of San Francisco, a corporation, the trustee therein named, for certain uses and benefits in the declaration of trust establishing the same designated. It is my *purpose and intent that the corpus of said fund* be in amount Two Hundred Thousand ($200,000.00) Dollars, and I hereby *bequeath a sufficient amount of my estate to make up the difference* between said sum of $200,000.00 and the value at the time of my death of all securities and properties which, in my lifetime, I may have setover and placed in said fund." (Italics added.)

Any doubt that might remain as to the intention of the trustor as expressed in his will, has been resolved by the probate court in its amended final decree of distribution wherein the court ordered that there be distributed to "The Wells Fargo Bank & Union Trust Co., a corporation, as Trustee under a certain trust *created* by Frederick A. Robbins *during his lifetime* and now designated as the Robbins Foundation the sum of $38,557.60 in cash and also an undivided interest equal to 54.828% of the other assets of the estate hereafter more particularly described and inventoried [including the land in question]." (Italics added.) Moreover, the decree did not describe the beneficiary of the trust, the purpose of the trust or the disposition of the foregoing assets after their distribution to the trustee, but with the respect to the trusts clearly created by will, the decree specifies the beneficiaries of the trusts, the trust purposes, and the disposition of the assets distributed to the trustee.

[5, 6] Petitioner contends that there was no reason for the probate court to determine at the time of the decree of distribution whether or not the trust was inter vivos or testamentary in character and that therefore the decree should not be considered determinative of this issue. It was the duty of the probate court, however, to determine at the time of the decree of distribution the existence and validity of any trust created by will and the extent of any interest that could pass to the trustee under that will. Cook v. Cook, 17 Cal.2d 639, 652, 111 P.2d 322; In re Estate of Loring, 29 Cal.2d 423, 427, 175 P.2d 524; In re Estate of Easter, 24 Cal.2d 191, 194, 148 P.2d 601. At the time of the decree the probate court must distribute the estate "to the persons entitled thereto" (Probate Code sec. 1020) and in the decree "it must name the persons and the proportions or parts to which each is entitled * * *." Probate Code sec. 1021. To determine the persons entitled to distribution and the extent of their interests it was the duty of the probate court to interpret the will and determine whether the intervivos trust agreement was part of the will. If it had determined that the intervivos trust agreement was intended to be incorporated into the will and that the whole trust was thus created by the will, it would have been necessary for the court to determine the validity of that trust as a testamentary trust and the effect, if any, of section 41 of the Probate Code on the property that had been transferred by the trustor before his death. In re Estate of Loring, 29 Cal.2d 423, 431, 175 P.2d 524; see Ratherford v. Ott, 37 Cal.App. 47, 51, 173 P. 490. By determining that the trust was created by intervivos agreement, it precluded consideration of that question to the extent that the property had been transferred by the trustor under the intervivos agreement. The court was concerned primarily with the questions of the identification of the distributee and the capacity of the distributee to take under the will. See Swetland v. Swetland, 102 N.J.Eq. 294, 297, 140 A. 279; In re Rausch's Will, 258 N.Y. 327, 331, 179 N.E. 755, 80 A.L.R. 98.

[7] It is apparent that the probate court did consider the question of the nature of the "Robbins Foundation" trust and found that it was an intervivos trust and that it was unnecessary to consider the validity and purposes of the trust, for, as already has been observed, the decree designates the trust as an existing intervivos trust and fails to specify the beneficiaries, purposes, or disposition of the assets distributed to it, although those matters are specified in detail in the decree with respect to the two charitable trusts that were created by will. This decree is, therefore, "conclusive as to the rights of heirs, devisees and legatees" (Probate Code section 1021) and, as a devisee and legatee, the trustee is clearly bound by the decree with respect to the "existence, validity of and rights under any testamentary trust, and the incidental matters which necessarily are involved in a determination on those subjects * * *." Cook v. Cook, supra, 17 Cal.2d at page 652, 111 P.2d at page 330; see also In re Estate of Loring, supra, 29 Cal.2d at page 431, 175 P.2d 524; In re Estate of Easter, supra, 24 Cal.2d at page 194, 148 P.2d 601.

The other theory on which the petitioner relies to show jurisdiction in the probate court is that the property distributed to the trustee of the "Robbins Foundation" constitutes the corpus of a separate testamentary trust and, as such, is a trust created by will within the purview of section 1120 of the Probate Code. Respondent's contention is that the will and decree of distribution provide for a testamentary transfer of certain property to an already existing intervivos trust and that the whole of the "Robbins Foundation" is therefore one trust to be administered as a unit.

Ordinarily, when a trustor of an intervivos trust provides in the trust instrument for additions to the trust by will and provides in his will for a gift to the trust, his intention is to authorize the trustee "to deal with the whole property as a unit. The only possible difficulty would arise in states in which different courts have jurisdiction over testamentary trusts and trusts created intervivos. At common law, however, a court of equity had jurisdiction over all trusts, and in many states today courts of probate are given jurisdiction over both kinds of trusts." 1 Scott on Trust p. 293. In those states in which testamentary and intervivos trusts are subject to the jurisdiction of different courts, there is no clear authority on the question of whether one or both have jurisdiction over this type of trust; however, "such meagre authority as exists points to equity, rather than probate, as the forum having jurisdiction over the combined fund." 1 Nossaman, Trust Administration and Taxation, pp. 603, 105, citing the unreported case of New York Trust Co. v. Rausch, decided by the New York Supreme Court in 1938.

[8] In the present case it is evident from the trust agreement and the will that the trustor intended the "Robbins Foundation" to be a single trust administered as one unit rather than as two trusts administered as two units. He provided in the 1931 amendment to the intervivos trust agreement that "upon my death the entire net income from said trust as established by me in my lifetime, or increased by me, under the provisions of my Will, be paid over annually to the Board of Governors, Shriners Hospital for Crippled Children at San Francisco." The will evinces the same intent, for the trustor there provided that "it is my purpose and intent that the corpus of said fund be in amount Two Hundred Thousand ($200,000.00) Dollars, and I hereby bequeath a sufficient amount of my estate to make up the difference. * * *" The decree of distribution likewise indicates that at the time of the decree the probate court determined that the property should be distributed to the trustee of the foundation to be administered as a single trust, for the property in question was distributed to "the Wells Fargo Bank & Union Trust Co., a corporation, as Trustee under a certain trust created by Frederick A. Robbins during his lifetime."

[9, 10] The question whether the trustor has created one trust or more than one trust depends primarily on the expressions of his intention in the trust instruments. Huntington Nat. Bank v. Commissioners, 6 Cir., 90 F.2d 876, 878; United States Trust Co. of New York v. Commissioner, 296 U.S. 481, 487, 56 S.Ct. 329, 80 L.Ed. 340; Parkhurst v. Ginn, 228 Mass. 159, 166, 117 N.E. 202, Ann.Cas. 1918E, 982; Industrial Trust Co. v. Harrison, 67 R.I. 131, 146, 21 A.2d 254, 135 A.L.R. 1312; cases collected Commissioner of Internal Revenue v. McIlvaine, 7 Cir., 78 F.2d 787, 102 A.L.R. 257 involving application of federal income tax; see also 40 Col.L.Rev. 309, 310-311. The question remains, however, whether there is some established principle of law or reason of policy that would justify this court in regarding the "Robbins Foundation" as consisting of two trusts, regardless of the intention of the trustor. Petitioner has not referred to any principle of law that prevents a trustor of an inter vivos trust from increasing the corpus of the trust by bequeathing or devising property for that purpose in his will. At least two jurisdictions that have not accepted the doctrine of incorporation by reference have sustained such gifts to existing inter vivos trusts as a valid method of increasing an established trust. In Swetland v. Swetland, 102 N.J.Eq. 294, 296, 297, 140 A. 279, the New Jersey Court held that such a gift was valid "regardless of what the rule is in New Jersey with respect to the doctrine of incorporation by reference * * * By it the testator merely added additional property to a trust fund established by him years before the execution of his will under a valid, active trust * * *. The trust to which this bequest is added is not theoretical, nebulous, intangible, or incapable of identification, but exists in fact, and the trustee legatee is as distinct and definite an entity as would have been an individual or corporation legatee." The New York Court of Appeals in Re Rausch's Will, 258 N.Y. 327, 330, 331, 179 N.E. 755, 756, 80

A.L.R. 98, involving a similar addition to the corpus of an inter vivos trust by will, held that "at the execution of this will there was in existence a valid deed of trust whereby a trustee was under a duty to apply the subject-matter of the grant to uses there declared. All that the later will does is to give additional property to the same trustee to be held in the same way. * * * A gift to a trust company as trustee of a trust created by a particular deed identifies the trust in describing the trustee, like a gift to a corporation for the uses stated in its charter. * * * The legacy when given was not the declaration of a trust, but the enlargement of the subject-matter of a trust declared already." This rule, applicable where the doctrine of incorporation by reference is not accepted, applies for the same reasons to a gift to an existing trust that the trustor did not intend to incorporate into his will.

No reason of policy has been suggested why this court should regard the Foundation as two separate trusts contrary to the expressed intention of the trustor. Petitioner contends that since the two other charitable trusts referred to in the will are clearly testamentary trusts "the probate court alone has jurisdiction over these two latter trusts" and an "anomalous situation would arise if the Robbins Foundation Trust is held to be inter vivos and outside the jurisdiction of the probate court, for then 55% of the Robbins house will be under the jurisdiction of the Superior Court in the exercise of its general equitable jurisdiction of the probate court." The contention that the probate court alone has jurisdiction, while 45% of the same house will be under the jurisdiction of the testamentary trusts would certainly not support a decision holding the Foundation to be two separate trusts, one inter vivos and the other testamentary, for if this contention is sound, an anomalous situation would arise with respect to the future administration of the Foundation, with part of its assets subject to the jurisdiction of one court and part subject to another. If the trustee should fail to keep the assets separate it would apparently be necessary for the trustee to seek the approval of two courts every time it sought to exercise its power of sale with respect to those assets. The trustor clearly did not intend such result in creating the Robbins Foundation or in providing in his will for an addition to its assets.

[11, 12] In any event, petitioner's contention is without merit, for the probate court was not the only court that could have jurisdiction to approve or disapprove the entire transaction. Since the jurisdiction over trusts conferred on a court sitting as a court of probate is limited to testamentary trusts, and the jurisdiction of a court having general equity powers is much broader, petitioner's remedy under the circumstances was to seek relief in a court of equity having jurisdiction to settle the entire controversy. In the absence of Probate Code section 1120 all trusts, after distribution, would be subject to the jurisdiction of the superior court, not sitting as a court of probate (In re Estate of McLellan, supra, 8 Cal.2d 49, 55, 56, 63 P.2d 1120) and that court, at least, retains residual jurisdiction over trusts not within the jurisdiction of a probate court. Whether or not in a situation involving testamentary trusts alone, the jurisdiction "conferred on the court sitting in probate by section 1120, Probate Code, supra, is exclusive, or is concurrent with the exercise of jurisdiction sitting in equity" (Wilson v. Security First-Nat. Bank, 21 Cal.2d 705, 712, 134 P.2d 800, 804, collecting cases; see also Dowdall v. Superior Court, 183 Cal. 348, 353, 191 P. 685), where the probate court lacks jurisdiction to determine an issue involving both testamentary and non-testamentary trusts, it is proper "for the superior court not sitting in probate to take jurisdiction of it and fully determine the controversy." McCaughna v. Bilhorn, 10 Cal.App.2d 674, 684, 52 P.2d 1025, 1031; see also Howard v. Bennett, 53 Cal.App.2d 546, 548, 127 P.2d 1012.

The petition for a peremptory writ of mandamus is denied and the alternative writ is discharged.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

32 Cal.2d 13

JORGENSEN v. JORGENSEN.

L. A. 20205.

Supreme Court of California, in Bank.
May 28, 1948.

Rehearing Denied June 24, 1948.

1. Appeal and error 🔑916(1)

Where defendant objected to introduction of evidence by plaintiff, on ground that amended complaint was insufficient to state cause of action, and court entered judgment on the pleadings, it would be assumed by Supreme Court for purposes of appeal by plaintiff that allegations of amended complaint were true.

2. Judgment 🔑576(3)

Public policy underlying principle of res judicata that there must be an end to litigation requires that issues involved in case be set at rest by final judgment, though party has persuaded court or jury by false allegations supported by perjured testimony.

3. Judgment 🔑540

Public policy that there must be an end to litigation must be considered together with policy that party shall not be deprived of fair adversary proceeding in which fully to present his case.

4. Judgment 🔑435, 443(1)

Equitable relief will be denied where it is sought to relitigate an issue involved in former proceeding on ground that allegations or proof of either party was fraudulent or based on mistake, but such relief may be granted if party seeking it was precluded by fraud or mistake of other party from participating in proceeding or from fully presenting his case.

5. Judgment 🔑443(1)

The terms "intrinsic" and "extrinsic" fraud or mistake do not constitute infallible formula to determine whether facts surrounding fraud or mistake warrant equitable relief from judgment and facts must be examined in light of policy that party who failed to assemble all his evidence at trial should not be privileged to relitigate case, as well as policy permitting party to seek relief from judgment entered in proceeding in which he was deprived of fair opportunity fully to present his case.

6. Judgment 🔑443(1)

Policy permitting party to seek relief from judgment entered in proceeding in which he was deprived of fair opportunity fully to present his case applies when party's adversary, in violation of duty arising from trust or confidential relation, has concealed from him facts essential to protection of his rights, though such facts concerned issues involved in case in which judgment was entered.

7. Judgment 🔑443(1)

Failure to perform duty to speak or make disclosures which rests upon one because of a trust or confidential relation is a "fraud", for which equity may relieve from judgment thereby obtained, though breach of duty occurred during judicial proceeding and involves false testimony, regardless of whether such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

8. Husband and wife 🔑271, 278(1)

Husband, as manager of community property, occupies position of trust which is not terminated as to assets remaining in his hands when spouses separate, and as part of his fiduciary duties must account to wife for community property when spouses are negotiating property settlement agreement. Civ.Code, §§ 158, 172–173.

9. Divorce 🔑254

Concealment of community property assets by husband from wife in connection with property settlement agreement is breach of fiduciary duty of husband that deprives wife of opportunity to protect her rights in concealed assets and thus warrants equitable relief from judgment approving such agreement. Civ.Code, §§ 158, 172–173.

10. Divorce 🔑254

Wife to whom community property is entrusted occupies position of trust and husband may obtain equitable relief from divorce decree incorporating property settlement agreement obtained by fraud of wife in concealing community assets entrusted to her control regardless of whether husband or wife has submitted property settlement agreement to court for approval. Civ.Code, §§ 158, 172–173.

11. Divorce ⚷109, 125, 127(3), 166

Spouse seeking divorce has burden of proving facts constituting statutory ground and of presenting corroboration of his own testimony or of admissions of other spouse, but failure to reveal grounds for divorce does not warrant equitable relief from divorce judgment. Civ.Code, § 130; Code Civ.Proc. § 2079.

12. Divorce ⚷253
Husband and wife ⚷271

Husband at time of divorce or separation is entitled to take position favorable to his own interest in claiming as his separate property assets that a court might hold to be community property, and when confronted with assertion by husband that certain assets are his separate property, wife must take her own position and if necessary investigate the facts.

13. Divorce ⚷254

Where wife obtained interlocutory decree of divorce in which prior property settlement agreement was adopted, wife was not entitled to have provisions of decree relating to agreement set aside because husband was alleged to have fraudulently claimed certain community property as his separate estate, in absence of a concealment of assets, and wife was barred from obtaining equitable relief by her admission that she and her attorney did not investigate the facts. Civ.Code, §§ 130, 158, 172–173; Code Civ.Proc. § 2079.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Bebe Jorgensen against Earle M. Jorgensen to set aside provisions of interlocutory divorce decree relating to property settlement agreement, wherein defendant filed a cross-complaint praying that his title to assets in question be quieted. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion, 187 P.2d 915.

Mitchell, Silberberg & Knupp, Guy Knupp, and Peery Price, all of Los Angeles, for appellant.

O'Melveny & Myers, Louis W. Myers, and Pierce Works, all of Los Angeles, for respondent.

TRAYNOR, Justice.

The parties were married in 1924. They separated in 1944, and executed a property settlement agreement providing that following their divorce the husband would pay to the wife $30,000 annually for her support and that of their children. The wife thereafter brought an action for divorce in which the husband made no appearance. She obtained an interlocutory decree in which the property settlement agreement was approved and adopted, and a final decree was subsequently entered. In the present action plaintiff seeks to set aside the provisions of the interlocutory decree relating to the property settlement agreement, on the grounds of fraud or mistake. She alleged in her amended complaint that some of the assets listed in the agreement as separate property of the husband were community property and that defendant procured her consent to the agreement by fraudulently representing those assets as his separate property. Plaintiff further alleged that she and the attorney who represented her when the property settlement agreement was made, relying exclusively upon defendant's representations, did not investigate whether the assets in question were community or separate property. Plaintiff alleged as an alternative cause of action that defendant made his representations by mistake upon the advice of his counsel.

The agreement recites that it "is based upon a full disclosure of all real and personal properties and shall constitute a final settlement, adjustment and division of the property and the financial matters of the parties." Plaintiff alleges that she consented to this statement and was satisfied with the contract because she was persuaded by the representations of defendant that under the agreement she received half the community property; that defendant had exclusive control and management of the property of the parties throughout their married life and was therefore aware that the property listed in the agreement as his separate property was community property; that she was not familiar with the facts, since she was preoccupied with her duties as housewife and mother; that in making the agreement and submitting it to the court she relied on defendant's honesty and the truthfulness of his representations; and that the attorney who represented her in the negotiations with respect to the property settlement agreement and had previously represented her in the negotiations with respect to a voting trust agreement with defendant was recommended to her by defendant, who paid the fee for his services.

In his answer defendant denied that the property settlement agreement classified as his separate property any assets in which the wife had a community interest or that he made false representations regarding any assets mentioned in the agreement. He also filed a cross-complaint praying that his title to the assets in question be quieted. At the trial defendant objected to the introduction of any evidence by plaintiff, on the ground that her amended complaint was insufficient to state a cause of action. The court sustained this objection, and after defendant had introduced into evidence the property settlement agreement and the interlocutory and final decree of divorce, entered a judgment for defendant on the complaint and cross-complaint.

[1] Since the court entered judgment on the pleadings with respect to plaintiff's amended complaint, it must be assumed for the purposes of this appeal that the allegations therein are true. With regard to the partition of the community property plaintiff alleged that before the property settlement agreement was executed, the parties agreed that each was to receive half the community property and that defendant represented to her that the agreement, drafted by his attorneys, gave her half the community property, whereas actually it deprived her of her community property interest in certain shares of stock, namely, half the outstanding stock of the Earle M. Jorgensen Company (hereafter referred to as Jorgensen Company) and all the outstanding stock of the Earle M. Jorgensen-Forge Division (hereafter referred to as Forge Division).

It appears from the amended complaint that the outstanding stock of the Jorgensen Company consists of 1000 shares, 500 of which were represented by certificate No. 14 and 500 by certificate No. 15 at the time the property settlement agreement was executed. Defendant owned the 500 shares represented by certificate No. 14 before his marriage to plaintiff. He acquired the 500 shares represented by certificate No. 15 from his former partner in 1927, approximately three years after the marriage. Thereafter defendant remained the sole manager of the corporation. According to the terms of the property settlement agreement the parties in 1943 "entered into a voting trust agreement pursuant to which said one thousand (1,000) shares were to be held and are now held by the Husband as voting trustee. Prior thereto, said five hundred (500) shares evidenced by Certificate No. 14 were the sole and separate property of the husband, and said five hundred (500) shares evidenced by Certificate No. 15 were community property of the parties. Said voting trust agreement provides that the beneficial interests under such trust shall be held by the parties in the same manner as said shares were owned by them immediately prior to the creation of said trust * * *. The parties hereby confirm the said beneficial interest is held and owned by them in said manner, and that upon termination of said voting trust said five hundred (500) shares evidenced by Certificate No. 14 will be owned by the Husband as his separate property, and said five hundred (500) shares evidenced by Certificate No. 15 will be held and owned by the parties as community property."

The property settlement agreement also provided that "In the event that either party shall at any time hereafter obtain a final decree of divorce from the other, but not otherwise, the following provisions of this paragraph shall become and shall thereafter remain effective * * *. The 500 shares of Earle M. Jorgensen Company evidenced by Certificate No. 14, and one-half of the 500 shares of said corporation evidenced by Certificate No. 15 shall be the sole and separate property of the Husband, and the other one-half of said 500 shares evidenced by Certificate No. 15 shall be the sole and separate property of the Wife * * *." Plaintiff alleges, however, that the 500 shares represented by certificate No. 14 and designated in the agreement as separate property had a value not exceeding $55,000 when the parties married and had only slightly increased in value when in 1927 defendant acquired the other 500 shares and became the sole manager of the corporation; that these shares were worth more than $1,000,000 when the parties executed the property settlement agreement; and that this increase in value was primarily a result of defendant's skill and industry in managing the corporation. She contends therefore that these 500 shares were largely community property at the time of the property settlement agreement.

As to the shares of the Forge Division, plaintiff alleges that this corporation was organized in 1942 with an authorized capital stock of 1000 shares, each with a par value of $100, of which only three shares were issued, and that these shares were acquired by defendant with community property funds; that they were worth $300 when the corporation was organized but that by the time the property settlement agreement was executed their value had been augmented to $175,000 by the skill and industry of defendant as manager of the corporation. Plaintiff contends that these shares were therefore entirely community property when the property settlement agreement was executed and that it was through the fraud of defendant that the property settlement agreement provides that "All shares of Earle M. Jorgensen Co. —Forge Division, a California corporation, standing in the name of the husband * * * are his sole and separate property."

Plaintiff contends that the part of the interlocutory decree approving and adopting the property settlement agreement was induced by defendant's false representations and that they constitute extrinsic fraud or mistake entitling her to equitable relief from the decree. Defendant on the other hand contends that if he perpetrated any fraud it was intrinsic and therefore there can be no equitable relief from the decree. Plaintiff relies on Taylor v. Taylor, 192 Cal. 71, 79, 218 P. 756, 51 A.L.R. 1074, and Milekovich v. Quinn, 40 Cal.App. 537, 181 P. 256. Defendant relies on Howard v. Howard, 27 Cal.2d 319, 163 P.2d 439. The cases relied on by plaintiff held that equitable relief from a divorce decree approving and adopting a property settlement agreement is available to a wife if the husband fraudulently secured her consent to the agreement by concealing community property assets, for such concealment precludes her from establishing her rights thereto. The Howard case, supra, held that a husband was not entitled to equitable relief from the provisions of a divorce decree approving and adopting a property settlement agreement upon the allegation that he entered into the agreement in reliance upon representations of his wife that she was a faithful wife and mother, whereas during coverture and before the execution of the agreement she had repeatedly committed adultery. In that case it was determined that by submitting the property settlement agreement to the court the issue as to its fairness had been tendered in the divorce action and that therefore the alleged fraud perpetrated by the wife was intrinsic to the issues involved in the divorce action and should have been guarded against at the trial thereof. Defendant contends that by the same reasoning the fraud alleged in the cases on which plaintiff relies was intrinsic.

[2–5] Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074, and Milekovich v. Quinn, 40 Cal.App. 537, 181 P. 256, as well as Howard v. Howard, 27 Cal.2d 319, 163 P.2d 439, recognize that when equitable relief from a final judgment is sought, it makes an important difference whether the fraud or mistake is intrinsic or extrinsic to the issues involved in the case in which the judgment was entered. The public policy underlying the principle of res judicata that there must be an end to litigation requires that the issues involved in a case be set at rest by a final judgment, even though a party has persuaded the court or the jury by false allegations supported by perjured testimony. This policy must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his case. Thus, equitable relief will be denied where it is sought to relitigate an issue involved in the former proceeding on the ground that allegations or proof of either party was fraudulent or based on mistake, but such relief may be granted if the party seeking it was precluded by fraud or the mistake of the other party from participating in the proceeding or from fully presenting his case. Gale v. Witt, 31 Cal.2d 362, 188 P.2d 755; Howard v. Howard, 27 Cal.2d 319, 321, 163 P.2d 439; Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105; Larrabee v. Tracy, 21 Cal.2d 645, 134 P.2d 265; Olivera v. Grace, 19 Cal.2d 570, 575, 122 P.2d 564, 140 A.L.R. 1328; Carr v. Bank of America, 11 Cal.2d 366, 371–373, 79 P.2d 1096, 116 A.L.R. 1282; Purinton v. Dyson, 8 Cal.2d 322, 325, 326, 65 P.2d 777, 113 A.L.R. 1230; Ringwalt v. Bank of America, 3 Cal.2d 680, 684, 685, 45 P.2d 967; Caldwell v. Taylor, 218 Cal. 471, 476–479, 23 P.2d 758, 88 A.L.R. 1194; Tracy v. Muir, 151 Cal. 363, 371, 90 P. 832, 121 Am.St.Rep. 117; see, Restatement, Judgment, p. 588; 3 Freeman, Judgments, 5th Ed., secs. 1233–1235; 3 Pomeroy, Equity Jurisprudence, 5th Ed., 610. The terms "intrinsic" and "extrinsic" fraud or mistake are generally accepted as appropriate to describe the two different categories of cases to which these policies of the law apply. Freeman, ibid. p. 2568. They do not constitute, however, a simple and infallible formula to determine whether in a given case the facts surrounding the fraud or mistake warrant equitable relief from a judgment. Larrabee v. Tracy, 21 Cal.2d 645, 649, 134 P.2d 265; see, Freeman, ibid. p. 2570. It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case.

[6, 7] The latter policy applies when a party's adversary, in violation of a duty arising from a trust or confidential relation, has concealed from him facts essential to the protection of his rights, even though such facts concerned issues involved in the case in which the judgment was entered. "The failure to perform the duty to speak or make disclosures which rests upon one because of a trust or confidential relation is obviously a fraud, for which equity may relieve from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony, and this is true whether such fraud be regarded as extrinsic or as an exception to the extrinsic fraud rule." 3 Freeman, Judgments, 5th Ed., p. 2576; see, Laun v. Kipp, 155 Wis. 347, 145 N.W. 183, 5 A.L.R. 655. In this state equitable relief has been granted from final judgments settling the accounts of guardians, administrators, or executors who withheld information that would have enabled the beneficiaries to attack the accounts. Lataillade v. Orena, 91 Cal. 565, 576, 27 P. 924, 25 Am.St.Rep. 219; Silva v. Santos, 138 Cal. 536, 541, 71 P. 703; Aldrich v. Barton, 138 Cal. 220, 223, 71 P. 169, 94 Am.St.Rep. 43; Simonton v. Los Angeles Trust & Sav. Bank, 192 Cal. 651, 655, 657, 221 P. 368; Morgan v. Asher, 49 Cal.App. 172, 182, 193 P. 288; see Griffith v. Godey, 113 U.S. 89, 93, 5 S.Ct. 383, 28 L.Ed. 934. The same principle applies to decrees distributing the estate of a decedent adversely to the rights of beneficiaries who have been precluded from pursuing their rights by concealment of facts by the fiduciary, (Larrabee v. Tracy, 21 Cal.2d 645, 649, 134 P.2d 265; Purinton v. Dyson, 8 Cal.2d 322, 325, 65 P.2d 777, 113 A.L.R. 1230; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 210, 92 P. 184; Bacon v. Bacon, 150 Cal. 477, 490, 89 P. 317; Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am.St.Rep. 98; see, Carr v. Bank of America, 11 Cal.2d 366, 371-374, 79 P.2d 1096, 116 A.L.R. 1282; Ringwalt v. Bank of America, 3 Cal.2d 680, 684, 45 P.2d 697) and to other probate decrees obtained under similar circumstances. Caldwell v. Taylor, 218 Cal. 471, 475, 23 P.2d 758, 88 A.L.R. 1194; In re Estate of Ross, 180 Cal. 651, 658, 182 P. 752; Curtis v. Schnell, 129 Cal. 208, 215, 61 P. 951, 79 Am.St.Rep. 107, see 23 Cal.L.Rev. 79, 83.

The same principle also applies in the cases concerning equitable relief from judgments approving and adopting property settlement agreements relied on by plaintiff. In Milekovich v. Quinn, 40 Cal.App. 537, 181 P. 256, the wife alleged in a divorce action that her husband held securities worth $60,000 which were community property. The husband denied her allegation, stating in his answer and in an affidavit filed in reply to an application of the wife for alimony pendente lite that the securities held by him were worth not more than $2,000. Relying on these representations, the wife entered into a property settlement agreement specifying the community property assets that she was to receive and providing that the husband should receive the remainder of the community property. The agreement was approved and adopted by the court in an interlocutory divorce decree. The wife sought equitable relief from the provisions of the decree relating to the agreement, since the husband had concealed from her bonds in the par value of $45,000 acquired with community property funds, which he had withdrawn from his safe-deposit box and delivered to a custodian after the commencement of the divorce action.

In Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074, the wife entered into a property settlement agreement wherein she released all obligations of the husband as to support and alimony and disclaimed all her rights to community property in consideration of the payment of $500 to her by the husband. She sought equitable relief from a divorce decree approving and adopting this agreement, on the ground that the husband had concealed from her the existence of certain real property acquired with community property funds placing it in the name of his brother.

[8-10] As the manager of the community property the husband occupies a position of trust (Civ.Code, secs. 172–173, 158), which is not terminated as to assets remaining in his hands when the spouses separate. It is part of his fiduciary duties to account to the wife for the community property when the spouses are negotiating a property settlement agreement. The concealment of community property assets by the husband from the wife in connection with such an agreement is therefore a breach of a fiduciary duty of the husband that deprives the wife of an opportunity to protect her rights in the concealed assets and thus warrants equitable relief from a judgment approving such agreement. When community property is entrusted to the wife, she likewise occupies a position of trust. It has therefore been held that a husband may obtain equitable relief from a divorce decree incorporating a property settlement agreement obtained by the fraud of the wife in concealing community assets entrusted to her control. Boullester v. Superior Court, 137 Cal.App. 193, 195, 30 P.2d 59. It is immaterial whether the husband or the wife has submitted the property settlement agreement to the court for approval; the fraud of one spouse in concealing the assets, if not discovered by the other, precludes the latter from protecting his or her rights as to the concealed assets in the divorce proceeding.

[11] Howard v. Howard, 27 Cal.2d 319, 163 P.2d 439, is clearly distinguishable from these cases, for in that case the husband did not allege that the wife procured the property settlement agreement by concealing information in violation of a fiduciary duty of disclosure. Her alleged fraud related to acts of adultery, which she was under no fiduciary duty to disclose, for those acts constituted a ground for divorce. The law imposes upon a spouse seeking a divorce the burden of proving facts constituting a statutory ground for divorce and of presenting corroboration of his own testimony or of admissions of the other spouse. Civ.Code, sec. 130; Code Civ.Proc. sec. 2079; Flynn v. Flynn, supra, 171 Cal. 746, 748, 154 P. 837; Deyoe v. Superior Court, 140 Cal. 476, 483, 74 P. 28, 98 Am.St.Rep. 73; see also, Civ.Code, sec. 132; Grannis v. Superior Court, 146 Cal. 245, 248, 79 P. 891,

106 Am.St.Rep. 23. If failure to reveal grounds for divorce warranted equitable relief from divorce judgments, the stability of such judgments and titles to property thereunder would be seriously imperiled.

[12, 13] The issue in the present case is whether under the facts stated in her amended complaint, the wife was deprived of a fair opportunity to submit her case fully to the court because of a breach of a fiduciary duty of the husband. There is no allegation in the complaint that defendant concealed assets that were part of the community property. The assets were disclosed, and the complaint is based on the theory that defendant fraudulently claimed certain community property as his separate estate. The classification of property as separate or community is frequently difficult. A husband at the time of divorce or separation is entitled to take a position favorable to his own interest in claiming as his separate property assets that a court might hold to be community property. Confronted with the assertion by the husband that certain assets are his separate property the wife must take her own position and if necessary investigate the facts. Champion v. Woods, 79 Cal. 17, 20, 21 P. 534, 12 Am.St.Rep. 126; Dowling v. Spring Valley Water Co., 174 Cal. 218, 222, 162 P. 894; Haviland v. Southern California Edison Co., 172 Cal. 601, 609, 158 P. 328; see, Brown v. Brown, 170 Cal. 1, 5, 147 P. 1168; Lindley v. Hinch, 57 Cal. App.2d 717, 719, 135 P.2d 421. If the wife and her attorney are satisfied with the husband's classification of the property as separate or community, the wife cannot reasonably contend that fraud was committed or that there was such mistake as to allow her to overcome the finality of a judgment. In the present case plaintiff alleged that she and her attorney relied exclusively on her husband's representations that the shares in question were his separate property and that her attorney made no examination or investigation to ascertain whether the shares were community property. She did not allege that her attorney intentionally failed to protect her interests. Plaintiff is barred from obtaining equitable relief by her admission that she and her attorney did not investigate the facts, choosing instead to rely on the statements of the husband as to what part of the disclosed property was community property.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.

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31 Cal.2d 801

Ex parte TROMBLEY.

Cr. 4799.

Supreme Court of California.

May 3, 1948.

1. Constitutional law 🔑83(3)

The court will not permit the purposes of the constitutional provision forbidding imprisonment for debt to be circumvented by mere form, and statutes declaring the nonpayment of an obligation to be a crime must be examined in the light of such provision and their validity is dependent upon whether the legislative objective is consistent with the constitutional guaranty. Const. art. 1, § 15.

2. Constitutional law 🔑83(3)

The power to prescribe punishment in a criminal case may not be used to defeat the constitutional guaranty against imprisonment for debt. Const. art. 1, § 15.

3. Master and servant 🔑84

Where complaint charged that defendant "having the ability to pay and payment of said wages having been demanded, did wilfully and unlawfully fail and refuse to pay", the offense charged was under Section 216(a) of the Labor Code and the addition of the language of subsection (b) "with intent to annoy, harass, injure, oppress, delay and defraud the said employee", which relates to other acts was ineffectual to change the offense first charged. Labor Code, § 216.

4. Statutes 🔑147

A mere change in phraseology or punctuation in the codification of an existing law will not ordinarily be construed to have changed its meaning since the principal objects of the code commission in revising the statutes, are to restate and clarify existing law and to correct inadvertent errors.

5. Master and servant 🔑84
Statutes 🔑147

The Labor Code has modified former statute by changes in phraseology and arrangement, and now the offense of having the ability to pay and wilfully refusing to pay wages due and payable when demanded is not qualified by language in former statute "or with intent to annoy, harass, oppress, hinder, delay or defraud the person to whom such indebtedness is due". Labor Code, § 216.

6. Constitutional law 🔑83(3)

Where defendant was charged with intent to annoy, harass, hinder, oppress, delay and defraud employee by wilfully and unlawfully failing and refusing to pay wages due employee although having ability to pay and jury by verdict of guilty had impliedly found that defendant had such intent, defendant was entitled to be discharged, if subdivision of statute which did not expressly require an intent to defraud is unconstitutional on ground that it provides for imprisonment for debt. Labor Code, § 216; Const. art. 1, § 15.

7. Criminal law 🔑21

The word "wilfully" as used in criminal statute implies a purpose or willingness to commit the act, and although it does not require an evil intent, it implies that the person knows what he is doing, intends to do what he is doing and is a free agent. Pen.Code, § 7, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Wilfully".

8. Master and servant 🔑84

Section of the Criminal Code making it a misdemeanor for any person who having the ability to pay wilfully refuses to pay wages due and payable when demanded, when construed in connection with the Penal Code definition of wilful, means that it is a crime for an employer having the ability to pay, knowingly and intentionally to refuse to pay wages which he knows are due. Pen.Code, § 7, subd. 1; Labor Code, § 216(a).

9. Constitutional law 🔑83(3)
Master and servant 🔑84

Mere failure to pay wages is not a crime and an employer is not subject to imprisonment who disputes in good faith an employee's claim for wages. Labor Code, § 216(a).

10. Constitutional law 🔑83(3)

The constitutional provision prohibiting imprisonment for debt was adopted to protect the poor but honest debtor who was unable to pay his debts, and was not intended to shield a dishonest man who takes an unconscionable advantage of another. Const. art. 1, § 15.

11. Constitutional law 🔑83(3)

An employer who knows that wages are due, has ability to pay them and still refuses to pay them acts against good morals and fair dealings and necessarily intentionally does an act which prejudices rights of his employee and such conduct amounts to a "case of fraud" within exception to constitutional prohibition against imprisonment for debt and may be punished by statute. Labor Code, § 216(a); Const. art. 1, § 15.

See Words and Phrases, Permanent Edition, for all other definitions of "Case of Fraud".

12. Habeas corpus 🔑26

The acts of a judicial officer are not subject to attack on the grounds of lack of authority in a habeas corpus proceeding where no objection to authority of acting justice was raised upon the trial or upon appeal to superior court and where there was no question that he was qualified to sit at the time of the trial if he was properly substituted, since a judicial officer who acts in such circumstances acquires a de facto status.

13. Criminal law 🔑90(1)

The jurisdiction of the justice court was not affected by any defects in the manner of substituting justices. Code Civ.Proc. § 105.

14. Criminal law ⚷260(12)

A second sentence after affirmance of judgment on appeal was unnecessary, and fact that defendant was resentenced by justice of the peace could not affect the validity of the judgment from which the appeal was taken, which included sentence pronounced at that time and the terms of which were in no way modified on appeal. Pen.Code, § 1263.

15. Criminal law ⚷982

Suspension of a sentence is an act of grace and clemency to be granted in a proper case and a person is not entitled to it as a matter of right. Pen.Code, §§ 1203.1, 1203a.

16. Criminal law ⚷258(3)

In prosecution of employer who having the ability to pay, had wilfully refused to pay wages due and payable, court could properly consider evidence as to sums due employees in providing for reparation, and suspension of 30-day jail sentence if sum due should be paid within 48 hours, was not an abuse of discretion. Labor Code, § 216; Pen.Code, §§ 1203.1, 1203a.

17. Criminal law ⚷258(3)

The fact that civil jurisdiction of a Class B justice court is limited to cases in which the demand is $300 or less did not deprive the court of power to provide for reparations in sums exceeding that amount in criminal cases. Pen.Code, § 1203.1.

18. Habeas corpus ⚷92(1)

Where rulings complained of were committed in the exercise of trial court's jurisdiction and did not deprive petitioner of any constitutional rights, they could not be reviewed in habeas corpus proceeding.

◆

Proceeding in the matter of Walter Trombley for a writ of habeas corpus.

Writ discharged and petitioner remanded to custody.

Francis T. Cornish, of Berkeley, for petitioner.

Fred N. Howser, Atty. Gen., Herbert E. Wenig, Deputy Atty. Gen., and Francis W. Collins, Dist. Atty., of Martinez, and Douglas N. Quinlan, Deputy Dist. Atty., of Richmond, for respondents.

Proceeding in habeas corpus to secure release from custody. Writ discharged.

GIBSON, Chief Justice.

Petitioner was convicted in a justice's court in Contra Costa County under three counts of a complaint which charged him with violations of section 216 of the Labor Code in that, having the ability to pay, he wilfully refused to pay the wages due to three of his employees. A fine of $100 and a 30-day jail sentence were imposed on each count, but the jail sentences were to be suspended if, within 48 hours, petitioner paid the amounts alleged to be due as wages in the three counts of the complaint.[1]

The judgment of conviction was affirmed on appeal to the superior court, and petitioner seeks his discharge on habeas corpus claiming that section 216 of the Labor Code conflicts with the constitutional prohibition against imprisonment for debt (Const., art. I, § 15); that the justice of the peace who presided at his trial acted without authority; and that the conditions upon which suspension of the jail sentence depended were beyond the power of the justice's court to impose.[2]

I. Constitutional Prohibition Against Imprisonment For Debt

[1] Section 15 of article I of the California Constitution provides that "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, nor in civil actions for torts, except in cases of wilful injury to person

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[1] Petitioner was also convicted and fined $25 under a fourth count of the complaint which charged him with violations of sections 204 and 207 of the Labor Code in failing to maintain semimonthly paydays or post notices thereof. No question is raised in this proceeding as to this count.

[2] Petitioner was remanded to custody after a hearing on a similar application before the District Court of Appeal (In re Trombley, 78 Cal.App.2d 528, 178 P.2d 510), and the subsequent application for the writ was made here apparently on the theory that section 1506 of the Penal Code, which permits a petition for hear-

or property * * *." Although by its terms the prohibition is directed to imprisonment in civil actions, it has been held to apply in a criminal proceeding where it appears that the legislation under which the accused is charged constitutes an attempt to make the mere act of failing to pay a debt a crime. (People v. Perry, 212 Cal. 186, 298 P. 19, 76 A.L.R. 1331; American Surety Co. v. Bank of Italy, 63 Cal.App. 149, 218 P. 466; People v. Holder, 53 Cal. App. 45, 199 P. 832; In re Crane, 26 Cal. App. 22, 145 P. 733; see State v. Avery, 111 Kan. 588, 207 P. 838, 23 A.L.R. 453; State v. Prudential Coal Co., 130 Tenn. 275, 170 S.W. 56, L.R.A.1915B, 645; [1928] 41 Harv.L.Rev. 786; [1928] 37 Yale L.J. 509, 513; [1927] 15 Cal.L.Rev. 153.) The courts will not permit the purposes of the constitutional provision forbidding imprisonment for debt to be circumvented by mere form, and, accordingly, statutes declaring the nonpayment of an obligation to be a crime are examined in the light of this provision, and their validity is dependent upon whether the legislative objective is consistent with the constitutional guaranty.

[2] Two California cases contain broad statements, made without analysis or discussion, to the effect that the prohibition against imprisonment for debt has no application in criminal proceedings. (See In re Nowak, 184 Cal. 701, 708, 195 P. 402; In re Oswald, 76 Cal.App. 347, 349, 244 P. 940.) These statements, however, were unnecessary to the decisions because the statutes under consideration involved something more than the mere failure to pay a debt. No case has been cited or found which, on its facts, upholds legislation making mere failure to pay a debt a crime, and we see no reason to depart from the rule established by the well-considered cases in California and throughout the country to the effect that the power to prescribe punishment in a criminal case may not be used to defeat the constitutional guaranty against imprisonment for debt. Accordingly, the statements in the Nowak and Oswald cases must be disapproved, and the validity of the statute under which petitioner was convicted must be tested in the light of the constitutional provision.

Section 216 of the Labor Code reads:

"In addition to any other penalty imposed by this article, any person, * * * is guilty of a misdemeanor, who:

"(a) Having the ability to pay, wilfully refuses to pay wages due and payable when demanded.

"(b) Falsely denies the amount or validity thereof, or that the same is due, with intent to secure for himself, his employer or other person, any discount upon such indebtedness, or with intent to annoy, harass, oppress, hinder, delay, or defraud, the person to whom such indebtedness is due."

Petitioner concedes that the offense set forth in subdivision (b) which expressly requires an intent to defraud, comes within the exception contained in section 15 of article I. (See In re Sears, 137 Cal.App. 308, 309, 310, 30 P.2d 571; Sears v. Superior Court, 133 Cal.App. 704, 708, 24 P.2d 842; In re Samaha, 130 Cal.App. 116, 19 P. 2d 839.) He contends, however, that he was prosecuted for a violation of subdivision (a) which he claims is unconstitutional.

Each of the three counts charged that petitioner "having the ability to pay, and payment of said wages having been demanded, did wilfully and unlawfully fail and refuse to pay * * * the wages due the said employee with intent to annoy, harass, hinder, oppress, delay, and defraud the said employee."

[3] It seems clear that petitioner was accused of a violation of subdivision (a). Although the complaint alleged he acted with the intent specified in subdivision (b), he was not charged with having committed an act set forth in that subdivision. The charge against him was that, having the ability to pay, he wilfully refused to pay,

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ing in certain cases, was not applicable. (See In re Page, 214 Cal. 350, 354, et seq., 5 P.2d 605). The question as to his right to apply for such a hearing, therefore, is not presented. Moreover, decisions remanding a person to custody in habeas corpus proceedings are not a bar to subsequent applications to a higher court. (Pen.Code, § 1475; Matter of Ring, 28 Cal. 247, 251; cf. In re Miller, 17 Cal.2d 734, 112 P.2d 10.) In re Trombley, supra, 78 Cal.App.2d 528, 178 P.2d 510, is therefore not res judicata.

and this is the gist of the offense contained in subdivision (a). The conduct denounced in the two subdivisions is similar but the proscribed acts are not necessarily the same. Moreover, an essential element of the offense set forth in (a) is "ability to pay," whereas it is not a required condition in (b).

The attorney general argues that it is immaterial whether petitioner was charged under subdivision (a) or (b) because, it is claimed, the clause in (b), which expressly requires an intent to defraud, also modifies (a). In support of this construction reliance is placed on cases interpreting the section before it was codified. The Labor Code was enacted in 1937, and section 6 of chapter 202 of the Statutes of 1919[3] was codified in the present section 216. The former statute was construed to require a wrongful intent to defraud the employee where the employer was charged, as here, with having the ability to pay and wilfully refusing to pay wages, and it was held that the statute did not conflict with the constitutional guaranty against imprisonment for debt. (In re Oswald, 76 Cal.App. 347, 349, 244 P. 940; Sears v. Superior Court, 133 Cal.App. 704, 708, 24 P.2d 842; In re Sears, 137 Cal.App. 308, 309, 310, 30 P.2d 571; In re Samaha, 130 Cal.App. 116, 19 P.2d 839.)

[4] Ordinarily, a mere change in phraseology or punctuation in the codification of an existing law will not be construed to have changed its meaning since the principal object of the code commission in revising the statutes are to restate and clarify existing law and to correct inadvertent errors. (Stats.1929, ch. 750, § 2; Gov. Code, § 10300 et seq.; Childs v. Gross, 41 Cal.App.2d 680, 687, 688, 107 P.2d 424; De Haviland v. Warner Bros. Pictures, 67 Cal.App.2d 225, 232, 153 P.2d 983.) Sometimes, however, the language of the prior statute is altered so as to change the meaning placed upon the former statute with the result that a change in the law is made through codification. (See Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379; In re Estate of Smith, 4 Cal.App.2d 548, 552, 41 P.2d 565; cf. Scott v. McPheeters, 33 Cal.App.2d 629, 633, 92 P.2d 678, 93 P.2d 562.) We are faced with that situation here.

[5] The making of two subdivisions out of the former section, the placing of a period between those subdivisions, and the deletion of the word "or" between the acts of wilfully refusing to pay and falsely denying the amount or validity of wages have made it impossible for subdivision (a) to be modified by the last clause of subdivision (b) which requires an intent "to annoy, harass, oppress, hinder, delay, or defraud, the person to whom such indebtedness is due." As the section is now cast in the Labor Code, under subdivision (a), an employer, "having the ability to pay," who "wilfully refuses to pay wages due and payable when demanded" is guilty of a misdemeanor, and under subdivision (b), an employer, *regardless of ability,* who "falsely denies the amount or validity" of a claim for wages "or that the same is due" with the intent specified therein is guilty of a misdemeanor. In re Trombley, 78 Cal.App.2d 528, 178 P.2d 510, proceeded on the theory that the statute had not been changed by codification, and the holding in that case must, therefore, be disapproved.

[6] It should be noted that, although petitioner was charged with the intent specified in subdivision (b) and the jury impliedly found that he had such intent, he is nevertheless entitled to be discharged if subdivision (a), which does not expressly require an intent to defraud, is unconstitutional. (See In re Bell, 19 Cal.2d 488, 495 et seq., 122 P.2d 22.) The question therefore is whether the conduct denounced in subdivision (a) is fraudulent within the

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[3] Section 6, prior to its repeal, read:
"Any person * * *, who having the ability to pay, shall wilfully refuse to pay the wages due and payable when demanded, as herein provided, *or* falsely deny the amount or validity thereof, or that the same is due, with intent to secure for himself, his employer or other person, any discount upon such indebtedness, or with intent to annoy, harass, or oppress, or hinder, or delay, or defraud, the person to whom such indebtedness is due, shall, in addition to any other penalty imposed upon him by this act, be guilty of a misdemeanor." (Italics added.)

meaning of the exception contained in section 15 of article I.

[7-9] The word "wilfully" as used in criminal statutes implies a purpose or willingness to commit the act (Pen.Code, § 7, subd. 1), and although it does not require an evil intent, it implies that the person knows what he is doing, intends to do what he is doing, and is a free agent. (See People v. Gory, 28 Cal.2d 450, 458, 170 P.2d 433; People v. Johnson, 14 Cal.App.2d 373, 380, 58 P.2d 211; Davis v. Morris, 37 Cal.App.2d 269, 274, 99 P.2d 345; People v. Swiggy, 69 Cal.App. 574, 580, 581, 232 P. 174; People v. California Protective Corp., 76 Cal.App. 354, 363, 244 P. 1089.) Subdivision (a), construed together with the Penal Code definition of the word "wilful," makes it a crime for an employer having the ability to pay, knowingly and intentionally to refuse to pay wages which he knows are due. A similar construction was placed on section 203 of the Labor Code which imposes penalties where an employer "wilfully fails to pay * * * wages of an employee who is discharged or who quits." In interpreting that section, it was recognized that a dispute in good faith as to whether any wages were due would be a defense to an action for such penalties. (Davis v. Morris, 37 Cal.App.2d 269, 99 P.2d 345.) Subdivision (a), therefore, does not, as contended by petitioner, make the mere failure to pay wages a crime, nor does it subject an employer to imprisonment who disputes in good faith an employee's claim for wages.

The cases of In re Crane, 26 Cal.App. 22, 145 P. 733, and People v. Holder, 53 Cal.App. 45, 199 P. 832, holding statutes unconstitutional, and relied on by petitioner, are not in point since the provisions there under consideration did not require either "wilfulness" or "ability to pay."

The case of People v. Perry, 212 Cal. 186, 298 P. 19, 20, 76 A.L.R. 1331, relied upon by the attorney general, concerns a related problem but it is not conclusive authority for the validity of the statute involved here. The statute in the Perry case provided that "any person who represents himself as a 'cash buyer' but who is not a cash buyer as defined in this act; * * * or any cash buyer as defined in this act who wilfully refuses to make payment for deciduous fruits as and when required by this act, is guilty of a felony", St.1929, p. 671, § 16. A "cash buyer" was defined as a person, having a regular business address in California, who furnishes such address to the grower with whom he has business, who represents himself as a cash buyer and purchases fruits for resale from a grower, and who, within 48 hours after demand, pays the purchase price agreed upon. It is clear that the portion of the statute which made it a crime for any person to represent himself as a "cash buyer," but who was not so in fact, comes within the fraud exception contained in the constitutional provision. Defendant Perry, however, was *not* charged under that portion of the act; he was proceeded against as a "cash buyer" who purchased grapes from a grower and wilfully refused to pay therefor following a demand in writing, as required by the act. The court nevertheless held that the statute did not violate the constitutional prohibition against imprisonment for debt.

The decision in the Perry case characterizes the conduct of one who purchases fruit on the representation that he will pay therefor on demand and who thereafter wilfully refuses to pay, as obtaining property "under false premises and fraudulent misrepresentation." This conduct, however, does not differ in respect to representation. This conduct, however, does not differ in respect to representations from the ordinary transaction where a purchaser promises he will pay on demand and thereafter wilfully refuses to do so. Furthermore, the court did not discuss the fact that the statute there under consideration did not provide that the debtor have ability to pay, and it would seem doubtful that such a condition could be properly implied from the use of the word "wilful," or the statutory definition of "cash buyer." A similar implication is, of course, not necessary here since, as we have seen, subdivision (a) expressly makes ability to pay an essential element of the offense. Because of the differences in the statutes and the character of the transactions it is unnecessary for us to determine the correctness of the result of the Perry case, but the decision may be accepted as authority for the proposition that if the act denounced is itself fraudulent, that is, it is one which necessarily accomplishes a fraud, then it is unnecessary that the statute contain an express provision requiring an intent to defraud.

[10, 11] We return to the question whether an employer, who, having the ability to pay, intentionally refuses to pay wages he knows are due, perpetrates a "fraud" within the meaning of the provision which excepts "cases of fraud" from the prohibition against imprisonment for debt. The historical background of section 15 of article I and similar constitutional guaranties of other states clearly shows that the provisions were adopted to protect the poor but honest debtor who is unable to pay his debts, and were not intended to shield a dishonest man who takes an unconscionable advantage of another. (I Debates and Proceedings of the Constitutional Convention, 1878–1879, 265–268; Code Civ.Proc. § 715; Gault v. Gault, 112 N.J.Eq. 41, 163 A. 139; see Clark v. State, 171 Ind. 104, 84 N.E. 984, 16 Ann.Cas. 1229.) It has long been recognized that wages are not ordinary debts, that they may be preferred over other claims, and that, because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and his family, it is essential to the public welfare that he receive his pay when it is due. (In re Ballestra, 173 Cal. 657, 658, 161 P. 120; In re Moffett, 19 Cal.App.2d 7, 19, 64 P.2d 1190; Moore v. Indian Spring etc. Min. Co., 37 Cal.App. 370, 379, 174 P. 378; see [1928] 41 Harv. L.Rev. 786–790.) An employer who knows that wages are due, has ability to pay them, and still refuses to pay them, acts against good morals and fair dealing, and necessarily intentionally does an act which prejudices the rights of his employee. Such conduct amounts to a "case of fraud" within the meaning of the exception to the constitutional prohibition and may be punished by statute.

II. Authority of the Justice of the Peace Who Presided at the Trial

The justice in the township where the complaint was filed was disqualified, and without assignment by the chairman of the Judicial Council but merely at the request of the disqualified justice, the cause was tried by a justice of a neighboring township who signed the docket sheet as "(Acting) Justice of the Peace." Petitioner does not contest the validity of a substitution of justices of the peace under section 105 of the Code of Civil Procedure but contends, in reliance on that section, that the acting justice was without authority to hear the case in that the disqualified justice did not request his services in writing.[4]

It is unnecessary, however, to determine whether the justice was properly authorized to sit in this proceeding.

[12, 13] The acts of a judicial officer are not subject to attack on the grounds of lack of authority in a habeas corpus proceeding where, as here, no objection to the authority of the acting justice was raised upon the trial or on appeal to the superior court, and where there is no question that he was qualified to sit at the time of the trial if he was properly substituted. (In re Haas, 6 Cal.App.2d 320, 44 P.2d 411.) A judicial officer who acts in such circumstances acquires de facto status. (In re Haas, 6 Cal.App.2d 320, 44 P.2d 411; State v. Carroll, 38 Conn. 449, 9 Am.Rep. 409; see Matter of Danford, 157 Cal. 425, 108 P. 322; note 158 A.L.R. 529; Joseph Jarrett, De Facto Public Officers: The Validity of Their Acts and Their Rights to Compensation [1936] 9 So.Cal.L.Rev. 189, 211 et seq.) Any statements to the contrary in Harlan v. Gladding, McBean & Co., 7 Cal.App. 49, 93 P. 400, are disapproved. The jurisdiction of the court, therefore, could not have been affected by

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[4] Section 105 of the Code of Civil Procedure reads in part: "At the written request of a justice of the peace * * *, another justice of the peace within the same county * * * may attend such court, and thereupon is vested with the power, and may perform all the duties, and issue all the papers or process, of the justice or judge making such request. * * *"

any defects in the manner of substituting justices.

[14] Petitioner further claims that the acting justice had no authority to pronounce judgment after the appeal to the superior court because he was a layman. The classification of the justice court changed to Class A after the judgment was pronounced following the trial and conviction. This judgment was affirmed without modification upon the appeal, and the acting justice then resentenced the petitioner in the same terms as the first judgment. It is this sentence which petitioner claims was made without authority. Assuming without deciding that the acting justice had no authority after the change in classification, the second sentence after the affirmance of the judgment on appeal was unnecessary, and it could not affect the validity of the judgment from which the appeal was taken which included the sentence pronounced at that time and the terms of which were in no way modified on appeal. (Penn.Code, § 1263.)

III. Power to Impose Conditions on Suspension of Jail Sentence.

Petitioner attacks the power of the justice's court to make the conditions on which his sentence would have been suspended had he chosen to accept the terms imposed. As we have seen, he was fined $100 and given a 30-day jail sentence on each count, execution of the jail sentence to be suspended if the petitioner paid within 48 hours the sums which it was charged were due the employees.

[15] Suspension of a sentence is an act of grace and clemency to be granted in a proper case, and a person is not entitled to it as a matter of right. The code expressly provides that in granting probation, the court has power to impose such "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from such breach" and, specifically, that the court "may provide for reparation in proper cases." (Pen.Code, §§ 1203.1, 1203a.)

[16] Although there had been no determination in a civil suit of the sums due the employees, the court nevertheless heard the testimony with respect to their claims and could properly consider this evidence in providing for reparation. The conditions imposed do not appear to be unreasonable, and we cannot say that the court abused the discretion conferred upon it by the statute.

[17] It is also contended that since the civil jurisdiction of a Class B justice's court is limited to cases in which the demand is $300 or less, the court here was without power to provide for reparation in sums exceeding that amount. Many misdemeanors of which a Class B court has jurisdiction involve injuries where the reparation would be wholly inadequate if the amount were restricted to the monetary limitation on the civil jurisdiction of the court. We would unduly limit the power of the court to effectuate the purpose of section 1203.1 of the Penal Code if we were to read this restriction into the statute, and it seems clear that no such limitation was intended.

[18] Petitioner claims finally that because of asserted errors he "in fact had no trial. The rulings complained of were committed in the exercise of the trial court's jurisdiction and did not deprive petitioner of any constitutional rights. Accordingly they will not be reviewed in this proceeding. (In re Lindley, 29 Cal.2d 709, 722, 723, 177 P.2d 918; In re Bell, 19 Cal.2d 488, 492–495, 122 P.2d 22.)

The writ is discharged, and petitioner is remanded to custody.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

31 Cal.2d 844

CUMINGS et al. v. HOKR et al., and six other cases.

L. A. 19588–19594.

Supreme Court of California, in Bank.

May 18, 1948.

Constitutional law ⚷215

State courts' enforcement of agreements restricting use or occupancy of realty to persons of white race is forbidden as denying persons of other races equal protection of laws in violation of 14th Amendment. U.S.C.A.Const.Amend. 14.

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Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Consolidated actions by Earl C. Cumings and others against Frank Hokr, Anne O'Ferrall, E. B. O'Ferrall and others, by M. A. Hester and Blair Hill against Carlos J. Barbe, Arteal C. Graves, Clara B. Graves and others, by M. A. Hester and Bertha Kenyon against Wardell T. Thompson and others, by M. A. Hester and Blair Hill against Mary Morrison and another, by Clara McCormick and others against Narsissie Howard and another, by John Bushelman and others against William W. Cooper and another, and by Clara McCormick and another against Lowry C. McCray and another, to enjoin defendants from using or occupying certain parcels of real property in violation of contractual restrictions of use or occupancy thereof to persons of the white race. From judgments for plaintiffs, defendants O'Ferrell and Graves in the first two actions and all defendants in the other actions appeal.

Reversed.

Loren Miller, of Los Angeles, for appellants.

Morris E. Cohn, of Los Angeles, Bartley Crum, of San Francisco, Hugh E. Macbeth, Jr., of Los Angeles, Edward Mosk, of Hollywood, Isaac Pacht, and Clore Warne, both of Beverly Hills, Martha Stewart Yerkes, of Pasadena, Albrecht Marburg Yerkes, of Los Angeles, Robert W. Kenny, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and D. O. McGovney, of Berkeley, amicus curiae, on behalf of appellants.

Ray C. Eberhard and Elizabeth Eberhard Zeigler, both of Los Angeles, for respondents.

PER CURIAM.

Defendants in these seven consolidated cases appeal from judgments by which it was "Adjudged and Decreed that defendants [named, respectively] * * * and all persons claiming, or to claim, through or under them, * * * not of the white or Caucasian race, be and they hereby are restrained and enjoined from using or occupying" certain specified parcels of real property owned or occupied by defendants and located in the Charles Victor Hall Tract in the City of Los Angeles, California.

The judgments are based upon findings of fact which, for the purposes of this opinion, may be summarized as follows: On various specified dates commencing in 1924 and running through 1944, the then owners of various lots in the Charles Victer Hall Tract joined in the execution of written agreements which had for their purposes "the restriction of the use or occupancy of property in said Charles Victor Hall Tract to persons of the white or Caucasian race"; among the parcels covered by the agreements were the several lots involved in these cases, which lots, since the execution of the respective agreements, have become occupied by defendants who are "not of the white or Caucasian race"; plaintiffs also own certain lots in the tract which are included in the restrictive agreements; the "use and occupancy of said premises by said Negro defendants has [sic] rendered the property of plaintiffs less desirable for residential purposes and has [sic] decreased the market value thereof."

As grounds requiring reversal of the judgments, defendants urge, among other things, that:

1. Enforcement of the restrictive covenants would deny defendants the equal protection of the law and would therefore violate the provisions of the Fourteenth

Amendment to the Constitution of the United States.

2. The covenants are void because they are contrary to the public good and to public policy.

Agreements such as these here involved have heretofore been held to constitute a lawful exercise of the freedom to contract and as such to be enforceable by court action. (Los Angeles Investment Co. v. Gary, 1919, 181 Cal. 680, 683, 684, 186 P. 596, 9 A.L.R. 115; Wayt v. Patee, 1928, 205 Cal. 46, 49, 50, 269 P. 660; Littlejohns v. Henderson, 1931, 111 Cal.App. 115, 118, 295 P. 95; Letteau v. Ellis, 1932, 122 Cal.App. 584, 587, 10 P.2d 496; Stone v. Jones, 1944, 66 Cal.App.2d 264, 269, 152 P.2d 19; Shideler v. Roberts, 1945, 69 Cal.App.2d 549, 557, 160 P.2d 67; see also Fairchild v. Raines, 1944, 24 Cal.2d 818, 827, 151 P.2d 260). However, on May 3, 1948, the Supreme Court of the United States in the cases of Shelley v. Kraemer (McGhee v. Sipes), 68 S.Ct. 836 (see also Hurd v. Hodge, 68 S.Ct. 847), resolved in defendants' favor the first of the above stated contentions. In the Shelley and McGhee cases the plaintiffs sought the enforcement of racial covenants similar in essential aspects to those now before us. The court held at page 842 of 68 S.Ct.: "We conclude * * * that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners [defendants] by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. * * * But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. * * * Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment." If follows that the judgments here appealed from must be reversed.

The judgment in each case is reversed.

31 Cal.2d 869

CASSELL et al. v. HICKERSON et al.

FAIRCHILD et al. v. RAINES et al.

L. A. 19685, 19523.

Supreme Court of California, in Bank.
May 18, 1948.

Constitutional law 🔑215

Privately imposed restrictions against occupation of lands by others than persons of white race cannot be enforced through court action.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge No. 19523, Harry R. Archbald, Judge No. 19685.

Actions by Florence H. Cassell and another against H. G. Hickerson and another and by Hazel Fairchild and others against Ross H. Raines and others to enjoin defendants from using or occupying certain parcels of realty in violation of agreements restricting use or occupancy thereof to persons of the white race. Judgments for plaintiffs, and defendants appeal.

Reversed.

Lech T. Niemo, of Los Angeles, and Lester V. Peterman, of Pasadena, for appellants.

Feinfeld & Feinfeld, of Los Angeles, and Walter S. McEachern and McEachern & Ritchie, all of Pasadena, for respondents.

PER CURIAM.

These cases, like Cumings v. Hokr, Cal. Sup., 193 P.2d 742, Davis v. Carter, Cal. Sup., 193 P.2d 744, and In re Laws, Cal. Sup., 193 P.2d 744, involve the legality and enforceability of privately imposed restrictions against occupation of certain lots of land by persons other than those of the Caucasian race. Upon the authority of Shelley v. Kraemer (McGhee v. Sipes), 68 S.Ct. 836 (see also Hurd v. Hodge, 68 S.Ct. 847), holding that such restrictions cannot be enforced through court action, the judgment of the trial court enforcing the restrictions is in each case reversed.

31 Cal.2d 870

DAVIS v. CARTER et al. and ten other cases.

L. A. 19696, 19697, 19783, 19759.

Supreme Court of California, in Bank.
May 18, 1948.

Constitutional law 🔑215

Privately imposed restrictions against occupation of lands by other than persons of the white race cannot be enforced through court action.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge Nos. 19696, 19697, Thurmond Clarke, Judge Nos. 19783, 19759.

Actions by Edythe G. Davis against Benny Carter and another and against Mathew Williams and others, by Clarence A. Sandel and another against Hobart Sanders, by Ane Marie Anderson and others against Earl F. Auseth and others, by Francis L. Smith against Omelia Craigen Crawford and others, by Victor J. Maricq and another against James Sumner Pickett, Jr. and others, by Leila Daniels against Hallie D. Johnson and others, by Josefa H. Tolhurst against Nellie B. Venerable and others, by Edna I. White against Russell T. Smith and others, by Elmer C. Weber and others against Arthur Twyne, Sr. and others, and by Fred B. McComas against Truman R. Lott and wife, to enjoin defendants from occupying certain parcels of realty in violation of agreements restricting use and occupation thereof to persons of the white race. Judgments for defendants, and plaintiffs appeal.

Affirmed.

LeCompte Davis, of Los Angeles, Alfred F. MacDonald, of Burbank, John F. Poole, E. H. Stayton, Joseph P. Guerin and Kenneth W. Kearney, all of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and D. O. McGovney, of Berkeley, as amicus curiae on behalf of appellants.

Hugh E. Macbeth, Eva M. Mark, Hugh E. MacBeth, Jr., Loren Miller, Harold J. Sinclair, Pacht, Pelton, Warne, Ross & Bernhard, George E. Cryer, and R. Alston Jones, all of Los Angeles, for respondents.

PER CURIAM.

These cases, like Cumings v. Hokr, Cal. Sup., 193 P.2d 742, Cassell v. Hickerson, Cal.Sup., 193 P.2d 743, and In re Laws, Cal.Sup., 193 P.2d 744, involve the legality and enforceability of privately imposed restrictions against occupation of certain lots of land by persons other than those of the Caucasian race. Upon the authority of Shelley v. Kraemer (McGhee v. Sipes), 68 S.Ct. 836 (see also Hurd v. Hodge, 68 S.Ct. 847), holding that such restrictions cannot be enforced through court action, the judgment of the trial court refusing to enforce the restrictions is in each case affirmed.

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31 Cal.2d 846

Ex parte LAWS et al.

Cr. 4698.

Supreme Court of California, in Bank.
May 18, 1948.

Constitutional law 🔑215

Covenants restricting use or occupation of land to persons of white race cannot be enforced by state court action in committing occupants for contempt in refusing to obey court's order to vacate lands.

In the matter of the application of Henry Laws and others for a writ of habeas corpus to secure their release from imprisonment under a commitment for contempt in refusing to obey a court order to vacate lands occupied by them in violation of restrictions against occupation of such lands by others than persons of the white race.

Petitioners discharged.

Katz, Gallagher & Margolis, John T. McTernan and Charles J. Katz, all of Los Angeles, for petitioners.

Daniel G. Marshall, of Los Angeles, as amici curiae on behalf of petitioners.

Fred N. Howser, Dist. Atty. and Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., all of Los Angeles, for respondent.

PER CURIAM.

This case differs from the other racial restriction cases this day decided (Cumings v. Hokr, Cal.Sup., 193 P.2d 742; Cassell v. Hickerson, Cal.Sup., 193 P.2d 743; Davis v. Carter, Cal.Sup., 193 P.2d 744) in that here petitioners by final judgment were enjoined from using or occupying their covenant restricted land, they refused to obey the order of the court, they were adjudged in contempt and committed for such disobedience and now seek release on habeas corpus.

Since it is unquestionable that commitment for contempt for refusing to obey the order of the court to vacate the restricted property amounts to "state action" to enforce the restrictions, within the purview of the decisions in Shelley v. Kraemer (McGhee v. Sipes), 68 S.Ct. 836, the petitioners are entitled to their release.

Petitioners are discharged.

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31 Cal.2d 856

PHŒNIX INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Sac. 5908.

Supreme Court of California, in Bank.

May 25, 1948.

1. Workmen's compensation 🔑**1939**

The findings of Industrial Accident Commission will not be disturbed on appeal where they are supported by substantial evidence or by inferences which may fairly be drawn from the evidence.

2. Workmen's compensation 🔑**1561**

Evidence relating to pre-training orientation flights given by employer both with and without charge to determine aptitude of children for eventual pilot training by employer, and to flight instructor's desire that his twelve-year-old daughter become pilot, warranted finding that death of instructor while piloting plane in which was riding his twelve-year-old daughter "arose out of employment" so as to be compensable. Labor Code, § 3600.

SCHAUER, J., dissenting.

Proceeding under the Workmen's Compensation Act by Virginia Hamilton, widow of Marion Robert Hamilton, deceased employee, opposed by Herbert Weggers, doing business as Weggers Airplane Seeding & Dusting Company, employer, and Phoenix Indemnity Company, insurance carrier. The Industrial Accident Commission awarded a death benefit to the widow, and the insurance carrier petitions for review.

Award affirmed.

W. N. Mullen, of San Francisco, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondents.

EDMONDS, Justice.

The Industrial Accident Commission awarded a death benefit to the widow of Marion Robert Hamilton, who was killed when the airplane he was flying crashed into a power line. By writ of review, Phoenix Indemnity Company, the insurance carrier of his employer, challenges the commission's jurisdiction to make the award.

The findings of the commission are attacked by the insurer upon the sole ground that there is no evidence whatever tending to prove death arising out of employment, as required by section 3600 of the Labor Code. Although the accident may have occurred during the course of Hamilton's employment, the argument runs, it did not arise out of such employment. More specifically, the act of Hamilton in taking his daughter for a ride was personal in nature, the employer loaned the plane to him for personal use, and the venture was not reasonably incidental to his employment.

The evidence showing the scope of Hamilton's employment and the use of the plane at the time of the accident is quite brief. He was employed by Herbert Weggers, doing business as Weggers Airplane Seeding and Dusting Company. In addition to providing crop dusting and seeding service, Weggers offered instruction in the handling and flight of airplanes. Hamilton was the designated flight instructor.

On the day of the accident, Hamilton had been continuously engaged since early morning in taking students aloft for instruction. He was required to be on duty until 5 p. m. or sundown. About an hour before that time, Mrs. Hamilton went to the airport with their 12 year old daughter. Hamilton said to the little girl, "Come on, I will take you up on your orientation ride and see what kind of a flier you are going to make." The father and daughter proceeded to the office and Hamilton asked Weggers if he might "use an airplane to take his daughter for a ride." Weggers replied, "Surely." The accident occurred soon after Hamilton and the girl took off in the plane.

Hamilton's daughter had never been listed as a student and no arrangements had ever been made regarding instruction for her. Weggers testified that the regulations of Civil Aeronautics Authority do not permit the licensing as pilots of persons under seventeen years of age, but he said that sometimes younger persons are taken up in the air for the purposes of determining whether or not they can learn to fly.

According to the widow's testimony, she and her husband had talked about giving their daughter instruction which would qualify her to pilot an airplane. She did not know of any arrangements her husband may have made with his employer, but she said, "He always paid for the gas or something. He didn't just take the plane."

There is other testimony tending to prove Hamilton's intention to provide instruction for his daughter in the use of airplanes. Fred Moedlinger quoted Hamilton as stating that it was his ambition to make a pilot of his daughter. He could not recall whether Weggers was present when such statements were made.

An employee of Weggers testified that he was in the office when Hamilton asked for the use of the plane. This witness did not hear Hamilton mention "an orientation ride," nor say anything about paying for it. But there is evidence of a conversation after the crash in which Weggers said that he was receiving "remuneration" from Hamilton for the use of the plane. And it appears that the ship in which the accident occurred was one which Hamilton had used earlier the same day to train students.

Upon this evidence, the commission found that the death of Hamilton was not caused by any injury arising out of and in the course of his employment. Thereafter, upon petition of the applicant, it granted a re-hearing and, without taking additional evidence, upon a re-examination of the record, the findings were set aside and a death benefit awarded upon a finding that Hamilton "sustained injury arising out of and in the course of (his) employment which caused his death. * * *" The employer and insurance carrier then obtained a re-hearing of the order granting the first re-hearing and the decision on re-hearing. At the supplemental hearing, the only witness appearing was Weggers, who testified that on a number of occasions his instructors had taken young people aloft in his planes. Some of these flights were paid for by the prospective student. Others were without compensation, Weggers stated, but to take a person aloft without charge the pilot was required to obtain his permission. He explained that free rides were given under several different circumstances; "sometimes a donation, or like selling an airplane, or something like that you know". Other testimony by him was that in the past youngsters had been "taken up with the idea that maybe in four or five years they would be a student for airplane instruction." But there had been no conversation with him, he said, in regard to any intention that the Hamilton girl should be a student.

Following this re-hearing, the commission ordered that the decision on the former re-hearing be affirmed and adopted as its final determination. The insurer then brought the present proceeding.

[1, 2] The findings of the commission will not be disturbed upon appeal where they are supported by substantial evidence, or by inferences which may fairly be drawn from the evidence. Associated Indemnity Corp. v. Industrial Acc. Comm., 18 Cal.2d 40, 42, 112 P.2d 615; Drillon v. Industrial Acc. Comm., 17 Cal.2d 346, 350, 110 P.2d 64; Schaller v. Industrial Acc. Comm., 11 Cal.2d 46, 50, 77 P.2d 836; Hillen v. Industrial Acc. Comm., 199 Cal. 577, 580, 250 P. 570. As tending to prove a fatal accident arising out of and in the course of the employment (see Sec. 3600 Labor Code), there is evidence from which it reasonably may be inferred that the facilities offered by Weggers to the public included pre-training orientation flights as well as those which were a part of the regular course of instruction. At times, children were taken on orientation flights for the purpose of determining the reactions of the child to air travel and his probable aptitude for eventual pilot training. On occasions, such trips had been made although it was known that the child could not enroll for instruction until a later time. Flights of that kind were made, more or less regardless of the age of the child. A charge was made for some of them; other flights were given without compensation. It was Hamilton's duty, as the flight instructor, to pilot the plane on these occasions. Mrs. Hamilton, therefore, made out a prima facie case of death arising out of and in the course of employment.

Evidence in three particulars is relied upon by the insurer to rebut this prima facie case: the conversation between Hamilton and Weggers just prior to taking off, the age of the child, and the fact that she was Hamilton's daughter. It is argued that Hamilton's question, "Can I have your plane," meant that he was requesting the plane for his own use, thereby stepping out of the course of his employment. But it is equally probable that Hamilton asked the question to determine whether or not Weggers had another use for the plane at that time, or to ascertain its availability for further student flights in the scope of his employment. Although previously on the day of the accident Hamiliton had instructed students in the plane used to take up his daughter, it was then on the ground after a flight for another purpose.

The age of the daughter, says the insurer, is a further indication that the flight was not in the course of Hamilton's employment. But here again, the commission could fairly infer that because of Hamilton's ambition and desire eventually to qualify her as a pilot she was a prospective student for instruction. Also, considering the more or less general practice of Weggers to take youngsters on orientation flights for the purpose of determining their aptitude, as a matter of law it may not be said that the purpose of the fatal trip had no connection with pilot training.

The relationship between Hamilton and the child is also not conclusive as indicating that his death was caused by an accident occurring outside of the scope of his employment. In the absence of this relationship, there is evidence which would support the award of a death benefit, and the relationship alone does not necessarily require a contrary determination.

Also, although it may be conceded that Hamilton was deriving a personal benefit from the flight by determining his daughter's aptitude for flying, this "does not per se bring him without the purview of the Compensation Law. * * * 'The true rule * * * is that the injury is compensable if received while the employee is doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do.'" Pacific Indemnity Co. v. Industrial Acc. Comm., 26 Cal.2d 509, 513, 159 P.2d 625, 627. Benefits to the employer, or to the employee, are not mutually exclusive, and "where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly or indirectly could he have been serving his employer." Lockheed Aircraft Corp. v. Industrial Acc. Comm., 28 Cal.2d 756, 758, 759, 172 P.2d 1, 3. It is not material whether the commission believed the testimony that the employer was to receive "remuneration" for the particular flight. If it accepted that evidence, there was proof of direct benefit to him. If the commission disregarded that testimony, it reasonably may be said that the flight was made in accordance with the employer's custom to provide trial trips without charge for the purpose of building up his business.

The award is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SPENCE., JJ., concur.

SCHAUER, Justice (dissenting.)

I dissent. I find the evidence, viewed fairly, impartially and realistically, inadequate to prove that the accident which occasioned the employe's death occurred while the employe was "performing service growing out of and incidental to his employment" or while he was "acting within the course of his employment." (See Labor Code, § 3600.) Accordingly I would annul the award.

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85 Cal.App.2d 798

ANTHONY et al. v. HOBBIE.

Civ. 7390.

District Court of Appeal, Third District, California.

June 2, 1948.

Hearing Denied July 29, 1948.

1. Automobiles 🔑160(3)

Motorist must use only reasonable care in anticipating presence of pedestrians on a highway.

2. Automobiles 🔑245(6, 46)

In action for death of pedestrian struck on highway at night by defendant's automobile, whether defendant driving at high speed was negligent with respect to lookout and control necessary to avoid striking persons on highway after he saw deceased's automobile in roadside ditch was for the jury.

3. Appeal and error 🔑989

Power of appellate court begins and ends with determination as to whether there there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury, and when two or more inferences can be reasonably deduced from facts, reviewing court cannot substitute its deductions for those of trial court.

4. Witnesses 🔑380(5)

A party may not impeach his own witness unless surprised by hostile testimony.

5. Witnesses 🔑389

Where a witness merely states that he does not remember, he cannot be impeached by showing of former statements regarding facts which he claims not to have remembered.

6. Witnesses 🔑380(5)

In death action, where companion of deceased waiting in automobile warned plaintiff's counsel that she could remember nothing concerning actual accident and so testified when called by plaintiffs, refusal to permit plaintiffs to impeach her testimony by coroner's inquest transcript wherein she testified favorably to plaintiffs' case was proper.

7. Automobiles 🔑246(50)

In action for death of pedestrian struck on highway at night by defendant's automobile, evidence that when defendant first saw decedent he was staggering at a point three feet to left of center line of the highway and seemed to stagger across into defendant's path supported instruction that decedent was crossing the highway.

8. Trial 🔑296(4)

In action for death of pedestrian struck on highway at night by defendant's automobile, charge that since there was no crosswalk at point where deceased was struck it was his duty to yield right of way was not error, where jury was further directed that pedestrian crossing a highway is required to exercise a higher degree of care than that required at regular crosswalk and that failure to yield would not necessarily constitute negligence.

9. Negligence ⚷121(1)

Violation of a statute is presumptive evidence of negligence, and if evidence establishes that such violation proximately caused injury and no excuse or justification is shown, responsibility may be fixed on the violator without other proof of failure to exercise ordinary care.

10. Negligence ⚷12

Facts surrounding an emergency may be such as to excuse violation of a statute and remove violator from effect of rule that violation of a statute is presumptive evidence of negligence.

11. Automobiles ⚷245(89)

In action for death of pedestrian struck on highway at night by defendant's automobile whether miring down of deceased's automobile two hours before the accident was such an emergency as would excuse his conduct in staggering across an open highway directly into path of oncoming automobile was for the jury.

12. Automobiles ⚷246(21)

In action for death of pedestrian struck on highway at night by defendant's automobile, instruction on imminent peril was properly given by reason of closing argument of plaintiffs' counsel.

13. Automobiles ⚷246(58)

In action for death of pedestrian struck on highway at night by defendant's automobile, evidence supported charge on question of decedent's intoxication.

◆

Appeal from Superior Court, Yuba County; Arthur Coats, Judge.

Action by Sadie Anthony and another against Don G. Hobbie for death of plaintiff's decedent when struck by an automobile. From the judgment, plaintiffs appeal.

Affirmed.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellants.

Rich, Weis, Carlin & Fuidge and Richard H. Fuidge, all of Marysville, for respondent.

PEEK, Justice.

This is an appeal by plaintiffs from a judgment entered pursuant to a jury verdict in favor of defendant in an action for the alleged wrongful death of the husband and father of plaintiffs respectively. On a former appeal a directed verdict for the defendant was reversed. Anthony v. Hobbie, 25 Cal.2d 814, 155 P.2d 826.

By their complaint plaintiffs allege generally that decedent's death resulted from the negligent operation of defendant's automobile. Defendant answered denying generally the allegations of the complaint and affirmatively charging that deceased was contributorily negligent. The jury rendered a verdict in favor of defendant and from the judgment entered in accordance therewith plaintiffs have appealed. Three contentions are made by plaintiffs (1) the evidence is insufficient as a matter of law to support the judgment; (2) the trial court committed prejudicial error in unduly restricting examination of an alleged hostile witness called by plaintiffs, and (3) the jury was misdirected to the prejudice of plaintiffs.

By virtue of plaintiffs' first contention we have examined the entire record which, summarized in the light most favorable to respondent, discloses that approximately at the hour of 1:30 a. m. on the night of January 31, 1941, the decedent was struck and fatally injured by a car operated by the defendant. The accident occurred on highway 99E at a point a few miles north of the town of Wheatland, California. According to defendant, who was called by plaintiffs under section 2055 of the Code of Civil Procedure, he and three companions had consumed several drinks of intoxicating liquor during the evening preceding the accident. Shortly prior to the accident their car had run out of gas and defendant flagged a motorist who took him to Marysville where he made arrangements to have gasoline taken to the stalled car. After refilling the car he proceeded north toward Marysville followed by the service car. Nearing the point of the accident defendant noticed a car with headlights burning in the ditch at the side of the road, and the next instant noticed deceased standing in the highway seventy-five or one hundred feet ahead of defendant's car. He described deceased as being bent over in a peculiar fashion, not looking at the oncoming car and staggering across the highway, and just before the impact staggered across the center white line directly in front of defendant's car. The car was then traveling at approximately fifty miles per hour and struck decedent with its left front fender. The point of impact was about three feet east of the center line of the highway and in defendant's lane.

Mr. Muller, the Marysville garage attendant who took the gasoline to defendant's stalled car, testified that he followed defendant for several miles during which time defendant maintained a constant speed of fifty miles per hour. He did not see decedent on the highway prior to the accident. Muller's son corroborated the testimony of his father.

Officer Williams of the highway patrol testified concerning physical facts at the scene of the accident and that defendant appeared sober when he talked to him.

Inez Hansen, the decedent's companion, was called by plaintiffs and testified that during the course of their trip that day to Stockton and return they had stopped at various bars for drinks and she was in the act of turning her car around and returning to Wheatland for more drinks when the car became mired in the ditch. Her answer to questions relating to further facts prior to and at the time of the accident was that she could not remember, and forms the basis of one of plaintiffs' alleged grounds for reversal.

Defendant read into evidence the testimony of one Jean Wilson who appeared as a witness at the first trial but was unavailable at the second. Preceding the accident this witness was driving her car north on highway 99E ahead of the Hobbie car. She saw the deceased standing in her lane of the highway waving his arms and leaning over sideways. To avoid him she was compelled to drive around him to her left and stated that had she not been driving slowly she would have hit him.

The evidence which appellants cite in support of their first contention: that defendant was charged with a duty to anticipate the presence of persons on the highway, of keeping a vigilant lookout and of keeping his car under such control as to avoid striking such persons, and therefore as a matter of law defendant was guilty of negligence, shows that defendant saw the automobile in which the decedent had been riding in the ditch at the side of the road, which appellants observe should have warned him he could reasonably expect the presence of persons on the highway; that he looked away from the road to observe the car and talked to his companion about it; that when he looked back on the road he saw decedent about seventy-five or one hundred feet in front of him on the west side of the center line waving his arms; that he was then traveling about fifty miles per hour and just as he applied his brakes he struck decedent a few feet to the east side of the center line.

[1] Respondent in answer to such contention relies upon the rule that a driver of a vehicle is required to use only reasonable care in anticipating the presence of pedestrians on the highway (Hine v. Leppard, 5 Cal.App.2d 154, 42 P.2d 389, 43 P.2d 595; Burk v. Extrafine Bread Bakery, 208 Cal. 105, 280 P. 522) and that in any event such question was one of fact for the jury. Anthony v. Hobbie, supra.

It is true, as appellants state, that on the former appeal it was held that such evidence was some evidence which if taken alone would support a judgment for the plaintiffs and for that reason it was error for the trial court to direct a verdict for the defendant. But it does not follow, as contended by appellants, that as the evidence on the second trial was substantially the same as on the first that therefore the judgment must be in favor of the plaintiffs, for, as the court there stated at pages 817, 818 of 25 Cal.2d, at page 828 of 155 P.2d: "The issues of negligence and proximate cause are essentially questions of fact."

[2, 3] Assuming that there is substantial or even a preponderance of evidence which would support a finding of negligence on the part of the defendant, nevertheless by reason of the conflict in the evi-

dence and the varying inferences which might be drawn therefrom, the question must be held to have been conclusively resolved in favor of the defendant by the jury, whose province it was to decide such question of fact. Under such circumstances the rule as stated in Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184, is particularly apropos: that the power of an appellate court "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

Appellants next contend that the trial court committed error in unduly restricting the examination of their witness Inez Hansen. In this regard it is contended that she was an indispensable witness for the proper presentation of their case because she possessed material and determinative knowledge which no other witness could supply and for the reason that failure to produce her would have impaired the weight of their evidence and permitted the jury to have drawn inferences unfavorable to them.

The record shows that this witness was driving the car in which decedent had been riding, and was sitting in the car when the decedent was struck and killed. When called as a witness she testified somewhat sketchily to matters occurring prior to the accident but claimed that she remembered nothing of the facts of the accident. Thereupon counsel for appellants attempted to impeach her testimony by means of the transcript of the coroner's inquest wherein it appeared she testified favorably to the plaintiffs' case. Defendant's objection to the proposed impeachment was sustained by the trial court.

[4, 5] Subject to certain exceptions which are immaterial here, it is the well settled rule in California that a party may not impeach his own witness unless surprised by hostile testimony. Zipperlen v. Southern Pacific Co., 7 Cal.App. 206, 93 P. 1049; Estate of Dolbeer, 153 Cal. 652, 96 P. 266, 15 Ann.Cas. 207; People v. Flores, 37 Cal.App.2d 282, 99 P.2d 326. In the present case, the witness did not give unfavorable testimony but merely stated that she did not remember the facts of the accident. Furthermore the lack of surprise in the present case would seem to be indicated by the fact that this witness testified in the same manner on the first trial. See Anthony v. Hobbie, supra. In addition during a conversation with one of plaintiffs' counsel a few days prior to the trial she told him she could remember nothing concerning the actual accident and would so testify if called as a witness. Under such circumstances the case comes within the rule of such cases as People v. Jaggers, 120 Cal.App. 733, 8 P.2d 206; Estate of De Laveaga, 165 Cal. 607, 133 P. 307; People v. Floyd, 78 Cal.App. 11, 247 P. 917, holding that where a witness merely states that he does not remember he cannot be impeached by the showing of former statements regarding the facts which he claims not to have remembered. In any event the introduction of such prior statements would be of no value as affirmative evidence of the facts stated but would only serve to impeach the statement that the witness does not now remember. Thus there would be no introduction of any positive evidence by the admission of the former statements concerning the facts of the accident. First Nat. Bank v. DeMoulin, 56 Cal.App. 313, 205 P. 92.

[6] Inasmuch as it cannot be said, as appellants contend, that Mrs. Hansen was an indispensable witness whom they were bound by law to produce, their argument that the situation so presented comes within an exception to the rule that one may not impeach his own witness except when surprised by adverse testimony, is without merit.

Appellants' final contention relates to certain instructions, twelve in number, which it is claimed misdirected the jury concerning the rights and duties of decedent immediately preceding the accident. It is argued that (1) there was no evidence to support the instructions that the decedent was crossing the highway, (2) that the instructions arbitrarily conferred the right of way on the defendant, and (3) that the evidence established as a matter of law that defendant was negligently driving his automobile at the time of the accident.

[7] As to the first complaint it cannot be denied there is evidence that when the defendant first saw the decedent he was staggering at a point about three feet to the left of the center line of the highway; that he seemed to stagger across the center line into the path of the oncoming car and that when he was struck he was three feet east of the center line and in defendant's lane of travel. In the light of such evidence the jury could have found that decedent was crossing the highway, making the instructions on that issue applicable to such a finding.

[8] Likewise without merit is the argument that defendant's instruction No. 13 arbitrarily conferred the right of way on defendant. If the portion of the instruction complained of by appellants, to-wit: "There was no cross-walk on the highway at the point where H. L. Anthony met his death. It was therefore his duty to yield the right of way" constituted the entire instruction appellants' argument would be better founded. However, a reading of the entire instruction dispels any erroneous impression which such portion thereof could have created, in that in qualification thereof the jury was directed that a pedestrian crossing a highway was required to exercise a higher degree of care than that required when crossing at a regular crosswalk; that failure to yield the right of way would not necessarily constitute negligence but would depend upon the surrounding circumstances; and that reasonable care in any instance relates to the conduct of an ordinary person.

[9] Appellants next complain of defendant's instruction that "A violation of a statute or an ordinance which proximately contributes to the cause of an injury or death is presumptively an act of negligence." Reading the instruction attacked in light of the facts and circumstances disclosed by the record it would appear to come squarely within the rule enunciated in the recent case of Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279. There the court reiterated the general rule that violation of a statute is presumptive evidence of negligence and that if the evidence establishes that such violation proximately caused the injury and no excuse or justification is shown by the evidence, responsibility may be fixed on the violator without other proof of failure to exercise ordinary care.

[10, 11] Appellants in apparent realization of the general rule attempt to escape its application here by arguing that the acts of decedent immediately prior to the accident were acts done in an emergency and therefore without the rule. It is true that the facts surrounding the emergency may be such as to excuse the violation. But it is difficult to understand how the miring down of a car approximately two hours before an accident is such an emergency as would excuse the conduct of a person in staggering across an open highway directly into the path of an oncoming car. It is not shown that crossing the highway, if such was the case, was itself an act necessitated by a sudden emergency. In any event such circumstances would but present a question of fact for the jury and its determination thereon within the well established rule would be binding upon the court. Crawford v. Southern Pacific Co., supra; Satterlee v. Orange Glenn School Dist., supra, 29 Cal.2d at page 590, 177 P.2d 279.

[12] Appellants next attack an instruction on imminent peril which instruction, according to the notation of the trial court appearing thereon, was given "by reason of closing argument of plaintiff's counsel." It is appellants' contention that as the evidence establishes as a matter of law that the defendant was negligent, the giving of the instruction was therefore prejudicial error. In the first place plaintiffs' assumption that defendant was negligent as a matter of law is contradictory to and not sustained by the evidence. And secondly, from our examination of the arguments of counsel we are entirely in accord with the conclusion of the trial court that by reason of counsel's argument the instruction became necessary.

[13] Finally appellants attack certain instructions by the court and by defendant upon the question of intoxication. There is no citation of authority that they were not applicable to the facts herein, and in view of the conclusive showing that all parties had been drinking during that evening it is our conclusion that under such circumstances the attacked instructions were entirely proper.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

SAVAGE v. MAYER.*

Civ. 15781.

District Court of Appeal, Second District,
Division 3, California.
May 21, 1948.

Rehearing Denied June 18, 1948.

Hearing Granted July 15, 1948.

1. Joint adventures 🔑5(2)

In action to recover secret profits made by defendant in sale of stock to plaintiff pursuant to alleged oral agreement that the parties and others, as joint adventurers, would buy sufficient stock to gain control of corporation and that defendant would obtain stock for plaintiff at lowest possible price, evidence sustained finding that defendant was guilty of fraud.

2. Joint adventures 🔑1, 5(2)

In action to recover secret profits made by defendant in sale of stock to plaintiff, evidence sustained finding that plaintiff and defendant were joint adventurers and that defendant, in obtaining stock for plaintiff, had undertaken to act for plaintiff in trust and in confidence and for benefit of plaintiff.

3. Joint adventures 🔑5(1)

In action to recover secret profits by a joint adventurer from his coadventurer in purchasing stock for him, code section providing that one defrauded in sale of property is entitled to recover difference between actual value of that with which defrauded person parted and actual value of which he received was not applicable, since value of stock was immaterial. Civ. Code, § 3343.

4. Joint adventures 🔑4(1)

Where joint adventurers agreed to buy sufficient shares of stock in corporation to give them a controlling interest, and one of the joint adventurers agreed to secure stock for another joint adventurer at the lowest possible price, joint adventurer, in obtaining stock for the other and in selling it to him at $20 a share, had the duty to disclose the fact that he had obtained the stock at $17 a share.

5. Joint adventures 🔑4(1)

Associates in a common enterprise, under whatever guise, have a duty to each other to make full disclosure of any profit not common to all of the associates.

6. Joint adventures 🔑5(1)

In action to recover secret profits by a joint adventurer from his coadventurer in purchasing stock for him, plaintiff was entitled to recover amount of profits made by defendant in buying stock at $17 a share and selling it to plaintiff at $20 a share, and was not limited to difference between price of $20 a share at which stock was sold to plaintiff and price of $19.75 a share which was average price of stock on the stock exchange.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by John E. Savage against Rudolph W. Mayer to recover secret profits made by defendant in breach of trust in selling stock to plaintiff. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

Oliver O. Clark, Robert A. Smith, and Pat Ford, all of Los Angeles, for appellant.

A. S. Goldman and Chas. I. Rosin, both of Los Angeles, for respondent.

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* Subsequent opinion 203 P.2d 9.

WOOD, Justice.

In this action, based upon alleged fraud of the defendant in a transaction involving the purchase of shares of stock, plaintiff obtained judgment for $26,400, and defendant appeals.

The findings were made by referring to paragraphs of the complaint and stating whether or not the allegations therein were true. Since the trial court found that the allegations of the complaint were true, except as to a few comparatively minor matters, the substance of the complaint should be stated here.

In the complaint herein, as a first cause of action, it is alleged as follows: That on November 15, 1944, plaintiff and defendant, for their mutual benefit and for the purpose of acquiring sufficient capital stock of the Pig'n Whistle Corporation to enable them in connection with other stockholders as a group to elect members of their selection as directors of said corporation, entered into an oral agreement with each other to the effect that each of the parties hereto would purchase an agreed number of shares of said stock; that the defendant at said time informed the plaintiff that, in the course of purchasing shares of said stock for himself he would also, without any expense or cost to the plaintiff or profit to himself, purchase for plaintiff the stock desired by plaintiff, and that he would purchase the said stock for the plaintiff at the lowest price at which it could be acquired; that the defendant was not at said time or any other time mentioned in the complaint a licensed broker so as to entitle him to act as a broker or agent in purchasing shares of stock for other persons and was not entitled to charge or receive any compensation in acting for other persons in the purchase of shares of stock; that during December, 1944, the defendant informed the plaintiff that he had purchased 9,000 shares of said stock from various persons at $20 per share and for the total sum of $180,000, and that he had agreed to pay said persons for and on behalf of plaintiff the said $180,000 for said 9,000 shares, and that said price of $20 per share was the lowest price at which said stock could be purchased; that pursuant to said representations of defendant the plaintiff paid to defendant, during November (December), 1944, the sum of $180,000 as the purchase price of said stock; that in truth and in fact the defendant did not purchase the said stock from various persons and did not arrange for the purchase thereof at $20 per share or for $180,000, but on the contrary the agreed purchase price of said shares of stock was not $180,000 but was $153,000, and was not at $20 per share but was at $17 per share, and the amount paid by the defendant for said stock was $17 per share and the total sum of $153,000 and no more, and the defendant, without the knowledge of the plaintiff, fraudulently retained for himself the sum of $27,000 of the money paid by the plaintiff for the purchase of said stock, and the plaintiff was defrauded in the sum of $27,000; that the said false representations made by the defendant were made for the purpose of defrauding and deceiving the plaintiff, and they were false and known by the defendant to be false, and were made for the purpose of causing the plaintiff to act thereon and to defraud him; that the plaintiff believed said representations to be true and relied and acted thereon and was deceived and defrauded by reason thereof, and as a result thereof plaintiff paid to defendant $180,000 instead of $153,000, the actual purchase price of said stock, and that by reason thereof plaintiff was damaged in the sum of $27,000; that by reason of the business association between plaintiff and defendant the plaintiff reposed his trust and confidence in the defendant and the defendant undertook to act for the plaintiff in trust and in confidence and for the benefit of the plaintiff and without profit to himself, and plaintiff at all times relied upon the belief that the defendant was so acting in trust and confidence.

Also in said complaint, as a second cause of action, it was alleged as follows: That plaintiff adopts all the allegations of the first cause of action as a part of said second cause of action, "as fully as though set out in full"; that about December, 1944, the plaintiff paid to defendant for the use and benefit of plaintiff the sum of $180,000 "for the purpose of defendant purchasing and acquiring for plaintiff 9,000 shares of capital stock of Pig'n Whistle Corporation"; that the defendant "expended of the said sum for the purchase of said stock" only the sum of $153,000 and retains $27,000 which now is and at all times has been the property of plaintiff and that $27,000 is now due from the defendant to the plaintiff; that the plaintiff has made demand upon defendant for said $27,000 and defendant has failed to pay any part thereof.

The exceptions, above referred to, wherein the court did not find the allegations of the complaint to be true, were as follows: That the money paid by plaintiff to defendant was paid in December, 1944, and not in November, 1944; that defendant had expended $600 for the benefit of plaintiff as taxes and other expenses in said transaction, and that the amount in which plaintiff had been defrauded was $26,400 and not $27,000. Further, it appears that the court, in making its findings by such reference method, failed to refer to paragraph II of the second cause of action. That such failure was an inadvertence is indicated by the fact that the court referred to paragraph I of the second cause of action and found that the allegations thereof were true, and then referred to paragraph III thereof twice and found twice that the allegations of paragraph III were true. Irrespective of the reason for such failure, the result is that the court failed to find, by specific reference to said paragraph II, that the allegations of paragraph II of the second cause of action were true. That paragraph was to the effect that plaintiff paid to defendant for the use and benefit of the plaintiff the sum of $180,000 to be used in said stock transaction, and that defendant expended only $153,000 of said sum and retained $27,000 which is the property of, and which is due to, the plaintiff. In its other findings, however, the court found in effect that the matters alleged in paragraph II were true. As above shown, the court found that plaintiff believed, relied and acted upon, and was deceived and defrauded by, the representations of defendant and as a result thereof plaintiff paid to defendant $180,000 instead of $153,000, the actual purchase price of said stock, and that by reason thereof plaintiff was damaged in the sum of $27,000; and that by reason of the business associations between plaintiff and defendant plaintiff reposed trust and confidence in defendant and defendant undertook to act for plaintiff in trust and confidence and for the benefit of plaintiff.

[1] Appellant's first contention is in effect that the finding of fraud is not supported by the evidence. This contention is not sustained. The evidence shows that defendant, at a time when he was in need of money, initiated the negotiations with plaintiff relative to defendant purchasing for plaintiff stock of the Pig'n Whistle Corporation, in order that the amount of stock to be so acquired by plaintiff and the amount of stock then owned or to be acquired by other designated persons might be sufficient to give plaintiff and said other persons, as a group, control of the company; that at that time Schwabacher & Company of San Francisco owned approximately 25,000 shares of the stock and had the controlling interest in the company; that at that time Mr. Frank Gentles, who resided in San Francisco, owned 12,000 shares. The plaintiff testified in part that in the early part of November, 1944, defendant told him he thought the Pig'n Whistle Corporation could be acquired on a reasonable basis, and that he then asked plaintiff if he would be interested in going into a combination, consisting of plaintiff, defendant, Mr. Gentles, and Mr. Louis B. Mayer, brother of defendant, that would take over the Pig'n Whistle Corporation; that plaintiff replied that it looked like a good deal; that a few days later, at the request of defendant, plaintiff went to defendant's apartment and met Mr. Gentles; that on that occasion, prior to the arrival of Mr. Gentles, defendant told plaintiff that Mr. Gentles owned 12,000 shares of the stock and that Mr. Gentles was dissatisfied with the Schwabacher management and that he would be glad to go in with plaintiff and defendant if they could form a group that could buy out the corporation, and that Mr. Gentles would stay in and would work with them in making a deal; that at that meeting Mr. Gentles said he was very anxious to go into a deal whereby the Schwabacher interests could be purchased and that he would be glad to stay in the company and work with any group that would be interested in coming in and taking out the

Schwabachers; that it was then discussed at that meeting that defendant should go to San Francisco, and, with the assistance of Mr. Gentles, should see what deal could be made with the Schwabachers; that a few days thereafter the defendant went to San Francisco; that defendant returned about five days thereafter and told plaintiff that he had a contract with the Schwabachers whereby they gave him five days to decide whether or not he would accept a deal that they had offered him; that plaintiff and defendant then discussed the contract and decided that the deal was not satisfactory, and they let the contract expire; that about December 3rd defendant said that they should buy some stock off the San Francisco Stock Exchange, and that Mr. Gentles had 12,000 shares and if plaintiff and defendant bought a certain amount of stock they would have Schwabacher wondering who would control the company; that plaintiff replied that if defendant would buy 3,000 shares he (plaintiff) would buy 3,000 shares provided that Mr. Gentles could get it off the stock market at a reasonable price; that defendant said he thought it was a good idea and that he had just returned from China on a refugee ship, and that he did not have money to buy stock with, but a friend of his, a Mr. Fingerman, would buy 3,000 shares and keep it; that the next day defendant went to San Francisco; that when he returned he said that Mr. Gentles was very much interested in plaintiff and defendant buying some stock and that Mr. Gentles would get 3,000 shares for plaintiff and 3,000 shares for Fingerman off the stock exchange and send the stock to them; that within a few days defendant told him that 6,000 shares had arrived at the Bank of America in Los Angeles, that 3,000 shares were for plaintiff and 3,000 shares were for Fingerman, that the price was $60,000 or 3,000 shares at $20 a share, that Mr. Gentles had gotten the stock off the exchange and that they would have to pay a little more than the regular price on the exchange in order to get that amount; that plaintiff replied that if that was the best they could do on the exchange it was all right with plaintiff; that plaintiff and defendant went to the bank about December 8th and plaintiff paid $60,000 to the bank, which was the face amount of a draft presented by the bank, and received 3,000 shares of stock; that defendant told plaintiff that Fingerman "had already taken up" his 3,000 shares; that thereafter defendant said that Mr. Gentles had 12,000 shares and they had 6,000 shares which amounted to 18,000, that if they had another 6,000 they would have 24,000 which would be practically as much as Schwabacher; that when they had 24,000 shares he would be able to get a fair deal from Schwabacher; that defendant then told plaintiff that Mr. Gentles would continue to get the stock off the exchange and send it to them; that about December 14th a second lot of stock arrived at the bank and plaintiff and defendant went to the bank and plaintiff paid $60,000 or $20 a share to the bank, upon a draft, and received another 3,000 shares of stock; that defendant told plaintiff that Fingerman had taken another 3,000 shares; that defendant then said that with their 12,000 shares and the 12,000 that Mr. Gentles had he was in a good position to deal with Schwabacher and that he was going to San Francisco for that purpose; that about December 20th, when defendant returned from San Francisco, he said he was unable to do any business with Schwabacher while Gentles was "in the picture" owning some of the stock, so that he (defendant) and Schwabacher bought Gentles' stock—that Schwabacher took 6,000 shares and he took 5,700 at $20 a share; that plaintiff replied that he could not see any sense in that—that they were in a position to talk business with 24,000 shares and that they had then disposed of a considerable portion of the 24,000 shares and that would leave them in a bad position because Mr. Gentles was one of their partners in the deal and he was willing to go along with them; that defendant said he was going to make a good deal since Gentles was out, but "with Gentles in the picture there was just no chance to make a deal"; that defendant said that the 5,700 shares he had bought were then in a brokerage house that was carrying it for him until he could get the money to pay for it, and he asked plaintiff to put up some more money to carry that stock; that about three days later (about December 23rd) plaintiff consented to put in some more money, and defendant said that when that was straightened out he would get a contract from Schwabacher and they would never have to put in any more money because his brother, Louis B. Mayer, would take care of the deal; that plaintiff then paid $28,000 to defendant to apply on the brokerage house account and in order to get title in himself to a pro rata part of the 5,700 shares at $20 a share, and for the purpose of carrying the whole 5,700 shares for a while, which matter of paying for all the stock, defendant said, had to be straightened out before he could deal with Schwabacher; that on December 28th defendant said that he had to have more money to carry the stock at the brokerage house, and on that date plaintiff paid him $32,000 more, making a total of $60,000 additional for 3,000 shares of the 5,700 shares which defendant was trying to buy through the brokerage house; that defendant at that time said that all of Gentles' stock had been sold in one transaction to him and Schwabacher; that after plaintiff paid the last $60,000 the additional 3,000 shares were delivered to him; that plaintiff did not know until several months later that stock he had previously purchased was Gentles' stock and that he had paid $20 a share for the stock that defendant had agreed to buy from Gentles at $17 a share.

Plaintiff testified further that thereafter in the early part of 1945 a group of persons, including Mr. Gentles who had repurchased stock in the company, and including himself, a Mr. Hirschberg, and the defendant, obtained a loan of $465,000 from a bank and bought all the Schwabacher stock and acquired control of the company; that Mr. Gentles became the chairman of the board of directors and plaintiff became a director; that Louis B. Mayer never put any money into the deal; that defendant did not put much money into the deal and that which he put in was a part of the money he obtained in charging plaintiff $20 a share instead of $17 a share for the 9,000 shares of stock; that in April, 1945, after the whole deal had been closed and after the meeting when the new directors had been elected, plaintiff told defendant that Mr. Hirschberg (treasurer of the company) had told him that all the stock that plaintiff bought originally had come from Gentles at $17 a share; that defendant replied, "That's right," and that he had to have money to work on the deal and that he had a right to make a profit on plaintiff's purchase of stock; that at that time plaintiff told defendant that defendant, Gentles and plaintiff were supposed to be partners in the deal and were the ones who were going to put the deal over; that defendant replied that that did not make any difference to him; that also at that time plaintiff told defendant that he had been informed that defendant had obtained an option from Gentles to sell his stock at $17 a share, and that, at the time he obtained it and during the time defendant was arranging for plaintiff to go into the group deal with Gentles, defendant had told Gentles that "the deal was off," and that he had a buyer down south who might buy his stock; that defendant replied that it did not make any difference to him; that plaintiff would not have bought a share of the stock from anyone if he had known that Mr. Gentles was going to be out of the deal, because he was the keynote in the whole transaction.

Mr. Gentles testified in part that he is chairman of the board of directors of the Pig'n Whistle Corporation, a director of Pacific Mutual Life Insurance Company, and a director of other companies; that he first met defendant in July, 1944, and first talked with him in September, 1944, about the stock; that he told defendant that he had 12,000 shares of Pig'n Whistle stock and that he was willing to sell it or to go in with a group if they could get a group to buy the controlling interest; that defendant said he would try to get a group to buy the control; that at another time he told defendant that if he got a group, willing to buy control, he would hold his stock and, if necessary, would buy more; that in a conversation with plaintiff and defendant in September, 1944, he told them that he wanted either to be in one group to control the company or to sell his stock and get out as a minority stockholder; that after plaintiff left them, at the place of that conversation, defendant said he believed he could get plaintiff interested in going in on a controlling deal; that later defendant told him that he thought plaintiff would go in on a group deal; that defendant also said that his brother, Louis B. Mayer, would put up all the money necessary; that during November defendant told him many times that he was still trying to get a group together; that in the first part of December defendant said that he had been unsuccessful in getting a group together because his brother had been sick, and that he could not get others to come in on the deal; that defendant then told him that he thought he could sell his stock if he (witness) wanted to sell it; that he (witness) replied that he wanted to sell it because he did not like to be a minority stockholder when he had no confidence in the management; that he (witness) then gave defendant a 30-day option to sell his stock at $17 a share, and defendant said that he thought he could sell it within that time because he had many friends in the movie colony who would buy it; that at the time he gave the option there was no mention of plaintiff's name, and that he (witness) did not know that there was any transaction with plaintiff or that plaintiff was going to buy the stock; that if he had known that plaintiff was ready to buy stock and join a group with the witness he (witness) would have preferred to stay in the corporation; that in February, 1945, about two months after he had sold his stock, he (witness) repurchased stock at $19 a share and joined with plaintiff and others as a group in purchasing the Schwabacher stock; that when the group was arranging the bank loan and arranging to buy the Schwabacher stock, he learned for the first time that plaintiff had bought his stock; that at that time defendant asked him not to mention to plaintiff at what price he (witness) had sold his stock because defendant had sold some of it to him at $20 a share; that at a later time he (witness) told defendant that he should tell plaintiff about the deal because they were all going to be partners in the deal and they should go in on a clean basis; that defendant replied that he intended to tell him and that he would rebate the difference between the $17 and $20 a share, less his expenses.

Mr. Oseran, called as a witness by plaintiff, testified that for a period of approximately 18 months in Los Angeles he was with defendant daily from 9 a. m. to midnight; that defendant said that he and the witness were partners; that he had known plaintiff about 30 years; that he arranged a meeting between plaintiff and defendant; that at that time defendant did not have any money; that at defendant's request he took plaintiff, in September, 1944, to defendant's apartment where plaintiff met defendant; that defendant asked the witness how soon plaintiff could put money in any transaction that came up; that defendant asked the witness what he thought of the Pig'n Whistle deal; that when plaintiff met Gentles at defendant's apartment, defendant told plaintiff that Gentles was a large stockholder in Pig'n Whistle; that he (witness) and defendant went to San Francisco to try to get the stock, to see if they could get the deal together; that when they were with Gentles at San Francisco, defendant said that he thought he had someone to pick up the stock but he didn't mention plaintiff's name at all; that when they returned from San Francisco, defendant told plaintiff that plaintiff "would come in on the deal and would make millions."

A representative of the bank, where the two blocks of stock for 3,000 shares each were delivered to plaintiff, testified in part that on December 6th the bank received a draft drawn on defendant for $51,000 that covered 3,000 shares of the stock which accompanied the draft; that the draft was paid by redrafting on plaintiff for $60,000—that defendant redrafted on plaintiff for $60,000, and that on December 8th plaintiff paid $60,000 to the bank on defendant's draft and received the stock; that $51,000 of the $60,000 was applied against the draft of $51,000 which had been drawn on defendant, and the $51,000 was sent to San Francisco; that the balance of $9,000, less $22.50 charges, was paid by the bank to defendant on December 8th; that on December 12th the bank received three drafts on defendant totaling $51,000, which drafts covered another 3,000 shares of stock which accompanied the drafts; that the drafts were paid in the same manner as the previous one, by redrafting on plaintiff by defendant for $60,000, and plaintiff paid the $60,000 to the bank; that $51,000 of that amount was applied in payment of the $51,000 draft which had been drawn on defendant; and that the balance of $9,000, less $2.50 charges, was credited to the account of defendant.

The president and general manager of Pig'n Whistle testified in part that in October, 1944, defendant and Mr. Gentles came into his office, and defendant said that his brother, Louis B. Mayer, had given him authority to buy control of the company and had placed one million dollars at his disposal to do so.

Defendant testified and denied all the statements by plaintiff relative to buying stock off the stock exchange. He also denied that he said he had a friend, Fingerman, who would also buy 3,000 shares of stock, and testified that nothing was said about Fingerman at any time. He also denied the statements of plaintiff, Gentles and the president of the Pig'n Whistle Corporation that he had mentioned the name of Louis B. Mayer, and he testified that the only time his brother's name was mentioned was when plaintiff wanted defendant to sign his brother's name on a note. (Plaintiff denied that he made such a statement about signing a note.) Defendant testified in his deposition that he told the representative of the bank that he did not want plaintiff to see the original drafts which were drawn on defendant, because there was a higher price on the drafts drawn on plaintiff by defendant.

In the view of the evidence most favorable to plaintiff (respondent) it is clear that plaintiff and defendant agreed to enter into a joint venture, for their mutual benefit, with the expressed agreement and understanding that plaintiff's primary purpose in agreeing to purchase stock of the company was to join Mr. Gentles and other stockholders in forming a group of stockholders who, by reason of the aggregate number of shares owned by the group, would have control of the company. It is also clear that defendant knew that plaintiff had no desire to purchase any of the stock merely as an investor, and it is clear that he knew that plaintiff's agreement to purchase stock was solely upon condition that Mr. Gentles keep his stock and join the group. It is also clear that defendant knew that Mr. Gentles did not want to sell his stock if the deal he had discussed with plaintiff was still pending and if there was a reasonable prospect of forming such a controlling group. Defendant's statement to Mr. Gentles that the deal was off was false. He knew at the time he made that statement that plaintiff had agreed to expend a large sum of money in purchasing stock in order to join such a proposed controlling group of stockholders that would include Mr. Gentles and his 12,000 shares. Defendant's scheme, based on that false statement and on a betrayal of the trust and confidence reposed in him by his co-adventurer, was to cause Mr. Gentles to believe that the group deal with plaintiff was off, and thereby obtain an option from him to buy his stock at a low price, and at the same time to cause plaintiff to believe that the group deal was still on, and thereby sell the stock to plaintiff at a high price. He knew that his relationship to plaintiff in the transaction was not that of an independent seller or any seller of stock, and he knew on the contrary that he occupied a position of trust and confidence in dealing with the money advanced by plaintiff for the purposes of their joint venture. Strong evidence of his intent to defraud is the method of "redrafting" he adopted in handling the sight draft at the bank. That method was calculated to, and it did, prevent his co-adventurer, the plaintiff, from ascertaining the real selling price of the stock before he parted with his money. That defendant intended to deceive by that method is established by his admission that he told the bank representative that he did not want plaintiff to see the original drafts because the redrafts drawn on plaintiff by defendant were for a higher price. That he had guilty knowledge of having defrauded plaintiff is established by his request of Mr. Gentles that he not tell plaintiff the price that defendant had paid him for the stock because defendant sold the stock to plaintiff for $20 a share. There was evidence herein that the records showed that Fingerman did not own any stock. Further strong evidence of defendant's intent to defraud, by causing plaintiff to believe that the group deal was still pending and progressing, is as follows: (1) Defendant's statement to plaintiff, just prior to the times plaintiff paid for each of the first two blocks of stock, that Fingerman had just purchased and taken delivery of 3,000 shares of stock; and (2) defendant's computations, after each of the first two purchases by plaintiff, as to the total number of shares then owned by the group, which computations each time included the 12,000 shares of Mr. Gentles and the 6,000 shares he asserted that Fingerman had purchased. Fingerman had changed his name to Field. Further evidence of deceitfulness on the part of defendant is that at a social gathering, sponsored by defendant, where plaintiff and Fingerman were present, the defendant introduced Fingerman to plaintiff as Field and did not identify him as Fingerman or anyone who was, according to defendant, a member of the stock group. The findings that defendant defrauded the plaintiff are amply supported by the evidence.

[2] Appellant's next contention is that even if a buyer of stock is deceived as to the price his seller paid for the stock, such fraud is not a basis for monetary relief. The question involved in the present case is broader in scope than the question presented by this contention. The court herein found in effect, upon sufficient and substantial evidence, that defendant and plaintiff were joint adventurers and that defendant, in obtaining the stock for plaintiff, had undertaken to act for plaintiff in trust and in confidence and for the benefit of plaintiff. Since this contention presents an abstract question, not founded upon the full factual basis of this case, it is not necessary to discuss it further.

[3-5]Another contention of appellant is to the effect that, even if a buyer of stock is entitled to recover damages for a seller's fraud, no recoverable amount can be determined in the absence of evidence of the actual value of the stock received. His argument is that if a buyer of stock elects to stand upon his contract, rather than to rescind and seek the return of his money, his recovery is limited to the measure of damages prescribed by section 3343 of the Civil Code. That section provides in part: "One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." This action is not to recover damages suffered by reason of fraudulent representations in a sale of stock by defendant to plaintiff. It is an action to recover money fraudulently obtained as secret profits by a joint adventurer from his co-adventurer, while acting in trust and in confidence for the benefit of his co-adventurer in purchasing stock for him, and under circumstances where he betrayed the trust and confidence reposed in him. The value of the stock herein is immaterial. Section 3343 is not applicable herein. In the case of Adams v. Harrison, 34 Cal.App.2d 288, 93 P.2d 237, the defendant, in April, 1922, sent a telegram to plaintiff stating that he had obtained an option to purchase a certain ranch and he asked plaintiff to buy it. Within a few months thereafter defendant therein acquired title to and possession of the ranch. In April, 1923, the plaintiff therein purchased from defendant a half interest in the land, and thereafter the property was operated by the parties as partners until 1926. Defendant represented to plaintiff, at the time he sold the half interest, that it cost about $60,000 more than it did in fact cost, and he charged plaintiff about $30,000 more for the half interest in the ranch than the half interest had cost defendant. In that action to recover secret profits, a judgment for plaintiff was affirmed. Defendant therein contended that since he had owned the ranch about a year before he sold part of it to plaintiff, and since no partnership existed until after the sale, he had a right to sell a half interest to plaintiff at a profit. Plaintiff therein contended that it was a case where a secret profit was obtained by one partner or joint adventurer by taking advantage of the other. The court therein said, 34 Cal.App.2d at page 297, 93 P.2d at page 242: "It clearly appears that

the primary purpose of both parties was to obtain the land for speculative purposes. * * * It matters little, however, whether the arrangement was technically a partnership or a joint adventure. The material and controlling element is whether the respondent entered into the transaction * * * with the understanding that each was to pay the same amount and that they were to share the cost of the ranch whether past or future. If, in fact, there was an agreement that this cost was to be shared equally there was a sufficient confidential relationship between the parties to require the appellant to disclose the true facts * * *." In that case the defendant also contended that the court erred in excluding testimony as to the value of the land, and in refusing to instruct the jury that the measure of damages, if any, would be the difference between the money paid for the property and the value of the property. In that case the court said, 34 Cal.App.2d at page 299, 93 P.2d at page 244: "It is argued that since the action was in fact based upon fraudulent representations the measure of damages is fixed by section 3343 of the Civil Code. That section has no application in this case where * * * the respondent waived the tort and sued for the return of his money. In such an action the actual value of the land is not material and has nothing to do with the amount which the plaintiff has paid and which he seeks to have returned." In the present case, as above indicated, the primary purpose of plaintiff and defendant was to form a group of stockholders who, by reason of the total number of their shares, would have control of the company. They entered into the transaction with the understanding that, in pursuance of their common purpose, plaintiff and a friend of defendant (acting for defendant's benefit) would buy an equal number of shares and that defendant would purchase the shares for them at a reasonable price. It is clear, as above stated, that the arrangement between them was a joint venture for their mutual benefit and that there was a sufficient confidential relationship between them to require the defendant to disclose the true facts. In the case of Munson v. Fishburn, 183 Cal. 206, at page 211, 190 P. 808, at page 810, the court said: "It is well settled that associates in a common enterprise, under whatever guise, have a duty to each other to make full disclosure of any preference or profit not common to all of the associates."

[6] Another contention of appellant is that since stock of the Pig'n Whistle Corporation was being sold on the stock exchange at an average price of $19.75 per share, during the time defendant was buying stock from Gentles, plaintiff could not, in any event, recover more than the difference between the price of $20 which he paid in the private transaction and the price of $19.75 which he would have had to pay on the exchange. This contention is not sustained. It is in effect a continuation of the previous contention regarding the measure of damages, and the answer to that contention is applicable here. Defendant was acting in a fiduciary capacity in furtherance of the common purpose of the parties and, irrespective of where he obtained the stock or the bargain if any he made in purchasing it, he was not entitled to secretly appropriate to himself any of the money which he had received from plaintiff to pay for the stock. It is indicated in appellant's brief that the stock which defendant obtained for plaintiff has doubled in value, and it is argued in effect that, in view of that increase in value, plaintiff has not been damaged. If it be a fact that plaintiff profited by his investment, even though defendant fraudulently overcharged him $26,400 in making the investment, that does not relieve defendant of his obligation to return to plaintiff money misappropriated by defendant.

Appellant asserts also, in his reply brief, that the complaint fails to state a cause of action for the reason that the value of the stock is not alleged therein. The complaint states two causes of action. As above stated, the value of the stock is immaterial in view of the allegations regarding joint venture, fiduciary relationship, and misappropriation of plaintiff's money.

The judgment is affirmed.

SHINN, Acting P. J., and VALLEE, Justice pro tem., concur.

KING v. SMITH et al. *

Civ. 16322.

District Court of Appeal, Second District,
Division 2, California.
May 19, 1948.

As Amended on Denial of Rehearing
June 7, 1948.

Hearing Granted July 15, 1948.

1. Evidence 🔑77(1, 5)

Where issue was whether money deposited in defendant bank was a guaranty by plaintiff of obligation of a third party as a sublessee or whether, as contended by defendants bank and sublessor, that plaintiff loaned money to sublessee who deposited money in escrow in bank as guarantee of sublessee's own obligation, failure of defendant bank and sublessor to take deposition of sublessee and of bank to produce its employees to substantiate defendants' claim raised presumption that evidence of bank's employees and sublessee would have been adverse to bank and sublessor. Code Civ. Proc. § 1963, subds. 5, 6, § 2061, subds. 6, 7.

2. Banks and banking 🔑154(8)

In action to recover money specially deposited with defendant bank, part of which was paid out by bank on execution on judgment in favor of sublessor of hotel and against sublessee, and part of which court ordered applied on a second judgment, evidence sustained plaintiff's contention that the money was deposited by plaintiff as a guarantee of sublessee's obligation, so that money remained plaintiff's property until plaintiff's title was divested in a lawful manner, as against contention that plaintiff loaned money to sublessee who then deposited it in escrow as security for his own obligation.

3. Evidence 🔑77(1)

Where issue was whether money deposited in defendant bank was deposited by plaintiff as a guaranty of obligation of a third party as a sublessee or was deposited by sublessee as security for his own obligation under sublease after being loaned to sublessee by plaintiff, and plaintiff proved his case by uncontradicted evidence, plaintiff had no duty to take deposition of sublessee or produce bank employees as witnesses in order to avoid unfavorable inferences from so doing.

4. Guaranty 🔑5

Where plaintiff guaranteed the obligation of a third party as a sublessee, but sublease never became effective because consent of original lessor to the sublease as required under original lease was not obtained, plaintiff's guaranty never became effective.

5. Guaranty 🔑53(1)

Where plaintiff deposited money in escrow as a guaranty of payment of rent by a sublessee, a change increasing the amount of rent payable under sublease entered into without plaintiff's knowledge or consent released plaintiff from any liability for sublessee's failure to pay rent. Civ.Code, § 2819.

6. Principal and surety 🔑101(1)

When a person becomes surety for the performance of a contract and the contract is altered, the surety is discharged.

7. Frauds, statute of 🔑20

Where money was deposited in escrow to guarantee the debt or default of another, and depositor signed no memorandum in writing, the purported guaranty was unenforceable. Civ.Code, § 1624, subd. 2, § 2793.

8. Banks and banking 🔑153

Where money was deposited in escrow to guarantee the debt or default of another, the money remained the depositor's property until depositor was divested of title in a lawful manner.

9. Landlord and tenant 🔑184(2)

Where plaintiff deposited money in escrow to guarantee the payment of rent by a sublessee, under terms of sublease, plaintiff was an indispensable party to any action against sublessee in which recovery of part of the funds were sought.

10. Banks and banking 🔑121

Plaintiff's property rights as evidenced by bank receipt showing plaintiff to have deposited money in bank were not affected by declarations of sublessee in an escrow agreement, which plaintiff never saw, which was susceptible of inference that money was not deposited by plaintiff as guarantor of payment of debt of sublessee under sublease but was a deposit by sublessee of the money as guarantee of his own obligation.

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* Subsequent opinion 199 P.2d 308.

11. Banks and banking ⚷121

Where plaintiff deposited money in bank as guaranty of payment of the debt of another, receipt from bank to plaintiff as depositor was recognition of property right of plaintiff in the money, and bank was thereby estopped from asserting that money was loaned by plaintiff to another who deposited money as guaranty for his own debt. Code Civ.Proc. § 1962, subd. 3.

12. Estoppel ⚷75

Where plaintiff deposited money in bank as guaranty of debt of a hotel sublessee, and plaintiff knew nothing of an increase in rental agreed upon between sublessee and sublessor, or of actions in which judgment was entered against sublessee in favor of sublessor and some of deposited money was ordered applied on one judgment and on other judgment execution was served upon bank which paid amount to sheriff without notifying plaintiff and charged amount against the deposit, plaintiff was not estopped to assert his property rights in the money as against the bank.

13. Contracts ⚷188

Where plaintiff deposited money in bank as guaranty of payment of rent of sublessee under sublease, and sublessor and sublessee entered into escrow agreement with bank, terms of escrow limiting liability of bank and providing for attorney fees if controversy arose under escrow were not applicable to plaintiff in action against bank which paid out money when execution was issued on judgments entered against sublessee in favor of sublessor and the amount paid out charged to the fund, and which was ordered to apply some of money to second judgment, where plaintiff was not a party to escrow agreement and had no knowlege of its terms.

14. Escrows ⚷14(1)

The obligation of a stakeholder is to deliver property held by him to the party entitled thereto, and he is not obligated to settle any disagreement between conflicting parties but, if he does so, he acts at his peril and is responsible for damages if he delivers the property to one not legally entitled to it.

15. Appeal and error ⚷770(1)

Where respondent advanced no ground on which judgment could be sustained, District Court of Appeal would assume that the argument made by appellant for reversal was meritorious and that respondent had abandoned any attempt to support the judgment.

16. Money received ⚷14

Where two defendants jointly participated in a fraudulent plot to obtain money from plaintiff by false representations, both were liable for return of the money to plaintiff.

17. Appeal and error ⚷1177(8)

Where no substantial evidence sustained findings of trial court requiring amendment, and there was no conflict of evidence on subjects of findings, a new trial was unnecessary and order to amend findings and to enter a judgment in accordance therewith would be made to the end that the litigation would be terminated without further proceedings in trial court.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by Charles S. King against J. S. Smith, John Cawog, and Bank of America National Trust & Savings Association, to recover money specially deposited with defendant bank. From an adverse judgment, plaintiff appeals.

Judgment reversed with directions.

Lyman A. Garber, of Beverly Hills, for appellant.

Hugo A. Steinmeyer, G. L. Berrey, and Geo. L. Beckwith, all of Los Angeles, for respondent Bank of America.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for respondent John Cawog.

WILSON, Justice.

This action involves two separate sums of money. Plaintiff sued to recover $3,000 specially deposited with Bank of America as a guarantee of an obligation of defendant Smith to defendant Cawog, also to recover $800 advanced by him to Smith for the purpose of paying an indebtedness of the latter to Cawog. The court rendered judgment that plaintiff recover only the sum of $117.-45, the balance remaining in the hands of the bank after deducting attorneys' fees of the bank which the court allowed in the sum of $250 and the amounts paid by the bank out of the $3,000 deposit of which $1576.67 was paid on an execution in an action brought by Cawog against Smith and $1055.85 was ordered by the court to be applied on a judgment in a second action by Cawog against Smith, and refused to render judgment in favor of plaintiff for the sum of $800, the second amount involved. Plaintiff has appealed from the judgment.

Cawog was the lessee of the Wawona Hotel in Los Angeles owned by Emma Arenz. He desired to sublease to Smith and wanted a guarantee from the latter. Plaintiff, whose home and place of business were in Oxnard, some 60 miles distant from Los Angeles, was a friend of Smith. Cawog and Smith resided in Los Angeles. On February 8, 1945, they went to plaintiff's home for the purpose of obtaining money from plaintiff as a guarantee that Smith would fulfill the terms of the sublease from Cawog. They told plaintiff that the rent under the sublease was $600 per month. Plaintiff went with them to the Oxnard branch of defendant Bank of America where he obtained $3,000 in cash from his safe deposit box and delivered it to N.W. Elmelund, manager of the branch bank. Elmelund gave plaintiff a receipt for the sum of $3,000, bearing an escrow number, signed by him as assistant cashier-escrow officer of the bank. Elmelund prepared escrow instructions having the same escrow number which were signed by Smith and Cawog and they also signed and left in escrow the document subleasing the hotel to Smith, at a rental of $600 per month. There is nothing in the escrow papers calling for any other amount. Plaintiff took no part in this transaction, was not a party to the escrow, signed no papers, and did not know anything concerning the character or contents of the escrow instructions or of the papers deposited therein. He never saw the original lease, the sublease or the escrow instructions. After delivering the money to Elmelund plaintiff walked away and engaged in conversation with the assistant manager of the bank at a point some distance from where Elmelund was preparing the papers. Immediately after the documents were signed Cawog and Smith returned to Los Angeles and Smith went into possession of the hotel.

At some time after the transaction at the bank at which the sublease at $600 per month was signed Smith and Cawog entered into another sublease or agreement whereby the rental to be paid by Smith was fixed at $1,350 per month. Plaintiff was not informed of the latter sublease nor of the additional rental which Smith agreed to pay.

Thereafter Cawog sued Smith for a balance alleged to be unpaid on the rental for June and July, 1945, alleging that the rental was at the rate of $1,350 per month. Plaintiff was not made a party to and had no notice of the action. Cawog recovered a judgment against Smith on August 14, 1945, upon which execution was issued on August 17, 1945, for $1,576.70 and levied on the Oxnard Branch of defendant bank. Without notifying plaintiff the bank paid the amount of the execution to the sheriff and charged it against plaintiff's $3,000 deposit.

The foregoing statement of facts is uncontradicted.

On Friday, July 20, 1945, Smith and Cawog again went to plaintiff's home in Oxnard where they informed him that Smith was in default and the latter requested a loan of $800 from plaintiff for the purpose of paying the amount he claimed to owe Cawog. They did not inform plaintiff that they had signed a second sublease for $1,350 per month, nor did they inform him that Cawog had already sued Smith in the action above mentioned for unpaid rents and that the action was then pending. Plaintiff testified that he asked Cawog how much Smith owed him and Cawog answered that the amount of the unpaid rent was $800; that he asked Cawog "If I give you $800 will that clear him?" Cawog replied, "Yes, that's all right." Cawog testified that he told plaintiff that Smith owed him $1800, but he did not deny that he answered that $800 would "clear him," meaning Smith. Plaintiff then wrote a check in favor of Smith for $800 which Smith immediately endorsed in plaintiff's presence and delivered to Cawog. Cawog endorsed the check and received the proceeds of it. The bank's endorsement stamped on the back of the check indicates that it was paid on July 20, 1945, Friday, the day on which it was drawn by plaintiff. On the following Monday, July 23, Cawog filed another action against Smith in the Superior Court of Los Angeles County alleging that Smith was indebted to him under the sublease in the sum of $1,877.82. Plaintiff was not a party to that action. Judgment was entered against Smith for $1055.85 which the court ordered paid out of plaintiff's money which he had deposited with the bank as above stated.

After deducting from plaintiff's $3,000 deposit the amount of the execution, the amount ordered by the court to be paid out of plaintiff's funds and the sum of $250 allowed by the court to defendant bank as attorney's fees in the litigation the court rendered judgment in favor of plaintiff against defendant bank for the remainder of $117.45.

Since plaintiff asserts no claim against the bank for the $800 loaned to Smith, the two funds will be discussed separately.

The $3,000 Deposit.

One question in dispute is this: Plaintiff contends that he deposited his money in the bank as a guarantee of Smith's obligation under the sublease. Defendants' bank and Cawog maintain that plaintiff loaned the money to Smith and that the latter deposited it in escrow as security for his own obligation.

While the question of law is in dispute there is no conflict in the evidence concerning the purpose of the deposit by plaintiff. There is no evidence whatsoever that the money was loaned to Smith, or that it was intended by any of the parties as a loan, or that it was deposited as such in the bank. Plaintiff did not deliver the money to Smith and the latter did not agree to repay it. See Civ.Code, sec. 1912. The evidence is all to the effect that it was deposited by plaintiff as a guarantee of Smith's liability by reason of the sublease which called for the payment of rental at the rate of $600 per month. There is no contradiction of plaintiff's testimony in this regard. Plaintiff testified that Smith told him in the presence of Cawog that the rent was $600 per month and that Cawog confirmed the statement; that when they went to the bank there was another discussion about the money and plaintiff told Elmelund "The reason I am giving you this money as a guarantee is because it is a wonderful proposition for this Smitty"; that he, plaintiff, did not give any money to Smith; that Smith did not promise to pay plaintiff any part of the profits of the transaction, and did not promise to pay plaintiff any interest on the money deposited; that he, plaintiff, did not give any authorization to the bank or to any of the parties to the transaction with respect to the deposit of the $3,000 before or after he handed it to Elmelund; that he never authorized the modification of the rental agreement from $600 to $1,350 or any other sum; that he never saw the original lease, did not know its terms, and did not know of a provision therein prohibiting the subleasing of the premises except with the express permission of the landlord.

On cross-examination plaintiff was asked the following question: "Have you and he [Smith] had any business transactions in which you had advanced any money prior to the time you loaned to him this $3,000?" He answered: "First of all, I didn't loan the money to him, this $3,000; and I never had any business transactions with him."

Plaintiff had carried a bank account in the Oxnard branch bank and had been acquainted with Elmelund, its manager, for approximately two years before the transaction in question. He had a right to and did have confidence in Elmelund and depended on the latter for protection of his money.

Cawog testified among other things that he and Smith went to Oxnard "in order to get the $3,000 to *guarantee* [the] sublease" and that that was the sole purpose of the trip. The evidence given by plaintiff was not denied in any particular.

[1] The record shows that at the time of the trial and for some time previously thereto Smith had been confined in the federal prison at McNeil Island. His deposi-

tion might have been but was not taken. Neither Elmelund nor the assistant manager nor any employee of the bank was called as a witness. Elmelund knew what had occurred when the money was deposited and could have testified as to his conversation with plaintiff concerning the deposit and the entire transaction among the parties. The failure of defendants bank and Cawog to take Smith's deposition and of the bank to produce its employees raises the presumption that their evidence, if it had been given, would have been adverse to defendants. Code Civ.Proc., sec. 1963, subdvs. 5 and 6; sec. 2061, subdvs. 6 and 7.

[2] The issues to be tried and determined were clearly defined in the pleadings. Plaintiff alleged that the deposit was a special one made as a guarantee of Smith's obligation. The bank denied the allegation and as a separate defense alleged that the deposit was made in escrow not by plaintiff but by Smith. The burden resting on plaintiff to prove the allegations in his complaint was sustained by the evidence which we have outlined. The burden on the bank to prove its special defense was not fulfilled. Since three witnesses who knew the facts were not called and their absence was not accounted for, we must presume that if produced they would not have given evidence in consonance with defendant bank's special defense.

[3] Defendants maintain that it was as much the duty of plaintiff to produce the witnesses referred to as it was that of defendants. The answer to this contention is that plaintiff did not need the absent witnesses. Both plaintiff and Cawog testified that the money was deposited as a guarantee. Plaintiff stated that he told Elmelund that it was a guarantee and expressly denied that the money was loaned to Smith. There is nothing in the escrow to indicate a loan. Since plaintiff had proved his case by uncontradicted evidence neither necessity nor compulsion rested upon him to call any other witnesses. If the bank's employees would have controverted any of plaintiff's testimony it is presumed that they would have been produced by their employer for that purpose. Their nonappearance adds strength to plaintiff's position.

[4] The sublease was attached to the original lease from Arenz to Cawog and recites that it is "subject to all of the terms and conditions as set forth in the lease." The lease contains a provision that it shall not be sold, assigned, pledged or hypothecated without the written consent of the lessor. The consent of the lessor to the assignment by Cawog to Smith was not obtained. Since plaintiff guaranteed the obligation of Smith under the sublease and since the sublease never became operative or effective by reason of the failure of the lessor to consent to it, plaintiff's guarantee never became effective.

[5, 6] Cawog testified that before he and Smith went to Oxnard on their first trip they had talked in the office of Cawog's attorney about the monthly rental of $1,350, and two subleases were prepared, one for $600 by Smith's attorney and one for $750 by Cawog's lawyer, and that the documents were signed after they returned from Oxnard. The sublease deposited in escrow called for $600. Plaintiff guaranteed rental at the rate of $600. The change in the terms of the agreement between Smith and Cawog without plaintiff's knowledge or consent released plaintiff from any liability for Smith's failure to pay rent. Civil Code, sec. 2819; Occidental Life Ins. Co. v. McCracken, 19 Cal. App.2d 239, 240, 65 P.2d 130; People v. Fidelity & Deposit Co., 28 Cal.App.2d 325, 332, 82 P.2d 495; First Congregational Church of Christ in Corona v. Lowrey, 175 Cal. 124, 126, 165 P. 440, and cases cited; Diehl v. Davis, 75 Kan. 38, 88 P. 532, 12 Ann.Cas. 548. When a person becomes surety for the performance of a contract and the contract is altered the surety is discharged. Parke & Lacy Co. v. White River Lbr. Co., 110 Cal. 658, 667, 43 P. 202.

[7] Since the money was hypothecated to guarantee the debt or default of Smith and since plaintiff, the owner and depositor of the money, did not sign any memorandum in writing, the purported guarantee is unenforceable. Civil Code, sec. 2793; sec. 1624, subd. 2; Irer v. Gawn, 99 Cal.App. 17, 29, 277 P. 1053; Diamond Coal Co. v. Cook, 6 Cal.Unrep. 446, 450, 61 P. 578. There is no evidence that brings the case within the ex-

ceptions enumerated in section 2794 of the Civil Code.

[8] The evidence shows conclusively that the money was deposited with the bank as a special deposit for a special purpose. As such it remained plaintiff's property until he was divested of title to it in a lawful manner. This deposit is similar to that involved in Anderson v. Pacific Bank, 112 Cal. 598, 44 P. 1063, 32 L.R.A. 479, 53 Am.St.Rep. 228, where the plaintiff delivered $2,000 to the acting president of the bank in the president's room to secure sureties who were signing a bail bond for persons who had been held to answer in the superior court. He received a receipt or certificate of deposit for the money signed by the acting president. Thereafter without his knowledge or consent the money went into the bank vault through the regular channels. The bail bonds were furnished but no loss was suffered by Anderson or the sureties, the defendants having been surrendered into custody by their bondsmen. Anderson demanded the return of his money from the bank which meanwhile had become insolvent. The court held that title to the money had not passed to the bank and that the plaintiff was entitled to its return to him, since it was deposited as a pledge and the pledgee had no right to make general use of it, citing sections 1835 and 2888 of the Civil Code. See also Hastings v. Bank of America, 79 Cal.App.2d 627, 629, 180 P.2d 358.

[9] Since the money was hypothecated by plaintiff as a guarantee of the liability of another, plaintiff was a necessary and indispensable party to any action in which recovery of any part of the fund was sought. Anderson and Hastings cases, supra. Plaintiff did not assume a personal liability and since the money remained merely as a guarantee, Smith had no interest in it and the bank exceeded its power in paying it out on executions against Smith in actions to which plaintiff was not a party. He was entitled to an opportunity of defending against the claim of Cawog. That he would have had a good defense if he had been sued on the guarantee is demonstrated by the facts and the law as above stated.

The facts (1) that plaintiff deposited $3,000 in cash and received a receipt therefor and (2) that the escrow instructions recite that "I [Smith] hand you herewith $3,000" do not create a presumption or even an inference that the two documents refer to the same money, since plaintiff denies all knowledge of the escrow or of any instructions given by Smith and Cawog or either of them and there is no evidence controverting plaintiff's testimony. There is nothing in the record connecting the two amounts. The money belonged to plaintiff and was handed by him personally to Elmelund. Smith could not have delivered plaintiff's money into the escrow.

[10, 11] Plaintiff's rights, as evidenced by the bank's receipt for the money, are not affected by Smith's declaration in the escrow instructions which plaintiff never saw. Code Civ.Proc., sec. 1848. Furthermore the receipt from the bank was a recognition of the property right of plaintiff in the money and the bank is thereby estopped from asserting otherwise. Code Civ.Proc., sec. 1962, subd. 3.

[12] Defendant bank contends that plaintiff saw his property being dealt with by Smith and that it was his duty to assert his right promptly. Defendant asserts, correctly, that Cawog had demanded that security be provided to secure the sublease, but it asserts, incorrectly, that plaintiff knew of the transaction that was taking place between Smith and Cawog. Defendant relies in vain on section 2991 of the Civil Code. Under the circumstances disclosed by the record to which we have referred the bank cannot rely on an estoppel against plaintiff.

[13] The escrow instructions of Smith and Cawog provided that the bank should not be liable for the failure of the conditions of the escrow or for damage caused by the exercise of the bank's discretion, or for any other reason except gross negligence or wilful misconduct with reference to the escrow, or for its failure to ascertain the terms or conditions of any agreement filed in or referred to in the escrow. The bank maintains that it was entitled to stand on the contract, referring to the escrow instructions, as a limitation of its liability. That would

be true if the action were by either party to the escrow against the other. Since plaintiff was not a party to the escrow and had no knowledge of its terms the limitation of liability is not applicable to his action against the bank.

There was a provision in the escrow instructions to the effect that in the event "that any controversy arises hereunder or that you are made a party to, or intervene in any litigation pertaining to this escrow or the subject matter thereof, you shall be reasonably compensated for such extraordinary services." By reason of this provision the bank requested an allowance of $250 as attorneys' fees in the litigation, which the court allowed and ordered paid out of plaintiff's $3,000 deposit. This was error for two reasons: (1) The escrow was between Smith and Cawog and the controversy now in litigation did not arise "hereunder," that is under the terms of the escrow. No dispute between Smith and Cawog existed or now exists in regard to the escrow. The controversy was and is between plaintiff on the one hand and Smith, Cawog and the bank on the other. It does not arise under the escrow instructions. (2) As we have repeatedly stated, the money in question was a special deposit made by plaintiff and belonged to him and not to either of the parties to the escrow. Plaintiff was under no obligation to pay and did not agree to pay the expenses of the bank arising under the escrow to which he was not a party.

[14] In Hardy v. Hunt, 11 Cal. 343, 70 Am.Dec. 787, Hardy gave $500 to one O'Brien for the purpose of placing a bet on the result of an election. It was understood that it was Hardy's wager but to be made in O'Brien's name. O'Brien placed the money with a stakeholder and before the election attachments were issued against O'Brien and served on the stakeholder. After judgments had been rendered against O'Brien the justice of the peace, on proceedings supplemental to execution, ordered the stakeholder to pay sufficient of the funds in his hands to satisfy the judgments against O'Brien. Thereafter Hardy brought action against the stakeholder, Hunt, to recover his $500. The court held that plaintiff, Hardy, did not part with ownership of the money by allowing it to be used in the name of another, and that since it was Hardy's money it could not be reached by a garnishment on the judgments against O'Brien. The court suggested that the stakeholder should have protected himself by a bill of interpleader. In Security Trust & Savs. Bank v. Carlsen, 205 Cal. 309, 271 P. 100, 470, 60 A.L.R. 630, the court upheld the right of an escrow holder to avail itself of the provisions of section 386 of the Code of Civil Procedure and to relieve itself of responsibility by interpleading money which it held in escrow where a disagreement had arisen as to its ownership. The court held (page 316 of 205 Cal., page 103 of 271 P.) that the obligation of a stakeholder is to deliver property held by him to the party entitled thereto; that he is not obligated to settle any disagreement between conflicting parties but if he does so he acts at his peril and is responsible for damages if he delivers the property to one not legally entitled to it.

In the instant case it was not the function of the bank nor was it within its power to determine the ownership of the fund. It could have avoided responsibility by interpleading the money and allowing plaintiff and Cawog to litigate between themselves as to who should receive it. Instead of doing so it was decided the controversy ex parte without notice to plaintiff and it therefore must accept the consequences of its act.

Plaintiff's $800 Loan to Smith.

In the statement of facts we have referred to the visit of Smith and Cawog to plaintiff's home on Friday, July 20, 1945, when Smith requested a loan for the purpose of liquidating unpaid rent due to Cawog. Plaintiff testified that Cawog said that Smith owed the latter $800. Cawog testified that he said $1800 was due. Plaintiff testified that he asked Cawog if $800 would clear Smith and Cawog answered: "Yes, that's all right." Cawog did not deny having made the latter statement. There was other conversation about the amount and, reading the entire record, it is manifest that plaintiff was led by Smith and Cawog to believe that $800 would pay the entire indebtedness owing by Smith to Cawog. Plaintiff's check to Smith for $800 was endorsed by Smith and Cawog, and Cawog received the money. On the following Monday Cawog sued Smith alleging an indebtedness of $1,877.82 and eventually recovered judgment for $1,055.85. The conduct of the two men clearly indicates a preconceived fraudulent scheme to obtain $800 from plaintiff, to be followed by the suit of Cawog against Smith and the levying of an execution on plaintiff's money to satisfy the judgment.

The inference of fraudulent intent is borne out by the fact that Cawog had already sued Smith for approximately $1,800 (the action was then pending), and if at the time of the second trip to Oxnard Smith's indebtedness to Cawog amounted to $1,877, which was the amount sued for in the second action, there was not sufficient of plaintiff's money remaining on deposit to satisfy the indebtedness. After deducting the sum of $800, which Smith and Cawog induced plaintiff to advance, from the alleged indebtedness which Cawog claimed was owing by Smith, the amount left in the fund was more than sufficient to satisfy a judgment for the remainder. This was a clever, fraudulent design perpetrated by Smith and Cawog on plaintiff who became the victim of his friendship to Smith.

Cawog's testimony was contradictory, irreconcilable, unreasonable and unbelievable. Among his many conflicting statements he testified with reference to the $800: "He got in his pocket, and he show the money to me. Q. When did he show you the money? A. He showed me the money in the King's house. Q. He showed you the money in King's house? A. And in office, too, in Wawona, yes." (The latter refers to the Wawona hotel in Los Angeles which was the subject of the sublease.) At another point he testified that plaintiff gave a check to Smith for $800 and that Smith immediately handed it to Cawog. The evidence is conclusive that the check was written by plaintiff in his home in Oxnard, endorsed by Smith and delivered to Cawog in plaintiff's presence, and cashed by Cawog on the same day. Plaintiff was never in the Wawona hotel.

[15] On this appeal Cawog has not answered any of the points made against him by plaintiff. Since plaintiff never asserted that the bank was liable for any part of the $800 fund no reference is made to it in the bank's argument. The brief filed by Cawog merely adopts the bank's brief as his. Inasmuch as he advances no grounds on which the judgment may be sustained, we are justified in assuming that the argument made for reversal is meritorious and that he has abandoned any attempt to support the judgment. Bendlage v. Kohlsaat, 54 Cal.App.2d 136, 140, 128 P.2d 691; Zeigler v. Bonnell, 52 Cal.App.2d 217, 218, 126 P.2d 118; Duisenberg-Wichman & Co. v. Johnson, 123 Cal.App. 125, 128, 10 P.2d 1010.

[16] Since Cawog and Smith jointly participated in the fraudulent plot that resulted in procuring the sum of $800 from plaintiff on the false representation that that amount would clear Smith's indebtedness, both are liable for its return to plaintiff and judgment should have been rendered against them therefor. Their evil intent to mulct plaintiff is evidenced by the facts hereinbefore related (1) with reference to the two actions brought by Cawog against Smith of which plaintiff had no notice in which judgments were obtained and in one of which an execution was levied on plaintiff's money on deposit in the bank as a guarantee, and (2) with reference to the two subleases—one placed in escrow calling for the rental of $600 represented jointly by Smith and Cawog to plaintiff as being the total of Smith's obligation, the other secretly agreed upon before their first visit to plaintiff's home for a larger amount not disclosed to plaintiff or to the escrow holder, the latter document having been signed in Los Angeles after the escrow had been made at the bank.

[17] Since there is no substantial evidence to sustain the findings hereby ordered to be amended and there is no conflict of the evidence on the subjects of such findings, a new trial is unnecessary and the order to amend the findings and to enter a judgment in accord therewith is made to the end that the litigation may be terminated without further proceedings in the court below.

The judgment is reversed with the following directions:

1. To amend the findings of fact as follows: (a) In each of Findings II, III, V, IX, XI and XIV strike out "untrue" and insert in lieu thereof "true." (b) Strike from each of Findings III, IV, VI and XIII the words beginning with and following the word "excepting." (c) Strike out all that part of Finding V beginning with and following the words "The court finds."

2. To add three findings of fact reading as follows: (a) "XXXVI. Charles H. King, who is plaintiff in action No. 519194, entitled Charles H. King v. J. S. Smith, et al., is not named as a party in the complaint in action No. 505712, entitled John Cawog v. J. S. Smith, nor in the complaint in intervention of Emma C. Arenz filed therein. These findings relate separately and respectively to both of said actions. Wherever a finding of fact in reference to the allegations contained in the complaint in the case entitled Cawog v. Smith, No. 505712, or in reference to the allegations contained in the complaint in intervention of Arenz therein, is in conflict with any finding of fact in reference to the action entitled King v. Smith, No. 519194, such finding shall not be deemed to be applicable to the last named action nor to modify or affect any finding in reference thereto." (b) "XXXVII. All allegations in the answer and in the cross-complaint of defendant Bank of America National Trust and Savings Association in denial of or inconsistent with the allegations in the complaint of Charles S. King in action No. 519194 or inconsistent with the findings of fact herein made are untrue." (c) "XXXVIII. That defendant Bank of America National Trust and Savings Association has performed additional and extraordinary services and has incurred expenses in connection with the escrow for which it should be reimbursed by defendants J. S. Smith and John Cawog but should not be reimbursed out of the funds of plaintiff King; that said bank is not entitled to compensation or reimbursement from said King or out of the funds deposited in said escrow; that $250 is a reasonable sum to be allowed said bank for its services to be paid by defendants Smith and Cawog but not by plaintiff."

3. To amend the conclusions of law as follows: (a) Strike out paragraph I and insert in lieu thereof the following: "That plaintiff Charles H. King is entitled to judgment herein against defendants J. S. Smith and Bank of America National Trust and Savings Association in the sum of $3,000." (b) Amend paragraph II by striking therefrom the following: "and is entitled to have said judgment satisfied out of said funds on deposit with said Bank of America." (c) Amend paragraph III by inserting after the word "judgment" the words and letters "against defendants J. S. Smith and John Cawog" and by striking out the words "and for the payment of said sum out of moneys remaining in its hands under the deposit referred to in the findings of fact herein." (d) Add paragraph "V" reading as follows: "That plaintiff Charles H. King is entitled to judgment against defendants J. S. Smith and John Cawog in the sum of $800, with interest thereon from July 20, 1945, said amount being in addition to and not included in the sum of $3,000 mentioned in paragraph I of these conclusions of law."

4. To amend the judgment as follows: (a) Strike out paragraph "First" and insert in lieu thereof: "That said plaintiff Charles S. King have and recover from defendants J. S. Smith and Bank of America National Trust and Savings Association the sum of $3,000." (b) Strike from paragraph "Second" the following: "and have said judgment satisfied out of said funds on deposit with said Bank of America." (c) Amend paragraph "Third" by inserting after the word "judgment" the words and letters "against defendants J. S. Smith and John Cawog" and by striking out the words "and for the payment of said sum out of moneys remaining in its hands under the deposit referred to in the Findings of Fact herein." (d) Add paragraph "Fifth" reading as follows: "That said plaintiff Charles S. King have and recover from defendants J. S. Smith and John Cawog the sum of $800, with interest thereon from July 20, 1945, said amount being in addition to and not included in the sum of $3,000 mentioned in paragraph 'First' of this judgment."

MOORE, P. J., concurs.

McCOMB, J., deeming himself disqualified, did not participate in the foregoing opinion.

85 Cal.App.2d 588

In re GIORDANO'S ESTATE.

CLARK, Atty. Gen. of the UNITED STATES v. FINO.

Civ. 3596.

District Court of Appeal, Fourth District, California.

May 21, 1948.

1. Constitutional law 🔑106

A litigant has no vested right in any matter of procedure, and fact that change in procedure may make proof of one party's rights more difficult or proof by another party less onerous can be of no avail to either.

2. Aliens 🔑10
Constitutional law 🔑109

The Probate Code sections declaring nonresident aliens' rights to take property in state by succession dependent on existence of United States citizens' reciprocal rights to take property in such aliens' countries and placing burden on them to establish existence of such reciprocal rights, are not merely procedural, but regulate succession, so that amendment thereof, placing burden of establishing nonexistence of such rights on petitioner requesting such finding, changed substantive law and was unenforceable against resident heir of nonresident alien's son, dying in state before amendment, as depriving such heir of property already vested in her. Probate Code, §§ 259, 259.1.
ochlbe

3. Descent and distribution 🔑74
Executors and administrators 🔑315(5)
Wills 🔑721

Title to decedent's property passes on his death to his heirs or devisees immediately by inheritance or terms of will and does not originate in distribution decree, though such decree, when it becomes final, constitutes muniment of title prevailing over contrary provisions of will or statutes of descent. Probate Code, § 300.

4. Aliens 🔑10
Constitutional law 🔑109

The Probate Code section placing burden on nonresident aliens to establish existence of reciprocal rights of American citizens to take decedents' property in such aliens' countries as required to entitle aliens to take property in state by succession, is not merely procedural, but substantive, and hence cannot be amended without affecting previously vested property rights. Probate Code, § 259.1.

5. Aliens 🔑16

The property of one dying before Probate Code sections, declaring nonresident aliens' rights to take property in state by succession dependent on existence of United States citizens' reciprocal rights to take property in such aliens' countries and imposing burden on them to establish existence of such reciprocal rights, were amended by section imposing burden of establishing nonexistence thereof on petitioner requesting such finding vested in decedent's only resident heir to exclusion of his alien nonresident mother, in absence of proof of existence of such reciprocal rights in country of her residence by United States Attorney General as her representative. Probate Code, §§ 259, 259.1.

6. Appeal and error 🔑1177(7)

A judgment will not be reversed on appeal and new trial granted appellant on ground that he might be able to prove fact as to which appellate court held that he failed to sustain burden of proof, in absence of request by him to take additional evidence, as court must decide case on record before it.

7. Aliens 🔑16

Trial court's finding of substance of Probate Code sections concerning nonresident aliens' rights to inherit property in state at time of decedent's death and statements in conclusions of law that such sections were laws of succession not merely procedural, and that representative of decedent's nonresident alien heir offered no proof of existence of American Citizens' reciprocal rights of inheritance in such aliens' country, were sufficient to invoke inference, supporting judgment directing distribution of all of decedent's propeprty to resident heir, that no such reciprocal rights existed, though there was no direct finding to such effect. Probate Code, §§ 259, 259.1.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

On rehearing.

Original opinion adhered to, and judgment appealed from affirmed.

Prior opinion, 191 P.2d 757.

David L. Bazelon, Asst. Atty. Gen., James M. Carter, U. S. Atty. and Clyde C. Downing, Asst. U. S. Atty., both of Los Angeles, M. S. Isenbergh, Sp. Asst. to the Atty. Gen. and David E. Feller, of Washington, D. C., for appellant.

H. E. Dwelle and Dorsey K. Dwelle, both of Fresno, and J. George Aye, Jr. and James W. Shipe, both of Sanger, for respondent.

MARKS, Justice.

A rehearing was granted by the court on its own motion to consider the bearing on this case of Estate of Knutzen, 31 Cal.2d 573, 191 P.2d 747, and Estate of Bevilacqua, 31 Cal.2d 580, 191 P.2d 752. While these cases were decided prior to our decision in the instant case we did not receive copies of those decisions until after our opinion was filed.

This is an appeal by the Attorney General of the United States, as substituted successor of the Alien Property Custodian, from a decree of distribution, distributing all of the property of the estate of Giorgio Giordano, who died intestate Jan. 17, 1945, to Anna Maria Fino, his sister who is a citizen of the United States residing in California, to the exclusion of Maria Giordano, his mother, who at all material times was an alien residing in Italy.

It is not questioned that the Alien Property Custodian, under Federal Statutes and under a Vesting Order made on November 2, 1945, has properly appeared in these proceedings as successor to any interest of Maria Giordano in the property of the estate and has requested that the interest of the mother be vested in him on distribution.

There were several brothers and sisters of deceased who were aliens, living in Italy, but as he died intestate, without surviving father, spouse, or issue, it is not necessary to mention them further, as the mother, had she been a resident of the United States, would have been his sole heir at law, entitled to inherit his property. Sec. 225, Probate Code.

The case turns on the effect to be given sections 259, 259.1 and 259.2 of the Probate Code (Stats. 1941, Ch. 895) which remained in effect until September 15, 1945, when section 259 was amended and the other sections were repealed. Stats. 1945, Ch. 1160. Section 259 was again amended and the other two sections were reenacted so that the amended section and the reenacted sections went into effect on September 19, 1947, (Stats. 1947, Ch. 1042) in much the same form as they were prior to the 1945 changes.

Section 259.2 has no important bearing on this case so no further attention need be given it. The two other sections, as originally enacted, provided as follows:

"Sec. 259. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testimentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries."

"Sec. 259.1. The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in section 259."

The important portion of the 1945 amendment of Section 259 reads as follows: "It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatees not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code."

It thus appears that at the time of the death of the deceased, and up to September 15, 1945, the burden of proving such reciprocal rights rested on the foreign alien heir, or in this case, the Alien Property Custodian who represented her. Commencing on September 15, 1945, and to September 19, 1947, the burden of proof rested on Anna Maria Fino. The enactments effective on September 19, 1947, returned the burden of proving reciprocal rights to the foreign heir, or, here, the Alien Property Custodian. In the court below neither of the parties established such reciprocal rights.

Deceased died on January 17, 1945, during the time the sections in their original form were in effect. The administratrix qualified on February 6, 1945. The final account and petition for distribution were filed on October 27, 1945, after the 1945 amendment, and the repeal of Section 259.1 became effective. The decree of distribution distributing the property of the estate to Anna Maria Fino was filed on November 1, 1946. The transcript on appeal was filed on July 10, 1947. The 1947 amendment of Section 259, and the re-enactment of Section 259.1 of the Probate Code, became effective while this appeal was pending and before its decision.

Certain of the arguments of respondent in support of the decree of distribution may be summarized as follows:

That under both the civil law and the common law, aliens could not take property by descent or operation of law; that under the provisions of Section 671 of the Civil Code, "Any person, whether citizen or alien, may take, hold, and dispose of property real or personal, within this state"; that under Sections 259 and 259.1 of the Probate Code as in force at the time of the death of deceased, Anna Maria Fino would take the entire estate unless appellant, as the representive of Maria Giordano, the non-resident alien, was successful in sustaining the burden of proving reciprocal rights of inheritance in Italy; that heirs at law of a deceased are determined by conditions existing at the time of death, and the rights of those heirs are then fixed and become vested at that time and may not be divested by subsequent legislative enactment, citing Estate of Benvenuto, 183 Cal. 382, 191 P. 678; Estate of Michels, 18 Cal. App.2d 201, 63 P.2d 333, and Johns v. Scobie, 12 Cal.2d 618, 86 P.2d 820, 121 A.L.R. 1404; Estate of Putnam, 219 Cal. 608, 28 P.2d 27; McKay v. Lauriston, 204 Cal. 557, 269 P. 519; Estate of Phillips, 203 Cal. 106, 263 P. 1017, and Estate of Wellings, 197 Cal. 189, 240 P. 21.

These arguments may be summarized by stating that it was the contention of respondent that as the inheritance from her brother vested in her under the law in force at the time of his death, and there being no evidence of reciprocal rights of inheritance in Italy, this property could not be taken from her by the legislature acting after the vesting; that as the amendment of 1945 would have the effect of depriving her of property, title to which had already vested in her, it cannot be given force and effect in this case. The sum total of these arguments is that the amendments destroyed a vested right in property and were therefore changes in the substantive law and not merely changes in procedure. Estate of Thramm, 80 Cal.App.2d 756, 183 P.2d 97, supports this argument.

[1] Appellant concedes that if the 1945 enactment is a change in the substantive law, and if given effect here, it would deprive respondent of property that had already vested in her, it cannot be given any force as it must be applied prospectively as affecting rights in property arising after its effective date. However, he argues that as the 1945 enactment became effective before the final account and petition for distribution were filed, and as the only change im-

portant here was to shift the burden of proof from one party to the other, it changed only the procedure and must be given effect in the hearing subsequently had on the petition for distribution and as respondent failed to meet the burden of proof placed on her by the 1945 statute, the presumption in appellant's favor therein contained became conclusive and the degree of distribution made contrary to that presumption must be reversed. Sour v. Superior Court, 1 Cal.2d 542, 36 P.2d 373; Heron v. Bray, 122 Cal.App. 79, 9 P.2d 513. He argues, and correctly so, that no litigant has any vested right in any matter of procedure, and that the fact that a change in procedure may make proof of the rights of one party more difficult, or proof by another party less onerous, can be of no avail to either. San Bernardino County v. Industrial Accident Commission, 217 Cal. 618, 20 P.2d 673; Arques v. National Superior Co., 67 Cal.App.2d 763, 155 P.2d 643. Appellant points to decisions in which it has been held that changes in a statute regulating the burden of proof are to be applied as changes in procedure only. McArthur v. Industrial Accident Commission, 220 Cal. 142, 29 P.2d 846; Sackheim v. Pigueron, 215 N.Y. 62, 109 N.E. 109; Southern Indiana Ry. Co. v. Peyton, 157 Ind. 690, 61 N.E. 722; Wallace v. Western N. C. R. Co., 104 N.C. 442, 10 S.E. 552; Easterling Lumber Co. v. Pierce, 106 Miss. 672, 64 So. 461; 235 U.S. 380, 35 S.Ct. 133, 59 L.Ed 279.

[2] The main issue of dispute between the parties is settled in the cases of Estate of Knutzen, supra, and Estate of Bevilacqua, supra. These cases hold that the sections under consideration are not merely procedural but rather are statutes regulating succession.

In Estate of Knutzen, supra, it is said [31 Cal.2d 578, 191 P.2d 751]:

"It is not, and does not purport to be, a forfeiture statute; instead the clear purpose is to regulate succession by providing that a non-resident alien may not inherit unless reciprocal rights are granted to our citizens by the country of which the alien is a resident.

"The right to succession is not an inherent or natural right, but one which exists only by statutory authority, and it is only by virtue of the statute that an heir is entitled to receive any of his ancestor's estate. (Citing cases.) While section 259.2 as enacted in 1941 and as re-enacted in 1947 provided for escheat if no heirs were found eligible to take the property, the primary purpose of the legislation was not to establish a procedure for escheat or for defeasance of any interest of nonresident aliens, but to place limitations and conditions on the right of such aliens to inherit. Hence the proper construction is that section 259 et seq. are laws of succession, that they constitute limitations on the power of aliens to inherit and that nonresident aliens are made ineligible to inherit, and acquire no rights in the estate in the absence of reciprocal rights of American citizens to inherit property in the country in which such aliens are resident."

In Estate of Bevilacqua, supra [31 Cal. 2d 584, 191 P.2d 756], it is said: "On the contrary, it is plain that the statute is one of succession and that sections 259 and 259.1 apply in any proceeding where the right to inherit is at issue." In the same case it is also stated:

"There is nothing arbitrary in the provision placing the burden of proof on the nonresident aliens who, presumably, are in a better position than residents to obtain information concerning foreign law. Moreover, there is no basis for complaint, at least insofar as this proceeding is concerned, in the argument that the statute places the burden of proof on nonresidents who are forbidden, by the Trading with the Enemy Act [40 Stats. 411], 50 U.S.C.A. Appendix, § 1 et seq., to prosecute any action in law or equity. The Alien Property Custodian is given full authority to succeed to their interests and to take such action as may be necessary to enforce and protect their rights. * * *

"Appellant, nevertheless, had already established a prima facie case showing a right to letters when he testified that decedent's wife and children were all aliens residing in Italy, and that he was a first cousin and the only relative of decedent in the United States. Under sections 259 et seq., he was entitled to rely on the fact that the burden of proving reciprocal inheritance rights was on the nonresident aliens."

[3] Title to property of a decedent's estate passes on death to the heir or devisee. Sec. 300, Probate Code. As said in Estate of Yorba, 176 Cal. 166, 167 P. 854, 855: "Under our system of law, the property of a decedent passes, upon his death, to his heirs or devisees. They take at once by inheritance, or by the terms of the will. Their title does not originate in the decree of distribution, although such decree, when it has become final, constitutes a muniment of title which will prevail over contrary provisions of the will or of the statutes of descent." See, also, Estate of Benvenuto, supra; McKay v. Lauriston, supra; Estate of Putnam, supra.

In Estate of Patterson, 155 Cal. 626, 102 P. 941, 944, 26 L.R.A., N.S., 654, 132 Am. St.Rep. 116, 18 Ann.Cas. 625, it was said: "There can be no doubt of the rule that, if the estate once vested in the heirs, the Legislature had no power thereafter by a subsequent law, to divest it."

[4] In a supplemental brief appellant argues that if Section 259 be conceded to be substantive in nature, still Section 259.1 establishing the burden of proof, is only procedural and thus being a separate section may be amended without affecting vested rights. This argument is contrary to the holdings in Estate of Knutzen, supra, and Estate of Bevilacqua, supra, from which we have already quoted, where both sections are said to be part of the substantive law of succession.

[5] It being now established that the three sections of the Probate Code were not merely procedural in nature but were parts of the substantive law of succession, it follows that the statue in effect at the time of the death of deceased must control, as the property of the deceased vested in his heir at that time and could not be divested by subsequent legislative enactment. Estate of Wellings, supra; Estate of Arms, 186 Cal. 554, 199 P. 1053. As the provisions in effect at that time placed the burden of proving reciprocal rights of inheritance on appellant, and as he failed to maintain that burden of proof, respondent was entitled to rely on the provisions of the sections and under them the trial court was required to distribute the property to the resident heir at law to the exclusion of the alien nonresident heir or her representative.

[6] In oral argument the appellant suggested that if the judgment were reversed and a new trial had he might be able to prove that, under the laws of Italy, reciprocal rights of inheritance existed. No request has been made here to take additional evidence and we must decide the case on the record as we find it.

[7] It was also suggested by appellant that the judgment must be reversed because there is no direct finding to the effect that there are no reciprocal rights of inheritance in Italy. The trial court did find the substance of the code sections as they existed at the time of the death. In the conclusions of law appear the statements that the three code sections are laws of succession and that there was no proof offered by appellant that reciprocal rights of inheritance existed in Italy. This is sufficient to invoke the inference that no such reciprocal rights existed which supports the judgment. See, also, Madera Sugar Pine Co. v. Adams, 68 Cal.App. 111, 228 P. 544.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

85 Cal.App.2d 583

FAGAN v. UNION PAC. R. CO.

Civ. 16226.

District Court of Appeal, Second District,
Division 2, California.
May 21, 1948.

1. Master and servant 🔑278(18)

In action against railroad by brakeman for injuries sustained when lumber company's hoister slipped down ramp and struck lead freight car on which brakeman was riding while engine was pushing freight cars along curved lumber mill spur track where there was impaired clearance, evidence sustained implied finding that railroad was negligent in failing to comply with its rule of stopping train when brakeman was out of sight of other trainmen. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

2. Master and servant 🔑276(8)

In action against railroad by brakeman for injuries sustained when lumber company's hoister slipped down ramp and struck lead freight car on which brakeman was riding, evidence established that railroad's negligence in failing to comply with rule that train should be stopped when brakeman was out of sight of other trainmen was a proximate cause of the accident, though operator of hoister was negligent and his negligence was also a proximate cause of the accident. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51.

3. Negligence 🔑15, 61(2)

If an injury is caused by concurrent effect of two separate wrongful acts, each is a proximate cause of injury and neither can operate as an efficient intervening cause with regard to the other, and neither party can escape liability so long as his own negligent act is one of proximate causes of the injury.

4. Evidence 🔑123(11), 317(2)

In action against railroad by brakeman for injuries sustained when lumber company's hoister struck freight car on which brakeman was riding, evidence concerning statement made by the driver of the hoister 15 minutes after the accident relative to how the accident occurred was properly excluded as hearsay as not part of "res gestae."

See Words and Phrases, Permanent Edition, for all other definitions of "Res Gestae".

5. Appeal and error 🔑1170(9)

Alleged error and confusion resulting from use of the word "employee" in reference to plaintiff and also to plaintiff's co-employees in instructions was not ground for reversal, where defendant admitted that alleged error was so obvious as to negate its existence. Const.art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action under the Federal Employers' Liability Act by Daniel W. Fagan against the Union Pacific Railroad Company, a corporation, to recover for injuries. From the judgment for the plaintiff, the defendants appeal.

Judgment affirmed.

E. E. Bennett, Edward C. Renwick, and Malcolm Davis, all of Los Angeles, for appellant.

Hildebrand, Bills & McLeod and D. W. Brobst, all of Oakland, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff, after trial before a jury, in an action to recover damages under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, defendant appeals.

The record discloses the following pertinent facts:

On March 14, 1946, plaintiff was a brakeman employed by defendant and was injured while performing his duties on a lumber spur track at the Bridal Veil Lumber Company at Bridal Veil, Oregon, under the following circumstances: The track on which the accident occurred extends in a general easterly and westerly direction, with a curve to the right, or north. At the time of the accident a movement was being made in a westerly direction on the lumber mill spur track. The engine was facing westerly, shoving five freight cars ahead of it. The most westerly, or lead car, was to be stopped at the west end of the spur track. To reach the point where this car was to be stopped it was necessary for the five cars to be shoved over a ramp crossing of the lumber yard. Defendant provided special instructions concerning this crossing which required that this particular place must be protected by a member of the crew preceding any movement across the roadway. There was also a rule of defendant company which required that when a brakeman, riding a car and giving signals which controlled the movement of the car, passed out of the sight of the other trainmen the movement of the train must be stopped immediately. At the westerly edge of the roadway there was a structure that caused impaired clearance and it was not possible to ride the side of a box car past that point. It was therefore necessary for a brakeman who was required to ride the side of the lead car on approaching this point to crawl from the side of the car onto the front end sill of it. The roadway was about 14 feet wide.

Plaintiff was instructed by the conductor to have the car shoved down the spur and to spot the lead car at "21", and that was all he had to do, since he had told both foreman at the Bridal Veil Lumber Company that the move was to be made. The conductor did not station one of the trainmen at the roadway but instead told the plant foremen and relied on them to keep the crossing clear. As the engine started to move the cars westerly on the spur track at position "21", plaintiff rode on the ladder on the side of the west end of the lead car. As the move proceeded, plaintiff, as he rode the car, was out of the vision of the engineer, so it was necessary to station another man at a point about halfway between plaintiff and the engineer. The man stationed there was Mr. Apperson, whose duty it was to relay signals from plaintiff to the engineer. When the lead car was about 40 feet from the ramp crossing plaintiff gave a slow signal so that he might have the opportunity of climbing around on the front end of the car. This signal was not obeyed or acted upon by the engineer. The train continued at its then speed of about 4 or 5 miles an hour. After giving the signal, plaintiff started to climb around onto the front end of the car and in doing so he went completely out of sight of the other trainmen. The train was not stopped immediately as required by the rule hereinbefore mentioned. It is conceded that had the engineer observed the rule, the train, at the speed at which it was then traveling, could have been stopped almost instantly.

At about this time a hoister owned by the lumber company came on to the ramp, moving backward with a heavy load of lumber. Although the operator set his brakes, the hoister continued slipping down the ramp and hit the side of the lead car, causing personal injuries to plaintiff.

Questions Presented for Determination

First: *Was there substantial evidence to sustain the implied finding of the jury that defendant was negligent?*

[1] This question must be answered in the affirmative. It is conceded that a rule of defendant company required that a train be immediately stopped when a brakeman, riding a car and giving signals which controlled the movement of the train, passed out of sight of other trainmen. It is likewise conceded that in the present case plaintiff who was riding on the lead car was giving signals controlling the movement of the train; that he passed out of view of other trainmen; that also the train could have been immediately stopped; and that had it been stopped in accordance with this rule the accident would not have occurred. Therefore one of the proximate causes of the accident was the violation of the rule by defendant. This fact alone constitutes sufficient evidence to sustain the implied finding of the jury that the negligent act of defendant was the proximate cause of plaintiff's injury. (Underwood v. Louisville & N. R. Co., 7 Cir., 131 F.2d 306, 307, [Writ of Certiorari denied Feb. 8, 1943. See 318 U.S. 760, 63 S.Ct. 559, 87 L.Ed. 1133].) Further discussion of

the evidence would not serve any useful purpose. (Thatch v. Livingstone, 13 Cal. App.2d 202, 203, 56 P.2d 549.)

Second: *Was the negligent act of defendant a proximate cause of the injury?*

[2, 3] This question must likewise be answered in the affirmative. It may be conceded that the operator of the hoister was also negligent and that his act of negligence was also a proximate cause of plaintiff's injury. However, the rule is settled that if an injury is caused by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury and neither can operate as an efficient intervening cause with regard to the other, and that neither party can escape liability so long as his own negligent act is one of the proximate causes of the injury. (Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 602, 110 P.2d 1044.)

Since the trial jury found, supported by substantial evidence, that defendant's wrongful act was a proximate cause of the injury, and that the hoister driver's negligent act was not an efficient intervening cause with regard to defendant's act, such finding cannot be disturbed by this court. (Springer v. Sodestrom, 54 Cal. App.2d 704, 710, 129 P.2d 499.)

Third: *Did the trial court commit prejudicial error in sustaining an objection to testimony which would have disclosed a statement relative to how the accident occurred, made by the driver of the hoister fifteen minutes after the accident?*

[4] This question must be answered in the negative. Clearly the statement of the driver of the hoister made fifteen minutes after the accident occurred was not part of the res gestae. It was clearly hearsay and not binding upon defendant. (Kimic v. San Jose-Los Gatos Interurban R. Co., 156 Cal. 379, 391, 104 P. 986; Willard v. Valley Gas & Fuel Co., 171 Cal. 9, 16, 151 P. 286.) Therefore the trial court's ruling was correct.

Fourth: *Did the trial court commit prejudicial error in instructing the jury?*

[5] This question must likewise be answered in the negative. Defendant concedes that the individual instructions read to the jury correctly state the law, but contends that in some of the instructions the word "employee" referred to plaintiff, while in other instructions it referred to coemployees of plaintiff, thereby confusing the jury. The answer to this contention is found in defendant's brief wherein he says, "The difficulty associated with making a persuasive argument upon the point here presented is that the error committed is so obvious as to negative [negate] its existence." Clearly if the alleged error was nonexistent under Article VI, section 4½ of the Constitution, it could not be prejudicial and must be disregarded by us. We are satisfied that the instructions were correct and did not contain any prejudicial error.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

85 Cal.App.2d 626

SLUSHER v. SLUSHER.

Civ. 3704.

District Court of Appeal, Fourth District, California.

May 24, 1948.

1. Divorce 🔑156

In divorce cases, where reconciliation followed by cohabitation is effected neither party is entitled as matter of right to have final divorce decree entered. Civ.Code, § 116.

2. Divorce 🔑156
Mandamus 🔑51

Where, after rendition of interlocutory divorce decree, events occur to change status or relation of parties, such as condonation and resumption of marital relation by parties, entry of final decree is not a ministerial act only, and becomes judicial act in performance of which trial court may use its discretion, and mandamus will not lie. Civ.Code, § 116.

3. Divorce 🔑184(6, 10)

Whether agreement to resume cohabitation after entry of interlocutory divorce decree is one of unconditional forgiveness so as to preclude entry of final decree or is conditional so as to warrant granting of final decree is a question of fact, and trial court's determination thereof is conclusive if evidence or reasonable inferences therefrom are conflicting. Civ.Code, § 116.

4. Divorce 🔑156

Trial court did not abuse its discretion in denying husband's motion for entry of final divorce decree, where parties, after wife had been granted interlocutory decree, had resumed cohabitation for several months, and there was evidence that blame for failure of reconciliation was on husband. Civ.Code, § 116.

5. Divorce 🔑139

Trial judge was without authority to dismiss divorce action on plaintiff's motion, which was opposed by defendant, where motion was made after interlocutory decree had become final and time for its modification under statute had expired. Code Civ. Proc. § 473; Civ.Code, § 131.

6. Divorce 🔑171

Where final divorce decree has been denied, innocent party may bring a second action if it is based on acts occurring after rendition of the interlocutory decree.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Virginia A. Slusher against George D. Slusher for divorce wherein interlocutory decree was rendered. From order denying his motion to enter final decree of divorce and dismissing the action for divorce, the defendant appeals.

Affirmed in part and in part reversed.

Calvin H. Conron, Jr., of Bakersfield, for appellant.

Werdel & Di Giorgio, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from an order denying a motion to enter a final decree of divorce and dismissing the action for divorce.

Plaintiff and defendant were married April 7, 1938. They separated about February 1, 1946. There were two children born to them.

Plaintiff filed her action for divorce on February 25, 1946. Defendant made default. The interlocutory decree was rendered on March 15, 1946. It divided the properties of the parties in accordance with the terms of a property settlement agreement which was approved in the decree, gave plaintiff custody of the two children, subject to reasonable visitation by defendant, and gave plaintiff $100.00 per month for her support and $150.00 per month for support of the children.

On September 25, 1947, defendant filed his notice of motion to enter a final decree of divorce. Attached to the notice of motion were affidavits stating in effect that in an attempt to effect a reconciliation the parties lived together as husband and wife from about March 1st to about September 13, 1947, but that the attempt was "futile, unsuccessful, and null and void * * *" and that "said parties have not become reconciled" for reasons stated which placed the blame for the failure on the plaintiff.

Plaintiff filed counter affidavits. She admitted the attempted reconciliation and that the parties had lived together as husband and wife from February 14, to September 13, 1947. She placed the blame for the failure of the reconciliation on defendant. She averred that commencing in May, 1947, he used alcoholic beverages to excess and that weekly, or oftener, when intoxicated he "would beat the plaintiff violently and curse the plaintiff in front of the minor children of the parties, * * * he would lock plaintiff out of their residence and embarrass her by forcing her to stay in the yard of their residence for long periods of time"; that this treatment and beatings "caused affiant to fear for her own safety".

The motion was heard on both affidavits and oral testimony. The evidence offered by plaintiff is to the effect that both parties acting in good faith agreed on a reconciliation, and in good faith, with the full intention of resuming their married life went back to live together as husband and wife and mutually restored each other to all marital rights (Sec. 116, Civil Code) on or about February 14, 1947; that each introduced the other to friends as husband or wife; that the reconciliation was a complete success and each party was happy and contented in the society of the other until defendant again commenced using intoxicants to excess; that thereafter and until their final separation about September 13, 1947, defendant's treatment of plaintiff amounted to extreme cruelty by physical beatings and conduct causing her mental suffering.

Defendant admitted the reconciliation and the resumption of marital relations for about seven months. He admitted that he acted in good faith and with the hope that the reconciliation would prove lasting and successful, but did not give his wife credit for like intentions. He believed that Mrs. Slusher's motive in returning to him was not to make the marriage a success but to secure a larger share of the property of the parties than was awarded her in the property settlement and in the interlocutory decree. He placed the blame for the failure of the reconciliation on plaintiff for various reasons based on her actions. It is not necessary to particularize them.

It thus appears that while the parties agree on their apparent attempted reconciliation about February 14, 1947, their living together for about seven months and their final separation in September, there is a sharp conflict in the evidence on all of the other material questions involved including the good faith of plaintiff in resuming marital relations. Thus the question is presented as to whether or not the trial court was justified in refusing to grant the final decree of divorce under these circumstances.

The rules governing the answer to this question, under the facts before us, are clearly set forth in Chester v. Chester, 76 Cal.App.2d 265, 172 P.2d 924; Lane v. Superior Court, 104 Cal.App. 340, 285 P. 860, and Angell v. Angell, Cal.App., 191 P.2d 54.

[1] In the Chester case it is said [76 Cal.App.2d 265, 172 P.2d 927]:

"It is undoubtedly the law that in divorce cases, when a reconciliation followed by cohabitation is effected neither party is entitled as a matter of right to have a final decree of divorce entered, Peters v. Peters, 16 Cal.App.2d 383, 386, 60 P.2d 313, and cases therein cited; Hawkins v. Hawkins, 104 Cal.App. 608, 611, 286 P. 747; Lane v. Superior Court, 104 Cal.App. 340, 285 P. 860."

[2] In the Lane case we find the following [104 Cal.App. 340, 285 P. 862]:

"A study of the decisions in the state, upon the question of the right of the trial judge to exercise his discretion in granting or refusing a final decree of divorce, leads to the conclusion that judicial opinion, if not judicial decision, has established two very general rules into which the cases fall. Where an interlocutory decree has been granted, and upon the application for a final decree no intervening facts appear to show a change in the status or relation of the parties, the entry of a final decree becomes something in the nature of a ministerial act on the part of the court, and mandamus may be invoked to compel it to perform its duty; but where, after the rendition of the interlocutory decree, events occur to change the status or relation of the parties, such as condonation and a resumption of the marital relation by the parties, the entry of the final decree ceases to be a ministerial act only, and becomes a judicial act in the performance of which the trial court may use its discretion, and mandamus will not lie. (Citing cases.)"

[3] In the Angell case the court, speaking through Mr. Presiding Justice Peters, said [Cal.App., 191 P.2d 57]:

"Whether an agreement is an unconditional one of forgiveness, and therefore justifies the denial of the final decree, or is a conditional one, and therefore warrants the granting of the final decree, is a question of fact. If the evidence, or the reasonable inferences therefrom, is conflicting, the determination of the question by the trial court, in accordance with elementary principles, is conclusive on the appellate court."

[4] As we have seen, the evidence was in sharp conflict on many important questions. Therefore, under the foregoing rules, the trial judge had a discretion in the matter and resolved the conflict in the evidence against defendant. This holding of the trial judge involving a determination of fact on conflicting evidence is conclusive on appeal so the order denying the motion to enter the final decree of divorce must be affirmed under the rules laid down in the foregoing cases.

[5] The next question is the right of the trial judge to dismiss the action for divorce on motion of the plaintiff, which was opposed by defendant, which motion was made after the interlocutory decree of divorce had become final and the time for its modification under the provisions of Section 473 of the Code of Civil Procedure had expired.

In Dupont v. Dupont, 4 Cal.2d 227, 48 P.2d 677, the trial court had granted the defendant's motion to modify the provisions of an interlocutory decree of divorce in respect to property rights, after the time for motion for new trial, for appeal, and for relief under section 473 of the Code of Civil Procedure had expired. In reversing the order as beyond the jurisdiction of the trial court, it was said:

"'It is well-established law that, when an interlocutory decree has become final, in the sense that it is no longer subject to the right of appeal or motion for new trial, or any right to relief by order within the provisions of section 473, of the Code of Civil Procedure, the trial court is without jurisdiction to vacate such decree or modify the same. There is, of course, the continuing authority of the court to modify its orders relating to the payment of alimony; but with respect to the right to a divorce and with respect to the determination of property rights, the right to modify or vacate the decree no longer exists.' DeHaven v. Superior Court, 114 Cal.App. 253, 255, 300 P. 95, 96; Bancroft v. Bancroft, 178 Cal. 367, 173 P. 582."

Leupe v. Leupe, 21 Cal.2d 145, 130 P.2d 697, 699, is to the same effect where it is said:

"* * * the decisions establish that the trial court is without jurisdiction to modify an unqualified disposition of property rights made in an interlocutory decree of divorce except in accordance with the methods applicable to judgments generally, time for which had expired in this case before respondent's motion was made. Even though a final decree is not entered, the interlocutory decree becomes a conclusive adjudication and is res judicata with respect to all issues determined. (Citing cases.)"

We therefore conclude that as to certain of the matters adjudicated, the interlocutory decree of divorce became a final judgment and for that reason, the trial court was without power to dismiss the case without the consent of both parties which was not given here. (Sec. 131, Civil Code.)

[6] This conclusion may not leave plaintiff without her remedies. It has been stated in cases that where a final decree of divorce had been denied, the innocent party may bring a second action if it be based on acts occurring after the rendition of the interlocutory decree. Lane v. Superior Court, supra; Chester v. Chester, supra. She also might be able to get a review of the settlement of property rights under the provision of subdivision one of paragraph IV of the property settlement, provided she can produce proper evidence.

The portion of the order dismissing the action is reversed. The portion of the order denying the final decree of divorce is affirmed. Plaintiff will recover her costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

85 Cal.App.2d 760

In re JOHNSON'S ESTATE.

LOS ANGELES ORTHOPAEDIC FOUNDATION et al. v. MILLER et al.

Civ. 15524.

District Court of Appeal, Second District, Division 1, California.

May 28, 1948.

1. **Wills** ⚷163(2)

Where relation of attorney and client exists between testatrix and beneficiary under will, burden is upon beneficiary to overcome presumption of fraud and unfair dealing.

2. **Attorney and client** ⚷123(1)

Dealings between attorney and client for benefit of attorney are presumptively invalid on ground of constructive fraud, which presumption can be overcome only by clearest and most satisfactory evidence.

3. **Wills** ⚷163(2)

A presumption of undue influence arises from proof of existence of confidential relationship between testatrix and beneficiary, coupled with activity on part of beneficiary in preparation of will.

4. **Appeal and error** ⚷1011(1)

An appellate court will not reverse a lower court when there is direct conflict of testimony and there is sufficient evidence to sustain opinion of lower court.

5. **Wills** ⚷55(7), 166(8)

Evidence sustained finding that purported codicil executed by testatrix when 79 years old leaving residuary estate to testatrix' attorney instead of to charitable institutions named as residuary legatees in original will was invalid both on ground of testatrix' incompetency and on ground of undue influence.

◆

Appeal from Superior Court, Los Angeles County; Ben R. Ragain, Judge.

Proceeding in the matter of the estate of Elizabeth M. Johnson, deceased, wherein will contest was filed by Los Angeles Orthopaedic Foundation and another, opposed by C. Pearl Miller, as executrix of the estate of Edmund A. Miller, also known as E. A. Miller, deceased, and E. A. Miller, as executor of the last will and purported codicil of Elizabeth M. Johnson, deceased. From judgment for contestants, proponent appeals.

Affirmed.

John Boyce-Smith, and John L. Fleming, both of Los Angeles, for appellant.

Walter H. Odemar, of Los Angeles, for respondent Los Angeles Orthopaedic Foundation.

William T. Blakely, of Los Angeles, for respondent Rebekah Assembly of California of I.O.O.F.

DORAN, Justice.

The present appeal is concerned with the validity of a codicil executed by Elizabeth M. Johnson, Deceased, the probate of which was set aside by the trial court on the ground of incompetency and undue influence. The salient facts of the case, as stated in the appellant's brief, are as follows: "From 1902 until the death of George C. Johnson on April 26, 1932, * * * E. A. Miller, whose widow and executrix brings this appeal, was attorney for George C. Johnson * * *. Mr. Miller probated his estate for his widow, * * * and acted as her attorney until her death 12 years later on July 29, 1944, she being at that time 87 years of age. She had no relatives. On June 25, 1936, when 79 years of age, she executed a Will leaving her residuary estate to two charities, to-wit: The Contestants-Respondents herein. * * * On December 18, 1940, * * * Elizabeth M. Johnson executed a Codicil to her said Will, by which she left the residuary estate to said E. A. Miller (attorney), who passed away shortly after the judgment herein appealed from was entered. Testatrix lived for approximately three and one-half years after this Codicil was executed. This Codicil was probated together with the Will, and thereafter the said charities * * * brought this proceeding to set aside the probate of the Codicil on the double ground of incompetency and undue influence." The case was tried without a jury and resulted in a judgment setting aside probate of the codicil.

[1-3] The trial court was "of the opinion (that) Mrs. Elizabeth M. Johnson at the time of the execution of the purported codicil was not of sound and disposing mind and memory and that she was at that time acting under fraud and undue influence of E. A. Miller". In reference to undue influence the trial judge relied upon In re Estate of Witt, 198 Cal. 407, 419, 245 P. 197, holding that "where the relation of attorney and client existed between the testatrix and the beneficiary under the will, the burden of proof is upon the defendant (attorney) to overcome the presumption of fraud and unfair dealing. All dealings between an attorney and his client for the benefit of the former are not only closely scrutinized, but are presumably invalid on the ground of constructive fraud; and such presumption can be overcome only by the clearest and most satisfactory evidence that the transaction was fair and equitable and no advantage was taken by the attorney, and that the client was fully informed of all matters relative to the transaction and was so placed as to be able to act understandingly and to deal with the attorney at arm's length. A presumption of undue influence arises from proof of the existence of a confidential relation between the testatrix and the beneficiary coupled with activity on the part of the latter in the preparation of the will".

In reference to the mental condition of the testatrix, the evidence was in conflict. A number of "intimate acquaintances" testified that the testatrix was mentally incompetent, the reasons given for such opinion being that Mrs. Johnson was feeble and forgetful, childish, rambling in conversation, ragged, dirty and unkempt in person. Some of these witnesses testified that in 1940 testatrix seemed irrational, but at times was fairly rational; Mrs. Johnson is also characterized as a woman of fixed opinions and very stubborn. Other witnesses, including a physician and a nurse, expressed the opinion that testatrix was sane up to the time of death.

Concerning the attorney's active participation in the making of the codicil, the record discloses the Attorney Miller and Mrs. Nelle Phillips who for many years had acted as secretary to the attorney, went to the home of testatrix, (at the latter's repeated requests, according to the testimony of the attorney and secretary,) whereupon testatrix stated that the attorney was to be substituted as residuary legatee in place of the two charities mentioned in the will. Attorney Miller and Mrs. Phillips then returned to the attorney's office where Mrs. Phillips prepared the codicil which was to effect the desired substitution; several days later Mr. Miller and Mrs. Phillips went to testatrix' residence and the codicil was executed before Mrs. Phillips and one J. A. Kirkham as witnesses. According to the appellant's brief, "Mr. Miller took no active part in the transaction although it is a fact that he was present".

It is appellant's contention that (1), "The evidence of incompetency introduced by respondent is insufficient to uphold the judgment on that ground"; (2), "Assuming that respondents made out a prima facie case of incompetency the clear evidence to the contrary offered by appellant more than overcomes it"; and (3), that the judgment "cannot be sustained on the ground of undue influence because there is no actual evidence thereof, no presumption thereof in this case and any possible presumption is overcome by appellant's evidence". In this connection appellant argues that Attorney Miller did not "actively participate" in the composition of the codicil; therefore that the presumption mentioned in Re Estate of Witt, supra, does not apply. On the other hand, the respondent's brief avers that "There was ample evidence introduced to support the judgment of the lower court holding that Elizabeth M. Johnson, deceased, was incompetent when the codicil was signed", and that "The evidence as well as the law supports the finding below of undue influence exercised by the (attorney) beneficiary of the purported codicil".

[4, 5] As stated in respondent's brief, "The trial court had an opportunity to study the demeanor of all the witnesses and * * * his written opinion indicates the impression they (contestant's witnesses)

made upon him in contrast to that made by proponent's witnesses. The rule of law that an Appellate Court will not reverse a lower Court when there is a direct conflict of testimony when there is sufficient evidence to sustain the opinion of that lower Court is too well known to require any citation of authorities". That the record herein discloses substantial evidence to support the decision of the trial court cannot well be doubted. Such being the case, and notwithstanding the conflict in testimony concerning the decedent's mental condition, there can be no appellate review of the evidence.

The written opinion of the trial court, after reviewing the evidence, concludes that "From the testimony of the above witnesses it can very easily be inferred that Mrs. Johnson long had intended to remember the two organizations in her will and when she did in fact execute the will on January 25, 1946, it was but the culmination in action of a long and many times expressed desire to provide for them". Such disposition also represented "the expressed desire of a deceased spouse from whom all of the property came". The trial court further observes that the alteration of such a will "is not apt to be made except for one of two reasons. First, some act on the part of the beneficiary which alienated the affections of the testator. Secondly, influence or pressure brought to bear by or on behalf of another".

In this connection it is to be noted that Attorney Miller testified that shortly before the codicil was made, Mrs. Johnson "said she did not want them (the two charitable organizations) to receive what was left of her estate, because they had done nothing at all for her and she said I had done so much for her that she wanted me to receive what was left after the special bequests of her furniture and furnishings". Apparently, the two organizations had done nothing to antagonize the deceased, unless, as said by the trial court, "It be the failure to do something which under no circumstances they could do", since one of the organizations was an orphanage and the other an institution for handicapped children.

The essential facts in Re Estate of Witt, 198 Cal. 407, 245 P. 197, 202, are strikingly similar to those of the instant case. In both cases the beneficiaries were attorneys occupying close confidential relationships with testatrix; both ladies were of weak or impaired mentality, personally unkempt and inclined to rambling conversation. In the Witt case the will, drafted in the attorney's office, as was the codicil in the present case, was witnessed by the attorney's employees, one of whom testified that the attorney was in the room and talked to Mrs. Witt about the will before it was executed. In the instant case it will be remembered that Attorney Miller and the secretary, Mrs. Phillips, first called on Mrs. Johnson in reference to the codicil; after same had been drafted in the attorney's office both returned to Mrs. Johnson's home where the instrument was executed with Mrs. Phillips acting as one of the subscribing witnesses, and in the attorney's presence. In answer to a question whether Miller said anything about making the codicil, the attorney finally said: "Very well. I may have mentioned it to her (the secretary) to go ahead and prepare the codicil. Most likely did."

In the light of the above and other evidence as to the circumstances surrounding the execution of the codicil making the attorney the principal beneficiary, it is useless to contend that there is no evidence of "active participation" on the part of the attorney. In this state of the record, the rule expressed in the Witt case is clearly applicable; namely, that "A presumption of undue influence arises from proof of the existence of a confidential relation between the testatrix and the beneficiary 'coupled with the activity on the part of the latter in the preparation of the will'", or as in the instant case, the codicil. The weight and credibility of the testimony claimed to rebut such presumption was, of course, a question for the trial court.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

86 Cal.App.2d 1

MEADOWS v. EMETT & CHANDLER (two cases).

Civ. 16085, 16086.

District Court of Appeal, Second District, Division 2, California.
June 3, 1948.

1. Trial ⚷142, 143

Nonsuit should be denied when evidence is substantially conflicting and contrary inferences can be drawn.

2. Trial ⚷139(1)

If evidence is legally insufficient to support a recovery, trial court should order a nonsuit.

3. Trial ⚷139(1)

The trial court may grant motion for nonsuit when, on consideration of evidence in its most favorable aspect, it does not establish a prima facie case.

4. Trial ⚷139(1)

To justify denial of motion for nonsuit, proof must be of a substantial character and must be such that a reasonably intelligent person can fairly deduce from it that the fact alleged really does exist.

5. Trial ⚷139(1)

Trial court may grant motion for nonsuit when evidence developed from plaintiff so conclusively establishes a defense that court might properly grant a new trial in case of verdict in his favor on like evidence.

6. Master and servant ⚷70(2)

Where employment contract provided that manager of insurance office was to receive certain monthly salary and one-third of commission for any "incidental personal business" which he might acquire, the quoted phrase was ambiguous and intention of parties was to be derived from contemporaneous conversations and circumstances of the making of the agreement. Civ. Code, § 1647; Code Civ.Proc. § 1860.

7. Master and servant ⚷70(2)

Where employment contract provided that manager of insurance office was to receive certain monthly salary and one-third of commission for any "incidental personal business", quoted phrase included only those items which came to manager incidentally or casually through his personal connections without unduly invading time and energies he was to devote to employer's business.

See Words and Phrases, Permanent Edition, for all other definitions of "Incidental Personal Business".

8. Master and servant ⚷80(13)

Where employment contract provided that manager of insurance office was to receive certain monthly salary and one-third of commission for any incidental personal business, and manager brought action for commissions, evidence was insufficient to establish that the railroad business was "incidental personal business" and justified judgment of nonsuit.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Actions by George Donald Meadows against Emett & Chandler, a limited partnership, and against Emett & Chandler, a corporation, and others to recover a share of commissions earned on certain insurance premiums. From adverse judgments, plaintiff appeals.

Affirmed.

MacDonald & Pettit and Robert H. Edwards, Jr., all of Los Angeles, for appellant.

Cosgrove, Clayton, Cramer & Diether, by T. B. Cosgrove and Leonard A. Diether, all of Los Angeles, for respondents.

MOORE, Presiding Justice.

Two separate actions are here involved—one against a corporation, herein referred to as respondent, the other against the partnership comprised of the two stockholders of the corporation. The latter entity had been engaged in the insurance brokerage business since 1929 when it was organized as "Gillis, Emett and Chandler" and so continued to February, 1939, when "Gillis" was dropped from the corporate name. Its principal place of business was in Los Angeles but it maintained a branch office in San Francisco. Emett was the president and general manager of the corporation at all times prior to its dissolution, and transacted all its business with appellant. The latter had been an insurance solicitor for six years prior to his meeting with Emett on February 9, 1939, when the two conferred in the San Francisco office of respondent with reference to appellant's employment as manager of that office. Pursuant to agreement, two days after their conference appellant addressed a letter to Emett as follows:

"This is to confirm our conversation and agreement of Thursday, February 9, 1939. On March 15, I shall begin my work with the understanding that my entire time is to be spent in servicing and expanding the accounts of Gillis, Emett and Chandler, Ltd.

"I am to receive $375.00 monthly which is to include expenses with the exception of any specifically authorized and for any incidental personal business which I might acquire I am to receive one third of the commission.

"Trusting this confirms our mutual understanding. * * *"

Commencing March 6, 1939, appellant continued in the employment of respondent for three years. In September, 1940, he was introduced to an official of a railroad company by a friend and as a result of negotiations conducted by him and Mr. Emett a policy of insurance was sold by respondent to the railroad company. Appellant left his position in February, 1942. In 1943 respondent was dissolved and its business and obligations were assumed by the partnership.

In 1946, having returned from military service, appellant commenced these actions: (1) Against the partnership, appeal number 16085; (2) against the corporation, number 16086. The gist of both actions was appellant's claim to a share of all the commissions earned on the railroad's insurance premiums. The brokerage collected by respondent out of premiums paid by the railroad company aggregated a sizable sum. On a trial of the consolidated cases following the introduction of appellant's evidence, motions for nonsuits were granted in both.

These appeals are to determine (1) whether the contract of employment entitled appellant to a share of such commissions collected by the corporation and, after its dissolution, by the partnership; and (2) if it did, whether such right was defeated by respondent's special defenses. In reaching such determination it will be necessary to pass upon only the questions raised by the second numbered appeal—that of respondent corporation.

Appellant's argument is based largely upon the facts that he alone was first introduced to the railroad officials by his friend Coney, and second that he worked with Emett in conducting the negotiations with the railroad company's officials. To justify such recovery the phrase "for any incidental personal business which I might acquire" must be held to include the sale of the policy to the railroad. Such construction of the last quoted language must be derived either (a) from the phrase itself in the light of the acts of appellant or (b) from the construction placed upon such acts by the manager of respondent.

A scrutiny of all the evidence favorable to appellant discloses the correctness of the judgments.

The Writing

The only memorial of the agreement is the letter of appellant quoted above. According to that document he was to receive a fixed salary and one third of the commissions paid on any "incidental personal business which I might acquire." Appellant contends that the railroad business is comprehended by the quoted clause, while respondents contend that it was neither personal nor incidental but was procured by the joint efforts of president Emett and appellant as a salaried employee of respondent and at its expense. Since the phrase "incidental personal" is not commonly used to describe business to be obtained by an employee, the court below received evidence of the circumstances of the employment as well as of the behavior of the parties towards the matter of soliciting the business and their treatment of it after the first premium had been paid.

Preliminary Conversations.

At the time of the agreement Emett and the witness Drenth advised appellant that they were in need of a manager for the

San Francisco office since they were acquiring much business from a wholesale paper company. In response to certain inquiries by Emett, appellant stated that he desired a position where he could participate in business that he produced. Emett replied that while he might make some satisfactory arrangement he did not desire a manager spending all his time soliciting his own business. After appellant had made it clear that his own business was not extensive, Emett told him that he was not to spend his time soliciting his own business; that he should devote all his time to the existing accounts of respondents; that his principal occupation would be to service Emett and Chandler accounts; that there is "enough business on the books to keep a man busy full time"; that he "did not want him to chase around after personal business"; "if you can produce an account or get an account without taking too much time, I will pay you one third of the commission." To this appellant agreed.

Subsequent Interpretation of the Agreement.

The mutual understanding of their agreement was emphasized by letters of both parties during the first month of the employment. On April 3, 1939, Emett wrote appellant to be particularly careful to mark all accounts originated by appellant's "leads and connections not emanating" from the corporation. Appellant's letter of April 4, 1939, indicates that his understanding was "that my entire time is to be spent in servicing and expanding the accounts of Gillis, Emett and Chandler, Ltd. * * * It is fully understood that my *contingent* [meaning his right to receive a portion of the commissions on personal business] is to only be on whatever business I produce through my former contacts and not through leads or connections emanating from our office." From his own understanding of his employment there could be no doubt that his total time was to be devoted to the business of his employer, except such incidental matters as might come to appellant by reason of renewals or from personal attachment to a client. In June, 1940, the rate of appellant's contingent was increased from one third to 45 per cent of the commissions received by the corporation on such "incidental personal business" as he should acquire for the corporation.

Appellant's Handling of Contingent Accounts.

The method of segregating appellant's "incidental personal business" evidences the mutual understanding and intention of the parties. Appellant prepared bills to his personal clients for the premiums on such policies as they had taken or renewed, and marked them "D M" to indicate that they were "incidental personal" business. Copies of such bills so marked were mailed to the Los Angeles office. No other scheme was followed by appellant to indicate his right to the "contingent" on the business placed by him. In the Los Angeles office on the first of each month with the aid of appellant's bills a statement was prepared showing the insurance sold by appellant during the previous month and claimed as his "incidental personal business." Such statement was forwarded to appellant. Also, periodically a summary of such monthly statements was sent to appellant with a check for the total.

Sale of the Railroad Policy.

With the foregoing view of the employment contract as interpreted by the parties the true significance of the evidence bearing upon the sale of the railroad policy by respondent will readily appear. Contact with the railroad officials resulted from a combination of factors. Two are outstanding. In August, 1940, respondent carried the insurance account for Zellerbach Paper Company whose insurer was the Aetna Company. Servicing Zellerbach necessitated meetings of appellant as respondent's agent and Aetna's representative, Mr. Coney. While appellant asserts his claim by virtue of Coney's friendship, the Zellerbach-Aetna connection with respondent appears to have been just as effective in bringing Coney to respondent's office. Coney had an inquiry from one Cox, in charge of the railroad's insurance, concerning a policy for the railroad. With Cox's consent Coney asked appellant to accompany him to inspect the railroad's policies. On Sunday, September 1, 1940, and the day following, appellant and Coney met with Cox's assistant, Herbert, in San Francisco.

Appellant pointed out to Herbert that the railroad had duplicate coverage and suggested a type of policy covering its total liability. Herbert stated to appellant that if the latter would visit the Omaha office of the railroad he could there secure the information with reference to gross revenue, accident frequency, and records of the Interstate Commerce Commission. Thereupon correspondence passed between Emett and appellant wherein the latter stated that he had directed Herbert to call on Emett at Los Angeles. Herbert called on September 5 for the purpose of ascertaining whether respondent was competent to handle the railroad account.

Aetna Will Not Insure the Railroad.

A few days after the conference of Emett and Herbert, Coney advised Cox by letter that Aetna could not write the railroad policy and "felt Mr. Herbert's time would not be entirely wasted if we did not get together by reason of the contract with Emett and Chandler. I can recommend them as an excellent brokerage firm and if you see fit to allow them to submit a proposition I am certain they will turn in a good job." After Aetna declined to write the railroad policy appellant wrote Cox on September 13 that Zurich General Accident and Liability Insurance Company might write the policy, and indicated that he or Emett might visit Omaha to obtain more information before conferring with Zurich. Also, he asked Emett's permission to visit Cox in Omaha and Zurich in Chicago. Emett consented and respondent advanced the necessary funds for the journey. Appellant proceeded to Omaha where he obtained the information required for the underwriter, and met Cox in Chicago about October 15. Late in November the two conferred with Emett in Los Angeles concerning the railroad's insurance.

Appellant's Asserted Expenditures.

The only positive evidence in support of a denial of the nonsuit was appellant's testimony that on the trip to the eastern cities he expended $500 of his own funds for entertainment. Such testimony is not substantial in view of other established facts. Not only was he absent from the San Francisco office for more than two weeks but before his departure he was supplied with funds for his expenses. Not only did his contract entitle him to the payment by respondent of all necessary outlays made in the pursuit of respondent's prospects but he actually received the money for such expenses before his departure. He thereby impliedly conceded that he was off to sell insurance to respondent's prospect. If appellant had considered the railroad policy as his "incidental personal" business would he have accepted funds from respondent to pay his traveling expenses without a previous understanding as to any obligation to be incurred thereby?

No suggestion was made by anyone prior to the visits to the eastern cities that appellant should or would expend his own money in pursuit of the railroad insurance. Upon his return he made no demand for repayment and at the trial could give no details of place, persons or of substance purchased. His testimony is also that his correspondence with Cox concerning the railroad insurance in the closing weeks of 1940 was directed by Emett, and all of it bore the signature of Emett and Chandler. Also, he testified that he made a second trip to Omaha in December, 1940. His own letters written to Cox at Omaha definitely establish that he was in San Francisco throughout the entire month.

Emett's Efforts Effective.

It is a glaring fact that Emett was also active in the campaign to place the railroad insurance. In addition to his early conferences with Cox, Herbert and appellant, he supervised appellant's correspondence with the railroad officials, visited Cox in Omaha in January to discuss the policy, induced Zurich to reduce the initial premium by 50 per cent and in February, 1941, was instructed by Cox to put the insurance in effect March 1, 1941, and requested appellant to "furnish binders for the primary and excess coverage." * Emett then directed Zurich to forward a binder on

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* As insurance terms: A binder means "a written instrument, used when a policy cannot be immediately issued, to evidence that the insurance coverage at-

primary coverage to Mr. Cox and requested appellant to obtain a "binder on the excess coverage" and to forward it to Cox.

Appellant Sent No Bills for a Share of the Railroad Business.

It is significant that with all his bills for his *contingencies* sent to respondent after the sale of the railroad insurance, appellant did not include his claim for a share of the brokerage on that policy. He sent the bill for the first premium of $5,000 on the policy effective March 1, 1941. He received payment therefor on May 8, 1941. Thereafter not one of the monthly statements as to appellant's "incidental personal business" sent to respondent made reference to the railroad's premium. None of respondent's summary statements of appellant's "contingent" business covering the periods from March 1, 1941, to April, 1942, referred to the railroad policy. Neither did appellant object to either monthly or summary statements because of such absence of reference to the railroad premium, but received and cashed all checks sent to him in payment of the summary statements. His testimony at first was that he did object to the first summary; this however was corrected by him as referring to discussions with Emett in November and December, 1941. In that discussion appellant stated that he had spent some of his own money on the railroad business and asked when he could expect his commission; that he did not expect his "full cut" and suggested that they go back "to our old arrangement." Emett replied that they would "wait now until the end of the year and see what it is. We will make a new deal." Appellant declared than that "down to 25 per cent might be fair." They mutually agreed to "wait until the end of the year, around March 1 to see what had developed in the premiums."

Such agreement to wait did not constitute proof of an alteration of the contract of employment. Neither did it make the railroad policy a part of appellant's "incidental personal" business. At that time appellant thought that 45 per cent of the railroad's premium as his share would be unfair to respondent. What could be unfair about it if it was his "incidental personal business"? It is inconsistent and unreasonable to contend that the brokerage on the railroad's premium was his "incidental personal business" and yet, first, confess that the percentage they had agreed upon as his share of such business was "not fair" and, secondly, agree to accept a reduction of his share from 45 per cent to 25 per cent. If appellant had really believed that his contract entitled him to 45 per cent of the commission it is unlikely that at the time of making the first demand for his share he would have offered to reduce his portion to 25 per cent.

Appellant Offers to Accept 1 Per Cent.

But appellant's eagerness to participate in the profits of the railroad's premiums reached a crescendo before another year had expired. The metamorphosis of his ambition during the twelve months cannot be definitely determined, but it is clear that he was aiming at some conquest however slight. He testified that he wrote Emett a letter sometime during the latter seven months of 1942. He had kept no copy but from his testimony it can be inferred only that he merely requested a share of the commissions on the railroad premiums, as he had done orally in the preceding December. On January 19, 1942, he asked for an increase of salary instead of the customary annual bonus paid by the corporation. At Emett's request he prepared a memorandum which he delivered to Emett. It is as follows:

"J——n. 19, 1942

"On or about March 1, 1942, my salary and expenses are to be $550 per month. It is understood that I will not receive any Xmas bonus.

"Don Meadows.

"As an indication of recognition on the Union Pacific I'm to receive 1% of the

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taches at a specified time, and continues, subject to a maximum limitation, until the policy is issued or the risk is declined and notice thereof given." "A binding receipt." Webster's International Dictionary.

Primary coverage means: The aggreate of risks covered by the terms of a contract of insurance.

Commission until further notice effective Jan. 1, 1942."

Two reasonable deductions instantly occur: (1) If appellant had had an agreement to share in commissions on the railroad premium he would not have offered to receive 1 per cent instead of 45 per cent; (2) his demands were not to enforce a right created by his contract of employment but to gain an increase of steady income.

After His Discharge Appellant Makes No Demand for a Share of the Brokerage on the Railroad Premiums.

Thirteen days after the conference and the memorandum above quoted, Emett wrote appellant that upon a consideration of the demands made by appellant the corporation had decided to accept his resignation. Appellant was paid to March 11, 1942, and immediately asked for his percentage of the commissions on his "incidental personal business," without a suggestion of the railroad premium. Neither was it mentioned in Emett's reply and check covering the period from July 1, 1941, to December 31, 1941, which check appellant accepted without protest.

In May, 1942, appellant continued his correspondence with the corporation in order to collect all moneys due him on his "incidental personal business." While suffering the chagrin attendant upon his discharge, in no letter to respondents did he make reference to the railroad policy. His letter of May 25, 1942, although it concerned his personal business, made no reference to the railroad premiums but suggested only that the corporation send "my commission check." On June 8, 1942, Emett forwarded a check for commissions due appellant on the statement attached, with these words: "This includes all outstanding items with the exception" of certain unpaid premiums. The railroad premium was not among them. Appellant did not intimate displeasure at the failure of the check to include a share of the railroad's premium or of the letter to mention it.

The only written communication from appellant that made reference to the railroad insurance subsequent to his discharge was his letter written at some time between May, 1942, and February, 1943. Of that he had no copy and Emett denied its receipt. The oral proof of its contents was that appellant "would appreciate an accounting of his share of the railroad premium." In the fall of 1942 appellant stated to the manager of the San Francisco office that the corporation owed him commissions and expenses by reason of the railroad account. The manager referred him to Emett who did not hear from appellant until October, 1945, when Emett rejected the claim.

Authorities.

[1-5] Nonsuit should be denied when the evidence is substantially conflicting and contrary inferences can be drawn. Kirk v. Los Angeles Railway Corporation, 26 Cal.2d 833, 837, 161 P.2d 673, 164 A.L.R. 1. But if the evidence is legally insufficient to support a recovery the trial court should order a nonsuit. Zito v. Wertz, 62 Cal.App.2d 161, 164, 144 P.2d 409. Also, the court may grant the motion when, upon a consideration of the evidence in its most favorable aspect, it does not establish a prima facie case. The proof must be of a substantial character. Estate of Bryson, 191 Cal. 521, 541, 217 P. 525. It must be such that a reasonably intelligent person can fairly deduce from it that the fact alleged really does exist. 9 Cal.Jur. 554. The court may also grant the motion when the evidence developed from the plaintiff so conclusively establishes a defense that the court might properly grant a new trial in case of a verdict in his favor upon like evidence. Nulsen v. Nulsen, 3 Cal.App.2d 407, 409, 39 P.2d 509; Crebs v. Uplifters Country Home, 133 Cal.App. 88, 95, 23 P.2d 807.

No Proof Contract Changed.

If Emett had never agreed that the railroad premium was to be a part of appellant's contingency; if it was not suggested by either in any conversation held contemporaneously with the conferences with the railroad officials that it would be appellant's "incidental personal business"; if the latter made no protest at the absence from the summary statements sent him by respondent of any credit to him on account of the railroad's premium, then by what behavior of either Emett or appellant can it be adjudged that both agreed in February, 1939, or at any subsequent date (1) that any policy placed by respondents on a railroad, or (2) that any business solicited by respondents in which appellant should render aid as a loyal employee should constitute appellant's "incidental personal business"? Appellant testified that he had never agreed with respondent "on any percentage of commissions" that he should receive on the railroads' business. If the contract of employment did not clearly comprehend such a transaction as the railroad's insurance, and if there was never a specific agreement that appellant should have a percentage of the commission earned thereby, his contention that he is entitled to share in the commissions paid to respondents by the railroad is utterly without support.

Appellant's Evidence Insufficient To Sustain a Judgment.

[6-8] Since the phrase "incidental personal business" is ambiguous the intention of the parties must be derived from the contemporaneous conversations and circumstances of the making of the agreement. Civil Code, sec. 1647; Code Civ. Proc., sec. 1860; McIllmoil v. Frawley Motor Company, 190 Cal. 546, 552, 213 P. 971; Universal Sales Corporation v. California Press. Mfg. Company, 20 Cal.2d 751, 761, 128 P.2d 665. The statements of the parties as testified by the witness Drenth leave no doubt that they definitely intended that appellant was to devote his working hours to handling the corporation's accounts and to soliciting new business for it. While thus engaged surely they did not intend that appellant might spend weeks or even days in pursuit of personal clients and call upon respondent to bear the expense. A reasonable interpretation of his "incidental personal business" is that it should include only those items which came to him incidentally or casually through his personal connections without unduly invading the time and energies he was to devote to respondent's business. If such had not been their mutual intention would Emett have admonished him on February 9 against "chasing around after personal business," or would he have confined appellant's extracurricular activities by the remark "if you can produce an account without taking up too much of your time"? The agreement as to appellant's share of the commissions as established by his letter of February 11, 1939, is no proof that he is entitled to a share of the brokerage on the railroad policies unless his phrase can be rationally construed to include business acquired by respondent by the expenditure of only its own money and by the joint efforts of its officers and employees. If the agreement could be fairly construed to mean that appellant should receive one third of the commissions on the railroad business, then such construction would entitle appellant to 45 per cent of the brokerage on every policy sold through appellant as employee of respondent during office hours. Had they contemplated such a scheme surely the salary feature would have been omitted from the agreement, and commissions only would have been provided as appellant's compensation. There is no implication that the phrase "incidental personal business" of appellant includes all or any business solicited after office hours from newly acquired prospects.

Certainly business acquired through "leads" originating in the corporation's office could not be deemed either "personal" or "incidental" as contemplated by the contract. Prior to Coney's communicating to appellant the wish expressed to him by Cox, Coney had been in frequent contact with the office of the corporation. As an Aetna representative he wrote the railroad and thereby implied that he would introduce appellant as a representative of the corporation. It was not necessarily the fact of Coney's long acquaintance with appellant that caused him to lead appellant to Cox and Herbert, but two other factors were of equal weight in effecting the meeting, namely: (1) Coney's periodic visits to the office of the corporation and (2) the latter's character and reputation. Neither appellant nor Coney had ever sold insurance to the other. Nor was either a business contact of the other prior to the transaction with the railroad.

The foregoing conclusions render unnecessary a discussion of other points raised by the parties in the two appeals.

The judgment in each case is affirmed.

McCOMB and WILSON, JJ., concur.

86 Cal.App.2d 15

MARK HOPKINS, Inc., v. CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION et al.

Civ. 13555.

District Court of Appeal, First District, Division 2, California.

June 4, 1948.

Taxation 🔑59

"Employer-employee relationship" did not exist between hotel operator and musicians in band playing temporarily in hotel, and operator was not liable for contributions for musicians under Unemployment Insurance Act, though contract which operator was compelled to sign because prescribed by musicians' union, named operator as employer of musicians, where complete control of musicians was vested in band leader. Gen.Laws, Act 8780d, §§ 6.5, 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer-Employee Relationship".

◆

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Mark Hopkins, Incorporated, a corporation against the California Employment Stabilization Commission and others to recover amount paid by plaintiff under protest in accordance with Unemployment Insurance Act with respect to compensation paid to musicians of bands playing at plaintiff's hotel, wherein defendant cross-complained bringing in as new parties Joe Reichman and others as leaders of the bands, seeking contributions from them under the act. From a judgment dismissing the cross-complaint and holding plaintiff liable, the plaintiff appeals.

Judgment reversed.

Rogers & Clark and Bruce F. Allen, all of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and Charles W. Johnson, Deputy Atty. Gen., for respondents.

NOURSE, Presiding Justice.

Appellant, Mark Hopkins, Inc., appeals from an adverse judgment in an action brought against the California Employment Stabilization Commission to recover $4,061.59 paid under protest, in accordance with Sec. 45.10 of the California Unemployment Insurance Act, which sum represented contributions, interest and penalties alleged by the Commission to be due under the Act with respect to compensation paid to musicians of bands playing at the hotel.

Plaintiff in its complaint stated that the collection of contributions, penalties and interest with respect to payments made to Joe Reichman, Ernie Heckscher, Herbie Holmes and Henry King was illegal, as set forth in its protest, and that the relationship existing between plaintiff and said persons did not constitute "employment", as defined in Sec. 6.5 of the California Unemployment Insurance Act and that no "wages" as defined in Section 11 of the Act were paid to said persons.

Defendants cross-complained bringing in the above mentioned band leaders as new parties, asking for judgment against each one of them in certain specified amounts as contributions owing under the California Unemployment Insurance Act (Deering's Gen. Laws 8780d); stating that the Commission was uncertain whether the band leader or the hotel was "the employer" within the meaning of Section 9 of the Act and praying for judgment against the individual band leaders or in the alternative the Mark Hopkins Hotel. The trial judge dismissed the cross-complaint as to the named band leaders and held the Mark Hopkins liable for the contributions.

The question presented in this case is whether an employer-employee relationship existed between the hotel and musicians or whether the leaders of the "name bands" were independent contractors.

Testimony was given to the effect that the hotel negotiated for the bands through the Music Corporation of America and another regular booking agency and did not deal directly with the band leaders or with the musicians in obtaining their services. It also appears that from 1941 on, covering the period of time involved in this action, in order to obtain one of these bands the hotel was obliged to sign contract Form B, a contract devised by the American Federation of Musicians. It was stipulated that the contract was prescribed by the rules of the American Federation of Musicians and was the only contract under which musicians would work in bands for hotels.

The Form B contract, which the hotels were compelled to accept without change, provides: "The employer shall at all times have complete control of the services which the employees will render under the specifications of this contract. On behalf of the employer the Leader will distribute the amount received from the employer to the employees, including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the Leader includes the cost of transportation, which will be reported by the Leader to the employer. The employer hereby authorizes the Leader on his behalf to replace any employee who by illness, absence, or for any other reason does not perform any or all of the services provided for under this contract."

The trial court, relying wholly on the terms of the Form B contract, found that the relationship between plaintiff and the individual members of the respective orchestras was that of employer and employee.

Appellant contends that the relationship of the band leader to the hotel was that of an independent contractor. It states the element of control necessary to establish an employer-employee relationship was lacking, that complete control was vested in the band leader who hired and fired his own musicians without interference from the hotel, decided what salaries to pay, made the agreements with the members and paid them, decided the number of musicians in the band, types of instruments, and supervised the deportment of the musicians on the hotel premises; that the leader maintained his own business organization with a manager or bookkeeper, hired a booking agency to procure engagements, accumulated a library of sheet music, paid promotional and advertising expenses and took his musicians with him from one engagement to another, and took the risk of profit or loss. These are the undisputed facts upon which appellant relies. Respondents rest their case on the terms of the Form B contract.

The precise question has been decided by the United States Supreme Court in Bartels v. Birmingham, 332 U.S. 126, 67 S.Ct. 1547, 1550, 91 L.Ed. 1947, 172 A.L.R. 317 where, on facts substantially identical, that court held that the elements of the employment, rather than the terms of the compulsory contract designed "to shift tax liability from one taxpayer to another" were the controlling factors. In conclusion the court said in 332 U.S. at page 132, 67 S.Ct. at page 1551, 91 L.Ed. at page 1954, 172 A.L.R. 317: "We are of the opinion that the elements of employment mark the band leader as the employer in these cases. The leader organizes and trains the band. He selects the members. It is his musical skill and showmanship that determine the success or failure of the organization. The relations between him and the other members are permanent; those between the band and the operator are transient. Maintenance costs are a charge against the price received for the performance. He bears the loss or gains the profit after payment of the members' wages and the other band expenses."

Judgment reversed.

GOODELL and DOOLING, JJ., concur.

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86 Cal.App.2d 13

DOBSON v. DOBSON.

Civ. 16208.

District Court of Appeal, Second District, Division 2, California.

June 3, 1948.

1. Marriage 🔑60(7)

In husband's marriage annulment suit, trial judge erred in arbitrarily refusing to accept as true uncontradicted, and not inherently improbable testimony of plaintiff and corroborating witness that plaintiff was so inebriated at time of marriage ceremony that he did not understand or know nature or legal effect thereof.

2. Evidence 🔑594

Testimony, which is not inherently improbable and is not impeached or contradicted by other evidence, must be accepted as true by trier of facts.

3. Evidence 🔑5(2)

It is matter of common knowledge that parties occasionally submit to marriage ceremony when one of them is under influence of intoxicating beverage to such extent as to be of unsound mind and without knowledge of what is taking place and hence unable to enter into contract.

4. Marriage 🔑58(3)

One participating in marriage ceremony while under influence of intoxicating beverage to such extent as to be of unsound mind and without knowledge of what is happening is entitled to annulment of marriage.

5. Marriage 🔑60(7)

Uncontradicted and not inherently improbable testimony of husband and corroborating witness imposed duty on trial court to find that husband was so inebriated at time of marriage ceremony that he did not know what he was doing and to award him annulment of marriage.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Proceeding by Gregory A. Dobson against Dorothy Dobson for annulment of the parties' marriage. From a judgment denying annulment, plaintiff appeals.

Reversed with direction to enter a decree annulling the marriage.

John O. Akin, of Long Beach, for appellant.

No appearance for respondent.

McCOMB, Justice.

From a decree denying plaintiff's application for an annulment of his marriage he appeals.

The undisputed facts are these:

Plaintiff and defendant participated in a ceremony of marriage in Las Vegas, Nevada, on Sunday, March 16, 1947, while plaintiff was under the influence of intoxicating liquor and so inebriated that he did not understand or know the nature of the ceremony or its legal effect. On Tuesday, March 18, 1947, while still suffering from the effects of intoxication, defendant advised plaintiff of the marriage, and on Wednesday, March 19, 1947, having fully recovered from his inebriation, he left defendant and has not since cohabited with her.

Plaintiff's testimony was corroborated by Richard T. Scott and there was no other evidence presented to the trial court. Upon this state of the record, the trial court denied the annulment stating in effect that he did not believe the plaintiff's testimony.*

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* The trial judge stated:

"I am satisfied that there isn't any minister in the City of Las Vegas or anywhere else that is ordained, that will marry a drunken person that is drunk to that extent."

[1, 2] This is the sole question presented for our determination:

Was the trial judge correct in rejecting the uncontradicted, unambiguous, unimpeached, plain and probable testimony of plaintiff and his corroborating witness?

This question must be answered in the negative and is governed by this rule: Testimony which is not inherently improbable and is not impeached or contradicted by other evidence must be accepted as true by the trier of fact. (Shepard v. Shepard, 65 Cal.App. 310, 313 et seq., 223 P. 1012. See also Gomez v. Cecena, 15 Cal.2d 363, 366, 101 P.2d 477.)

[3, 4] Applying the foregoing rule to the facts of the instant case, it is apparent that the trial judge was in error in arbitrarily refusing to accept the testimony of plaintiff as true. Such testimony was uncontradicted, unambiguous, unimpeached and plain. The testimony was also *not inherently improbable.* It is a matter of common knowledge that occasionally parties submit to a marriage ceremony when one of the persons is under the influence of an intoxicating beverage to the extent that such person is of unsound mind and does not know what is taking place, thus being unable to enter into a contract. (McNee v. McNee, 49 Nev. 90, 237 P. 534. See also cases cited in 28 A.L.R.(1924) p. 648.) In such case the intoxicated participant is entitled to have the marriage annulled. (Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L.R.A.,N.S., 818, Ann. Cas.1913B, 1230.

[5] In view of the evidence it was the duty of the trial court to find that plaintiff at the time of the purported marriage ceremony was so inebriated that he did not know what he was doing and to award him an annulment of the purported marriage.

For the foregoing reasons, the judgment is reversed and the trial court is directed to enter a decree in accordance with the prayer of plaintiff's complaint.

MOORE, P. J., and WILSON, J., concur.

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85 Cal.App.2d 631

TURKINGTON et al. v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO.

Civ. 13439.

District Court of Appeal, First District,
Division 1, California.
May 25, 1948.

1. Contempt 🔑40, 63(1)

Contempt proceedings are quasi criminal in character, and judgments of conviction in such cases are governed by the rules applicable to criminal cases.

2. Contempt 🔑54(4), 60(1)

All of the elements of a charged contempt must be averred in the affidavit of the accuser and must be developed in the proofs.

3. Contempt 🔑54(4), 60(1)

In contempt proceeding initiated by traffic court to punish members of chamber of commerce highway committee for publishing a resolution condemning court's enforcement of city traffic and parking regulations and requesting the judge's removal from office, failure of accusing judge to plead or prove that defendants ever intended that their resolution should be brought to the attention of the court by publication or otherwise was fatal.

4. Contempt 🔑52
Judges 🔑49(1)

In a "direct contempt", that is, a contempt in the immediate presence of the court, the judge in whose presence the contempt was committed possesses the constitutional power to punish the offender summarily, and in such a case no question of disqualification of the judge affronted by the direct contempt can arise.

See Words and Phrases, Permanent Edition, for all other definitions of "Direct Contempt".

5. Contempt 🔑2

A judge as a judge is no more committed to use the contempt process to punish an affront than is a private individual, the only justification for a contempt proceeding being to punish an interference with the orderly administration of justice.

6. Judges 🔑49(1)

Where an alleged contempt of court is an indirect one and where it consists of charges made against a particular judge in the absence of some impelling necessity, the judge who has been affronted should not preside over the proceedings.

7. Judges 🔑56

If a judge is disqualified all of his actions in the proceeding after such disqualification appears would be void. Code Civ.Proc. § 170, subd. 5.

8. Judges 🔑51(4)

Under the statute providing that a judge shall not sit in an action where by reason of bias an impartial trial cannot be had before him, once a judge is challenged on such ground his right to preside over the entire proceedings is suspended until the basic question of his qualifications is determined. Code Civ.Proc. § 170, subd. 5.

9. Judges 🔑53

Under the statute providing for disqualification of a judge, where it is shown that an impartial trial cannot be had because of his bias, failure to urge the disqualification on the grounds of bias and prejudice as provided may constitute a waiver of the objection. Code Civ.Proc. § 170, subd. 5.

10. Judges 🔑51(2)

Under the statute providing for disqualification of a judge on grounds of bias and prejudice where complaint is filed at "earliest practicable opportunity" and before the commencement of the hearing of any issue of fact, a statement objecting to the qualification of the judge filed within four days of filing of contempt charges was not delayed an unreasonable time. Code Civ.Proc. § 170, subd. 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Earliest Practicable Opportunity".

11. Judges 🔑51(3)

Affidavits of disqualification of a judge are generally insufficient when they merely state the conclusions of the affiant or are based on hearsay. Code Civ.Proc. § 170.

12. Contempt 🔑67

In contempt proceeding wherein defendants filed a statement of prejudice on ground that judge was the victim, accuser, prosecutor, court, and jury, and urged as grounds for disqualification newspaper articles containing quotations of the judge's comments about the controversy showing that he was biased, and where the judge treated the statement as a proper one and ruled it sufficient and did not appeal from his own ruling, court could not later for the first time on appeal from a certiorari proceeding to test his refusal to disqualify himself complain that the statement alleging disqualification was insufficient as based upon hearsay. Code Civ.Proc. § 170.

13. Constitutional law 🔑90
Contempt 🔑8

If a person by false charges against a court does directly interfere with the administration of justice, he may be punished for a constructive contempt and the constitutional guaranty of freedom of speech will not protect him, but, before he can be so punished, the false charges must be of such nature that they not only have a reasonable tendency to obstruct justice, but must also constitute a clear and present danger to the administration of justice.

14. Constitutional law 🔑90

A false publication that merely tends to obstruct justice is not sufficient to justify the interference with the constitutional right to free speech by punishment for contempt, and there must accompany such tendency a "clear and present danger" of such obstruction, and such danger must be both imminent and serious.

See Words and Phrases, Permanent Edition, for all other definitions of "Clear and Present Danger".

15. Contempt 🔑8

Even though the criticism of a judge's action in a pending case is untruthful, is harsh and intemperate, and arises out of improper motives, it does not constitute a contempt unless there is a clear and present danger to the orderly administration of justice and such danger must be serious and imminent.

16. Contempt ⚷8

Resolution of traffic and highway committee of chamber of commerce, published in newspapers of San Francisco, seeking removal of the judge of the traffic court in effect amounting to a criticism of the judge's general attitude toward traffic regulations, the public officers whose duty it was to enforce them, and charging that he favored certain traffic offenders, further charging that his actions had "lessened his efficiency and his dignity and that he ought to be removed as unsuited to the duties required of him", did not constitute an "imminent peril to the orderly administration of justice" so as to authorize conviction of members of the committee of either direct or constructive contempt of court.

See Words and Phrases, Permanent Edition, for all other definitions of "Imminent Peril to the Orderly Administration of Justice".

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Certiorari proceeding by Edward L. Turkington and others to review a contempt proceeding initiated sua sponte by the Municipal Court of the City and County of San Francisco, State of California, against the petitioners. From an order denying the writ, petitioners appeal.

Order appealed from reversed.

Wright & Larson and Heller, Ehrman, White & McAuliffe, all of San Francisco, for appellants.

Philip Adams, of San Francisco, for American Civil Liberties Union.

Emanuel Redfield, of New York City, amicus curiae in support of appellant.

J. W. Ehrlich and James Martin MacInnis, both of San Francisco (Victor E. Cappa and Roy A. Sharff, both of San Francisco, of counsel), for respondent.

PETERS, Presiding Justice.

On February 25, 1946, Judge Twain Michelsen, who then and for some time prior thereto had been presiding over the traffic department of the Municipal Court of San Francisco, filed an affidavit and issued an order to show cause returnable before himself directing the thirty-eight members of the Street and Highway Committee of the San Francisco Chamber of Commerce to show cause why they should not be punished for a constructive contempt described in the affidavit. The judge, on the same date, likewise signed an order shortening time, making the order returnable at 11:00 a.m. March 1, 1946, it being provided that service could be made up to 1:00 a.m. on March 1, 1946. Thus those accused of the contempt had, at most, a little over three days to prepare their defense, and conceivably could have had but ten hours. Most of the accused were served, appeared on the appointed day, filed formal appearances, and answers to the order to show cause. One of the accused—Don Fazackerley—in addition, filed a statement challenging the qualifications of the judge to hear the proceeding on the ground that the judge was biased and prejudiced. As to Fazackerley, the court continued the proceeding for one week. As to the rest of those appearing, the court, over vigorous objections of all of the accused then present that the court had no jurisdiction, proceeded to hear the contempt proceeding. At the conclusion of the hearing, the judge dismissed the proceedings as to some of the accused, found twenty of the accused guilty of contempt, fined each of them $25, and in default of payment, each was to be imprisoned in the county jail at the rate of one day's imprisonment for every $2 of the fine. The accused thereupon petitioned the Superior Court for a writ of certiorari. The writ was denied. The accused thereupon perfected two appeals, one joined in by nineteen of the accused, which is the appeal now under consideration, and the other perfected by Ernest Ingold alone, which will be considered hereafter, infra, 193 P.2d 802.

The affidavit of Judge Michelsen, which is the basis of this proceeding, avers that he was the traffic judge of the Municipal Court; that he had pending in his court many undetermined traffic cases; that the accused were members of the Traffic and Highway Committee of the Chamber of Commerce; that on February 23, 1946, the members of that committee issued and signed, and the newspapers published, a resolution reading as follows:

"Whereas, there exists in San Francisco an Automobile and Truck Traffic and Parking Problem recognized by all, and

"Whereas, by the creation of one way streets, limited and no parking areas, synchronization of traffic signals, sidewalk pavement and curb markings and signs, the condition was helped, and

"Whereas, the Judge of the Traffic Court presently presiding, has, for no reason, or for various reasons, condemned and criticized the regulations properly imposed, and

"Whereas, the Judge of the Traffic Court has by his public utterances and conduct brought disrespect, confusion, nonenforcement, violation, a worsened parking and traffic situation, and

"Whereas, the Judge of the Traffic Court has by his actions lessened the dignity and efficiency of his office as Judge, and has impaired or nullified the ability of the officers of the law charged with the enforcement of traffic and parking regulations to carry out their duty, all to the detriment of the city and its people,

"Therefore, be it resolved, that this committee requests of the proper authorities that the present Judge of the Traffic Court, Twain Michelsen, be immediately removed from his office as unsuited to the duties required of him, and that he be replaced by a judge who will carry out the laws and regulations as they are properly established without discrimination, favor or personal bias."

The affidavit alleged that the "charges" in the resolution were untrue and avers that they "tended to and actually did: * * * Interfere with the orderly and due administration of justice in cases involving traffic laws and regulations; * * * Bring into disrepute the municipal court and the Judge thereof, and expose the court and said judge to public disfavor, distrust and suspicion." It is also generally alleged that such resolution impeded, embarrassed and obstructed the court and judge thereof in the discharge of its and his duties.

[1-3] At the hearing of March 1, 1946, the appellants admitted joining in the resolution and in submitting it to the Board of Directors of the Chamber of Commerce, but they denied that they authorized or participated in its release to the newspapers, professing ignorance as to how the newspapers secured a copy of the resolution. If the sufficiency of the evidence were the only point in the case, a quite logical argument could be made to the effect that the respondent failed to prove an essential element of the charge, and, in fact, failed to allege it properly. The affidavit merely alleges that after the resolution was adopted it was "distributed" to the newspapers, without alleging that the appellants in any way authorized or joined in such distribution. The evidence fails to cure that defect. The basis of the alleged contempt was that, because of the publication of the resolution in the newspapers, it tended to interfere with the orderly administration of the traffic court. Obviously, the mere adoption of the resolution and its transmittal to the Board of Directors could not have interfered with the orderly administration of the traffic court unless the resolution were brought to the attention of the court by publication or otherwise. The proof not only fails to show that appellants in any way authorized the publication, but shows that they did not. It must be remembered that contempt proceedings are quasi-criminal in character (Hutton v. Superior Court, 147 Cal. 156, 81 P. 409), and that judgments of conviction in such cases are governed by the rules applicable to criminal cases. Mattos v. Superior Court, 30 Cal.App.2d 641, 86 P.2d 1056. All of the elements of the charged contempt must be averred in the affidavit of the accuser and must be developed in the proofs. In the present case it might well be held that there was a fatal defect in the pleading and proof in that it was not pleaded or proved that appellants ever intended that their resolution should be brought to the attention of the court by publication or otherwise.

[4] There is another preliminary matter to which reference should be made. The alleged contempt, if a contempt at all,

was a constructive contempt and not a direct contempt. In a direct contempt, that is a contempt in the immediate presence of the court, the judge in whose presence the contempt was committed possesses the constitutional power to punish the offender summarily. Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767; Bulcke v. Superior Court, 14 Cal.2d 510, 94 P.2d 1006. Such power is necessary to preserve the integrity of the court. In such a case no question of the disqualification of the judge affronted by the direct contempt can arise. The necessities of the case require that the affronted judge preside. But no such necessity exists in the case of an indirect or constructive contempt. The federal cases hold that unless there is some emergency, and none here was pleaded, proved or found, the affronted judge who prefers the charges should not sit in the contempt proceedings. Thus in the Cooke case, supra, 267 U.S. at page 539, 45 S.Ct. at page 395, 69 L.Ed. 767, the court stated:

> "The power of contempt * * * is most important and indispensable. But its exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward, and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency, but it is not always possible. * * * All we can say upon the whole matter is that, where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge, called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. [Citing cases.]
>
> "The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows. We think, therefore, that when this case again reaches the District Court, to which it must be remanded, the judge who imposed the sentence herein should invite the senior Circuit Judge of the circuit to assign another judge to sit in the second hearing of the charge against the petitioner."

In Cornish v. United States, 6 Cir., 299 F. 283, at page 285, another constructive contempt case, the federal court stated: "Another matter should be mentioned. The publication claimed to be contemptuous was dominantly a libel upon the individual judge who had issued the injunction. In such a case, and where there is no impelling necessity or exigency, we greatly deprecate the prosecution of contempt proceedings before that same judge * * *." See, also, Toledo Newspaper Co. v. United States, 6 Cir., 237 F. 986, 988; Coll v. United States, 1 Cir., 8 F.2d 20, 24.

[5, 6] The thought expressed in these cases applies with particular force to the instant case. The charges contained in the resolution constituted an accusation against the character and integrity of Judge Michelsen. It was he who filed the affidavit. He then secured the services of two attorneys to represent him in prosecuting the case. He then acted as judge and jury in trying the proceeding over appellants' vigorous objections. Thus the person claiming to be the victim became the accusser, prosecutor, judge and jury. The proceeding became, in effect, a means of vindicating Judge Michelsen rather than a means of vindicating the integrity and dignity of the court. It must be remembered that a judge as a judge is no more permitted to use the contempt process to punish an affront than is a private individual. The only justification for a contempt proceeding is to punish an interference with the orderly administration of justice. It is most important that contempt proceedings be put, as far as possible, beyond the reach of even unjust criticism. Where the alleged contempt is an indirect one, and where it consists of charges made against a particular judge, in the absence of some impelling necessity, the judge who has been affronted should not preside over the proceedings.

This issue, relating to the possibility of the disqualification of Judge Michelsen, becomes even more pointed when the facts relating to the Fazackerley statement challenging the judge's qualifications are considered. On the return date of the order to show cause Fazackerley filed his statement challenging the qualifications of the judge, and requesting that another judge hear the matter, on the grounds that Judge Michelsen was interested in the action being the complaining witness, and because he was "biased and prejudiced so that a fair and impartial trial cannot be had before him." In support of the charge various statements purportedly made by Judge Michelsen to the reporters and printed in the newspapers are quoted, in which various heated counter-charges were allegedly made by the judge. Fazackerley prayed "on behalf of himself and the other parties hereto" that another judge be assigned to hear the proceeding. Judge Michelsen, in apparent compliance with § 170 of the Code of Civil Procedure, ruled that the proceeding as to Fazackerley should be continued one week, but held that the appellants had no right to urge the disqualification issue based on the Fazackerley statement because they had not individually filed similar statements. The appellants persistently requested a continuance to permit the judge's qualifications to be passed upon, but all such motions were denied. What happened to the contempt proceeding against Fazackerley, or to his challenge against the judge, does not appear in the present record.

[7] There is some merit in the argument that, when Judge Michelsen's qualifications were challenged by Fazackerley on a ground not limited solely to Fazackerley but applicable to all of the accused, the effect of such challenge was to deprive the challenged judge of jurisdiction over the proceeding until his qualifications had been passed upon. Of course, if the judge were disqualified, all of his actions in the proceeding, after such disqualification appeared, would be void. Giometti v. Etienne, 219 Cal. 687, 28 P.2d 913; Briggs v. Superior Court, 215 Cal. 336, 10 P.2d 1003; Cadenasso v. Bank of Italy, 214 Cal. 562, 6 P.2d 944. Section 170(5) of the Code of Civil Procedure provides that: "When it is made to appear probable that, by reason of bias or prejudice of such justice, judge, or justice of the peace a fair and impartial trial can not be had before him," he shall not sit or act in the action or proceeding involved. The same section also provides for the judge disqualifying himself when he has knowledge of any facts that would disqualify him under the section, but if such facts exist and he fails to disqualify himself "any party to such action or proceeding who has appeared therein" may present and file a written statement of objection to "the hearing of such matter or the trial of any issue of fact or law in such action or proceeding before such judge." The section requires that the statement of objection "shall be presented at the earliest practicable opportunity, after his appearance and discovery of the facts constituting the ground of the judge's disqualification, and in any event before the commencement of the hearing of any issue of fact in the action or proceeding before such judge." When such a statement is filed it is then provided that the challenged judge is deprived of power to pass on the question of his own qualifications, and that such question shall be passed upon by another judge. Of course, until such question is decided, the challenged judge is without jurisdiction to proceed.

[8] Now what does this section mean? It does not specifically provide for the disqualification in toto of the challenged judge as to all parties to an action when only one party, or any greater number but less than all, files a statement of disqualification on grounds applicable to all of the parties. But, although the section contains no express language on this subject, the proper interpretation of the language that is used would seem to indicate that, once a judge is challenged on such grounds, his right to proceed over the entire proceedings is suspended until the basic question of his qualifications is determined. As already noted, the section provides that no judge shall act in any action or proceeding when it is made to appear probable that a fair and impartial trial cannot be had before him, and then the section allows any party to file the required statement. It is not difficult to spell out of such language a pur-

pose to disqualify the judge from presiding over the proceeding once the showing of disqualification is made by anyone having the right to raise the issue, i.e., by any party. It is the fact of disqualification that is important, not who raises it, as long as it is raised as provided in the section. It is most important that the decisions of courts should be afforded the respect and confidence of the community, but, in order to warrant such respect and confidence, it is fundamental that such decisions should be above the suspicion that they were rendered by a judge who was biased and prejudiced and had an interest in the litigation. (See, generally, Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 333, 187 P. 1056. It could well be argued that the Fazackerley statement redounded to the benefit of all of the accused, particularly where all of the accused called the attention of the court to the facts that the prayer of the statement was on behalf of Fazackerley and all of "the other parties hereto," and that "the other parties" desired to urge the same grounds of disqualification.

[9, 10] While it is true that, since the amendments to § 170 of the Code of Civil Procedure, a failure to urge the disqualification on the grounds of bias and prejudice as provided in the section may, under some circumstances, constitute a waiver of the objection (Krebs v. Los Angeles Ry. Corporation, 7 Cal.2d 549, 61 P.2d 931), there can be no doubt that the Fazackerley statement was filed within the time limited in the section. As already pointed out, the section requires the statement to be filed at the "earliest practicable opportunity" and "before the commencement of the hearing of any issue of fact." Here the statement was filed before the hearing of any issue of fact. It was filed within four days of the filing of the charges. The exact date Fazackerley was served does not appear. There was no impelling reason for haste. Certainly four days, and perhaps much less, cannot be held to be an unreasonable time. Moreover, Judge Michelsen must have believed that the Fazackerley statement was filed in time because, as soon as it was called to his attention, he immediately and quite properly continued the proceeding as to Fazackerley. Under such circumstances respondent is in no position to argue now that the statement was filed too late.

[11] In apparent recognition of the fact that the Fazackerley statement, if in proper form, might have disqualified the judge as to all of the parties, respondent argues that even as to Fazackerley the statement of disqualification was legally insufficient. In this respect respondent points out that such statement urged as grounds for disqualification certain newspaper articles containing "quotations of said Judge Twain Michelsen's comments and statements" about the controversy, which, on information and belief, are alleged correctly to quote the judge, and which, it is claimed, showed that the judge was "inflamed and biased." Respondent then cites the well-settled rule that affidavits of disqualification are generally held insufficient when they merely state the conclusions of the affiant, or are based on hearsay. Ephraim v. Superior Court, 42 Cal.App.2d 578, 109 P.2d 378; People v. Nolan, 126 Cal.App. 623, 14 P.2d 880.

There are two answers to this contention. It must be remembered that Judge Michelsen does not contend that he did not make the statements in question, nor does he contend that he was misquoted. He based his charges against appellants on newspaper articles quoting the resolution, without even alleging on information and belief or otherwise that the appellants had authorized the publication of such articles. In view of the nature of the controversy, it was most appropriate for Fazackerley to cite newspaper articles purporting to quote the judge on the issue involved. Under such circumstances the statement was legally sufficient. This conclusion is strengthened by the fact that the judge's personal interest in the case was apparent to all, he being the victim, accuser, prosecutor, court and jury.

[12] In the second place, respondent is in no legal position to urge at this late date that the Fazackerley affidavit was insufficient. Judge Michelsen treated the statement as a proper one, and continued the matter as to Fazackerley for one week. He

thus ruled that the statement was sufficient, and respondent, not having appealed, is in no position to challenge such ruling.

[13] Any of the points heretofore discussed might well require a reversal, but it is not necessary to rest our decision solely on any one or all of such points. There is another and conclusive reason why the order denying the writ of certiorari must be reversed, and that is that the publication of the resolution (assuming appellants authorized its publication) was not a constructive contempt at all. To punish appellants on such a charge would constitute an invasion of their constitutional right of free speech. The constitutional guarantee is a fundamental one and is couched in the broadest of language. The right thus guaranteed is, of course, not unlimited. One such limitation is that no person is permitted to impede the orderly administration of justice. If a person, by false charges against a court, does directly interfere with the administration of justice he may be punished for a constructive contempt, and the constitutional guarantee will not protect him. But before he can be so punished the false charges must be of such a nature that they not only have a "reasonable tendency" to obstruct justice, but also must constitute "a clear and present danger" to the administration of justice. Intemperate language, false charges, and unfair criticism, no matter how strongly expressed, may be in bad taste, but they do not constitute a constructive contempt unless there is an immediate, clear and present danger imperiling the administration of justice. These principles have been firmly fixed by the recent decisions of the United States Supreme Court, and those decisions, interpreting as they do a provision of the United States Constitution, are binding on this court.

In the early federal cases there appears some confusion as to where the right of free speech or of the press ended and the right to punish for contempt began. In Toledo Newspaper Co. v. United States, 247 U.S. 402, 38 S.Ct. 560, 62 L.Ed. 1186, the Supreme Court attempted to clarify this confusion and laid down the rule that a false utterance could be punished as a contempt if it had "a reasonable tendency" to interfere with the administration of justice. To use the exact words of the court in 247 U.S. at page 421, 38 S.Ct. at page 565, 62 L.Ed. 1186: "* * * the wrong depends upon the tendency of the acts to accomplish this result without reference to the consideration of how far they may have been without influence in a particular case." But as early as Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470, this concept began to be questioned, and the so-called "clear and present danger" test began to be discussed. Finally, in Nye v. United States, 313 U.S. 33, 52, 61 S.Ct. 810, 85 L.Ed. 1172, the court expressly overruled the Toledo Newspaper case insofar as it held that the test was the "reasonable tendency to obstruct justice," and again spoke of the "clear and present danger" test. Then in Bridges v. California, consolidated with Times-Mirror Company v. Superior Court, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192, 159 A.L.R. 1346, decided in 1941, the Court attempted to define more clearly the principles that should control in determining in a particular case whether the constitutional right of free speech or the common law duty of court to protect the right to a fair trial should prevail. In both of these cases the petitioners had been found guilty of contempt and the Supreme Court of California had affirmed (Bridges v. Superior Court, 14 Cal.2d 464, 94 P.2d 983; The Times-Mirror Co. v. Superior Court, 15 Cal.2d 99, 98 P.2d 1029, and the Supreme Court of United States reversed. In the Times-Mirror case the facts were that two labor union members had been convicted of assault. The trial court had pending before it applications for probation. Under such circumstances the newspaper in its editorial columns discussed the merits of the cases at length, vigorously denounced the two men who had been convicted, and strongly recommended that the trial court should deny probation. In the Bridges case a motion for a new trial was pending in a labor dispute case. While such motion was pending Bridges telegraphed to the Secretary of Labor condemning the decision as "outrageous" and threatened that unless a new trial were granted he would call a Pacific

Coast strike. In both cases the comment was about a pending case, and in both cases strong, intemperate and untrue remarks were made. The Supreme Court of the United States assumed that in both cases the accused were attempting to influence the course of pending litigation in the trial court. In both cases the trial court found, and the Supreme Court of California affirmed the finding, that the acts had a reasonable tendency to interfere with the orderly administration of justice. Nevertheless, the judgment was reversed, the Supreme Court holding that, as a matter of law, the comments did not present a clear and present danger to the orderly administration of justice. The majority of the court (the decision was 5 to 4) pointed out that prior decisions had established the rule that the constitutional right to free speech must be protected unless the comments about a court or judge are of such a nature "as to create a clear and present danger that they will bring about the substantive evils." In 314 U.S. at page 261, 62 S.Ct. at page 193, 86 L.Ed. 192, 159 A.L.R. 1346. At page 262 of 314 U.S., page 193 of 62 S.Ct., page 192 of 86 L.Ed., page 1346 of 159 A.L.R., it is stated:

"Moreover, the likelihood, however great that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', * * * it must be 'serious', * * *.

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. * * * For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

The Court then refutes the argument that, regardless of the free speech provision, this country adopted the English common law on the subject of contempts where a "'reasonable tendency' to obstruct justice" is all that is required, and then stated, 314 U.S. at page 270, 62 S.Ct. at page 197:

"* * * The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

"The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases."

At page 273 of 314 U.S., page 198 of 62 S.Ct., page 192 of 86 L.Ed., page 1346 of 159 A.L.R., appears the following comment: "In accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." The Court then held that the editorials and telegram did not create, as a matter of law, a clear and present danger.

[14] There thus emerges from the Bridges' case a rule that had been strongly hinted at in earlier cases, but now couched in the strongest and most positive language,

to the effect that a false publication that merely tends to obstruct justice is not sufficient to justify the interference with the constitutional right to free speech by punishment for contempt, and that there must accompany such tendency a clear and present danger of such obstruction. Such danger must be both "imminent" and "serious."

It is true that the Bridges' case was a five-to-four decision, but that case does not stand alone. Five years later, in 1946, the Supreme Court reaffirmed that case in Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295. There were no dissents in the Pennekamp case, but three justices wrote separate concurring opinions. In this case the contempt charges were based on newspaper editorials bitterly, unfairly, and untruthfully attacking the Florida Circuit Judges for dismissing certain criminal charges. The Florida courts found that the newspaper had willfully and recklessly withheld the truth from the public, and that the motive behind the publication was to abuse and destroy the efficiency of the courts, and on this ground the Florida Supreme Court affirmed the convictions. 156 Fla. 227, 22 So.2d 875. Nevertheless, all of the justices participating in the four opinions of the Supreme Court of the United States held that the judgment must be reversed. The majority opinion had this to say about the Bridges' case, 328 U.S. at page 334, 66 S.Ct. at page 1031, 90 L.Ed. 1295:

"Bridges v. California fixed reasonably well marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation. The case placed orderly operation of courts as the primary and dominant requirement in the administration of justice. * * * This essential right of the courts to be free of intimidation and coercion was held to be consonant with a recognition that freedom of the press must be allowed in the broadest scope compatible with the supremacy of order. A theoretical determinant of the limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the clear and present danger rule. The evil consequence of comment must be 'extremely serious and the degree of imminence extremely high before utterances can be punished.' * * * It was, of course, recognized that this formula, as would any other, inevitably had the vice of uncertainty, * * * but it was expected that from a decent self-restraint on the part of the press and from the formula's repeated application by the courts standards of permissible comment would emerge which would guarantee the courts against interference and allow fair play to the good influences of open discussion. As a step toward the marking of the line, we held that the publications there involved were within the permissible limits of free discussion."

The majority opinion then also stated, in 328 U.S. at page 344, 66 S.Ct. at page 1035, 90 L.Ed. 1295:

"From the editorials, the explanations of the petitioners and the records of the court, it is clear that the full truth in regard to the quashing of the indictments was not published. We agree with the Supreme Court that the Rape Cases were pending at the time of the editorials. We agree that the editorials did not state objectively the attitude of the judges. We accept the statement of the Supreme Court that under Florida law, 'There was no judgment that could have been entered in any of them except the one that was entered.' [156 Fla. at page 240], 22 So.2d at page 882. And, although we may feel that this record scarcely justifies the harsh inference that the truth was willfully or wantonly or recklessly withheld from the public or that the motive behind the publication was to abase and destroy the efficiency of the courts, we may accept in this case that conclusion of the Florida courts upon intent and motive as a determination of fact. * * *

"The acceptance of the conclusion of a state as to the facts of a situation leaves open to this Court the determination of federal constitutional rights in the setting of those facts."

The Court then had this to say about the basic principles involved,, in 328 U.S. at page 346, 66 S.Ct. at page 1037, 90 L.Ed. 1295: "Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct. It does not follow that public comment of every character upon pending trials or legal proceedings may be as free as a similar comment after complete disposal of the litigation. Between the extremes there are areas of discussion which an understanding writer will appraise in the light of the effect on himself and on the public of creating a clear and present danger to the fair and orderly judicial administration. Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice."

And in 328 U.S. at page 348, 66 S.Ct at page 1038, 90 L.Ed. at page 1295, appears this language:

"The comments were made about judges of courts of general jurisdiction—judges selected by the people of a populous and educated community. They concerned the attitude of the judges toward those who were charged with crime, not comments on evidence or rulings during a jury trial. Their effect on juries that might eventually try the alleged offenders against the criminal laws of Florida is too remote for discussion. Comment on pending cases may affect judges differently. It may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess any more than it generally can depend on the personal equations or individual idiosyncrasies of the tort-feasor. * * * We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida. * * *

"What is meant by clear and present danger to a fair administration of justice? No definition could give an answer. Certainly this criticism of the judge's inclinations or actions in these pending nonjury proceedings could not directly affect such administration. This criticism of his actions could not affect his ability to decide the issues. * * *

"It is suggested, however, that even though his intellectual processes cannot be affected by reflections on his purposes, a judge may be influenced by a desire to placate the accusing newspaper to retain public esteem and secure reelection presumably at the cost of unfair rulings against an accused. In this case too many finedrawn assumptions against the independence of judicial action must be made to call such a possibility a clear and present danger to justice. For this to follow, there must be a judge of less than ordinary fortitude without friends or support or a powerful and vindictive newspaper bent upon a rule or ruin policy, and a public unconcerned with or uninterested in the truth or the protection of their judicial institutions. If, as the Florida courts have held and as we have assumed, the petitioners deliberately distorted the facts to abase and destroy the efficiency of the court, those misrepresentations with the indicated motives manifested themselves in the language employed by petitioners in their editorials. The Florida courts see in this objectionable language an open effort to use purposely the power of the press to destroy without reason the reputation of judges and the competence of courts. This is the clear and present danger they fear to justice. Although we realize that we do not have the same close relations with the people of Florida that is enjoyed by the Florida courts, we have no doubt that Floridians in general would react to these editorials in substantially the same way as citizens of other parts of our common country.

"As we have pointed out, we must weigh the impact of the words against the protection given by the principles of the First Amendment, as adopted by the Fourteenth, to public comment on pending court cases. We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it."

The latest expression of the United States Supreme Court on this subject is to be found in Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546, decided in May, 1947. The majority opinion was joined in by six justices and another wrote a very strong concurring opinion. Two justices dissented. Here the Texas courts had attempted to punish a publisher, an editorial writer and several reporters for editorial attacks and news stories unfairly and untruthfully commenting on the actions of an inferior court judge in granting a directed verdict against a serviceman tenant in a forcible detainer action. The alleged contemptuous publications were made while the motion for a new trial was still pending, and were found by the Texas courts to have been made with the intent to influence the court to grant the new trial. Ex parte Craig, Tex.Cr.App., 193 S.W.2d 178. After referring to the very strong findings of the Texas courts, the Supreme Court reviewed the law on the subject as follows in 331 U. S. at page 371, 67 S.Ct. at page 1252, 91 L.Ed. 1546: "The court's statement of the issue before it and the reasons it gave for holding that the 'clear and present danger' test was satisfied have a striking resemblance to the findings which the Court in Toledo Newspaper Co. v. United States, * * * held adequate to sustain an adjudication of contempt by publication. That case held that comment on a pending case in a federal court was punishable by contempt if it had a 'reasonable tendency' to obstruct the administration of justice. We revisited that case in Nye v. United States, * * * and disapproved it. And in Bridges v. State of California, supra, we held that the compulsion of the First Amendment, made applicable to the States by the Fourteenth * * * forbade the punishment by contempt for comment on pending cases in absence of a showing that the utterances created a 'clear and present danger' to the administration of justice. * * We reaffirmed and reapplied that standard in Pennekamp v. State of Florida, supra, which also involved comment on matters pending before the court."

The Court then expressed itself as follows in 331 U.S. at page 375, 67 S.Ct. at page 1254, 91 L.Ed. 1546:

"The only substantial question raised pertains to the editorial. It called the judge's refusal to hear both sides 'high handed,' a 'travesty on justice,' and the reason that public opinion was 'outraged.' It said that his ruling properly 'brought down the wrath of public opinion upon his head' since a serviceman 'seems to be getting a raw deal.' The fact that there was no appeal from his decision to a 'judge who is familiar with proper procedure and able to interpret and weigh motions and arguments by opposing counsel and to make his decisions accordingly' was a 'tragedy.' It deplored the fact that the judge was a 'layman' and not a 'competent attorney.' It concluded that the 'first rule of justice' was to give both sides an opportunity to be heard and when that rule was 'repudiated,' there was 'no way of knowing whether justice was done.'

"This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one 'who ventures to publish anything that tends to make him unpopular or to belittle him.' * * * The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."

The Court thereupon held that the publications, as a matter of law, did not constitute a clear and present danger within the meaning of the Bridges and Pennekamp cases.

[15] The reasoning of these three cases is conclusive in the instant case. The language of the questioned resolution was not nearly so intemperate or unfair as that employed by those charged in the Pennekamp and Craig cases. We may assume

that the charges contained in the resolution against Judge Michelsen were untrue, and we may assume that such charges were intended to affect his actions in pending traffic cases. But that is not the test. Even though the criticism of a judge's actions in a pending case is untruthful, is harsh and intemperate, and arises out of improper motives, it does not constitute a contempt unless there is a "clear and present danger" to the orderly administration of justice, and such danger must be "serious" and "imminent." The resolution amounts to a criticism of the general "attitude" of Judge Michelsen toward the traffic regulations, the public officers whose duty it was to enforce them, and charges that he favored certain traffic offenders. It will be recalled that in the Pennekamp case the publications likewise criticized the "attitude" of the District Judges toward persons charged with public offenses, and the writings there made specific mention of particular pending cases. The statements that Judge Michelsen's actions had "lessened his dignity and efficiency" and that he should be removed as "unsuited to the duties required of him" might have the "tendency to make him unpopular or to belittle him," but this was held, in the Craig case, to furnish no foundation for contempt proceedings, unless "the fires which it kindles must constitute an imminent, and not merely a likely, threat to the administration of justice." That one judge is more sensitive to public criticism than another does not empower the former to limit without sufficient cause the constitutional privilege of free speech. Pennekamp v. Florida, supra. Likewise, the charge that he "discriminated," "favored" and was "personally biased" to the advantage of charged offenders is within the permissible range of free comment as set out in the Pennekamp and Craig cases. In the Pennekamp case the judges were also charged with such favoritism of persons accused of crime, and in that case particular charged crimes were pointedly discussed. The publication in the Craig case charged favoritism of the judge toward the litigant who was opposing the serviceman. Indeed, the publications in the Craig case charged that the judge had gone so far as to even refuse to allow the serviceman "to be heard" on his own behalf. If such language as was used in the Pennekamp and Craig cases did not constitute an "imminent threat" to the administration of justice, it would seem certain that the language of the resolution herein cannot be held to have been such a threat.

[16] The holdings of the United States Supreme Court are binding on this court insofar as they constitute an interpretation of the federal Constitution. These holdings are based on the fundamental concept that the right of free speech is essential in a democracy, and should not be limited by the use of the contempt process except where there is a real impediment to the orderly administration of justice. In a society where the courts constitute a free and independent branch of the government, the judges of such courts cannot expect to be free from the perils of criticism and comment, any more than other public officials are free from such criticism or comment, except where such comment directly imperils the outcome of pending litigation. In a democracy, public officials, and this, within the limits above discussed includes judges, cannot expect to live in a rarified environment where they are free from criticism. They must expect to live in a more rugged atmosphere where their acts and qualifications are subjected to the perils of even pitiless publicity. Respect for the judiciary can never be secured in the minds and the hearts of the people by shielding the judges from such criticism. The dignity of the bench can never be preserved by muzzling those who desire to criticize. Enforced silence engenders suspicion and distrust, not respect. A judge must be presumed to possess judicial stamina, firmness and fortitude. He must be presumed to have the backbone to withstand the rigors of even unfair criticism. To hold, in the instant case, that the resolution involved constituted an "imminent" peril to the orderly administration of justice would require us to impute to the judge criticized a lack of the attributes we must presume he possesses. This we are not inclined to do.

The order appealed from is reversed.

WARD and BRAY, JJ., concur.

85 Cal.App.2d 651

INGOLD v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO.

Civ. 13497.

District Court of Appeal, First District,
Division 1, California.
May 25, 1948.

1. Constitutional law ⚷273
Contempt ⚷40

Contempt proceedings are governed by the principles applicable to criminal prosecutions, and in cases of constructive contempt the accused is entitled to due process which includes a reasonable opportunity to prepare and to present his defense.

2. Constitutional law ⚷273

In contempt proceeding for alleged constructive contempt in allegedly publishing a resolution demanding the judge's removal for alleged improprieties in traffic cases, where defendant was not served with order to show cause until evening preceding the hearing and had less than 24 hours to prepare his defense, refusal to permit a continuance so that counsel could prepare the defense and denying defendant the right to interrogate the judge on the truthfulness of the facts set forth in the resolution forming the basis for the contempt was a denial of due process of law.

◆

Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Certiorari proceeding by Ernest Ingold to review a contempt proceeding initiated sua sponte by the Municipal Court of the City and County of San Francisco, State of California, against the petitioner. From an order denying the writ, petitioner appeals.

Order reversed.

Henry J. Kleefisch, of San Francisco, for appellant.

J. W. Ehrlich and James Martin MacInnis, both of San Francisco (Victor E. Cappa and Roy A. Sharff, both of San Francisco, of counsel), for respondent.

PETERS, Presiding Justice.

This is a companion case to Turkington et al. v. Municipal Court, Cal.App., 193 P.2d 795. This appellant was a member of the same Chamber of Commerce committee involved in the Turkington case, and joined in passing the resolution discussed in that case. He was cited and tried for contempt in the same proceeding with the appellants in the companion case, and, like them, found guilty. He also petitioned the Superior Court for a writ of certiorari. Upon the denial of that petition he perfected a separate appeal. On this appeal he makes the same contentions that were made in the Turkington case, and which have been fully discussed in that case. Upon the authority and for the reason stated in that opinion the order here appealed from must be reversed.

In addition to all of the points raised by counsel in the Turkington case, this appellant emphasizes one additional point that is barely referred to in the briefs in the other case, and that is, that it was prejudicial error to have refused his motion for a continuance for the purpose of summoning witnesses. Inasmuch as the facts in reference to this point give some indication of the atmosphere in which this contempt proceeding was tried, and indicate the reason why the courts have frowned upon the judge who has been attacked presiding in a constructive contempt proceeding, a brief reference to such facts will be made.

It appears that this appellant was not served with the order to show cause until the evening preceding the hearing. He had had less than one day to prepare his defense. At the commencement of the hearing he moved for a setting of the matter to be "tried the same as any other matter." This motion was denied. He then repeatedly and persistently contended that Judge Michelsen was disqualified. All motions to disqualify the judge were denied. Appellant then moved that the matter be continued to permit the subpoenaing of witnesses. His counsel stated that he intended and desired to call Judge Michelsen as a witness and that, in his opinion, it was improper for the judge to sit and pass upon his own evidence. Counsel indicated that he wanted to interrogate the judge about the traffic cases decided by the judge since he had been appointed to the traffic court, apparently in the hope that in this fashion he could prove the truth of at least some of the charges contained in the resolution. Counsel for appellant also announced that he desired to interrogate the judge about certain of his extrajudicial statements made to the press. The motion was promptly denied, and the judge stated that the lawyer might question him but not upon his actions in traffic cases.

[1, 2] These actions of the judge amounted to a denial of due process. As already pointed out in the Turkington case, supra contempt proceedings are governed by the principles applicable to criminal prosecutions. In cases of constructive contempt the accused is entitled to due process which includes a reasonable opportunity to prepare and to present his defense. Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767; McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L.R.A. 691. This appellant had had less than twenty-four hours to prepare his defense. To deny to him and to his counsel time in which to prepare his defense, and to deny to him the right to interrogate the judge on the truthfulness of the very facts set forth in the resolution which formed the basis for the contempt, was to deny to him due process of law.

For the above reason, and for the other reasons set forth in full in the Turkington case, supra, 193 P.2d 795, the order appealed from is reversed.

WARD and BRAY, JJ., concur.

OLSON et al. v. BIOLA CO-OP. RAISIN GROWERS ASS'N et al.*

S. F. 17401.

Supreme Court of California.

June 4, 1948.

Rehearing Granted July 1, 1948.

1. Damages ⇨79(1), 157(3)

A contract which undertakes to fix amount of damages in anticipation of a breach of obligation is void to that extent except where it would be impracticable or extremely difficult to fix the actual damage, and hence party relying on a liquidated damage clause in contract must plead and prove facts validating his right to recover thereon. Civ.Code, §§ 1670, 1671.

2. Agriculture ⇨6

Under Agricultural Code, a nonprofit co-operative marketing association is permitted to fix by contract or by-laws liquidated damages to be paid on a breach of contract with respect only to sale, delivery, or withholding of products that may be subject matter of contract, and any attempt by association to go beyond such express statutory power must fall within statutory provisions which permit recovery of liquidated damages by contract only where it is impracticable or extremely difficult to fix the actual damages. Agricultural Code, § 1209; Civ.Code, §§ 1670, 1671.

3. Agriculture ⇨6

Marketing agreement providing that co-operative raisin growers association "buys and the grower sells" to association annually his crop of raisins contemplated a sale with future delivery and under Agricultural Code sale was completed and title passed to association upon delivery to and acceptance by association and its packer. Agricultural code, § 1208.

4. Agriculture ⇨6

Delivery of wet raisins by member growers to cooperative raisin growers association was not a breach of marketing agreement for which liquidated damages could be recovered under provision of Agricultural Code permitting a nonprofit co-operative marketing association to fix by contract or by-laws the liquidated damages to be paid for breach of contract with regard to sale, delivery, or withholding of products. Agricultural code, § 1209.

5. Agriculture ⇨6

The right of nonprofit co-operative marketing association under Agricultural Code to provide by contract or by-laws for liquidated damages to be paid for a breach of contract with respect to sale, delivery, or withholding of products extends only to breaches of contract with respect to the quantity of product to be delivered and not with respect to quality thereof. Agricultural Code, §§ 1209–1211.

6. Agriculture ⇨6

Section of Agricultural Code providing that any provisions of law in conflict with Agricultural Code shall not be construed as applying to nonprofit co-operative marketing associations did not render inapplicable, with respect to raisins of inferior quality sold by members to association, statutory provisions that a contract may not fix amount of damages to be paid for future breach except where it is impracticable or extremely difficult to determine the actual damages sustained, since such statutory provisions are not in conflict with Agricultural Code in such case. Agricultural Code, §§ 1208, 1209, 1213; Civ.Code, §§ 1670, 1671.

7. Agriculture ⇨6

Marketing agreement between co-operative raisin growers association and members, construed as a whole, manifested intent to provide for recovery of liquidated damages only where a grower failed or refused to deliver all raisins grown to association.

8. Contracts ⇨147(3)

The determination of meaning of a contract depends upon the intent of the parties as evidenced by entire agreement construed in the light of circumstances under which it was made. Civ.Code, §§ 1636, 1641.

TRAYNOR and SCHAUER, JJ., dissenting.

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Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

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* Subsequent opinion 204 P.2d 10.

Representative suit by A. J. Olson and others against Biola Cooperative Raisin Growers Association, a corporation, and others to recover liquidated damages for delivery of substandard raisins to the association in violation of a marketing agreement between association and its members. From an adverse judgment, defendants appeal.

Judgment reversed.

Prior opinion 184 P.2d 742.

Chester R. Andrews, William C. Crossland, Lawrence W. Young, and Milo Popovich, all of Fresno, for appellants.

Irvine P. Aten, Aynesworth & Hayhurst, and G. L. Aynesworth, all of Fresno, for respondents.

SPENCE, Justice.

Biola Cooperative Raisin Growers Association was organized as a nonprofit cooperative marketing association under the laws of the state of California. Plaintiffs—four members of the Association—brought this action, a representative suit, against the Association and the other sixteen members thereof, including the five directors, to recover liquidated damages alleged to be due by virtue of the delivery of raisins deemed to be substandard under the provisions of the marketing agreement between the Association and its various members. Eight of the individually named defendants were found to be so liable in conformity with the theory of plaintiffs' complaint, and judgment accordingly was entered against them in varying amounts computed upon the basis of their substandard tonnage delivery to the Association, the total sum being $19,856.79, plus interest, and costs. These defendants have appealed from such judgment, urging, as a principal ground for reversal, that liquidated damages were not properly assessable against them under the record in this case. Consideration of the language of the marketing agreement and the statutory regulations governing the disposition of such damage claim as is here made demonstrates the merit of defendants' argument distinguishing their default as one in quality rather than in quantity of crop delivery.

The record reveals that on October 20, 1944, plaintiff Chris H. Scheidt, "a grower member of the * * * Association," entered into an agreement with the Association whereby he undertook to process and pack the "raisin crop" of the Association "for the year 1944" for a specified sum per ton. He rented the Association's packing-house for the season, and the Association's members were obligated to deliver their raisins there "properly cured and in good condition" under the terms of their marketing agreement with the Association. Delivery of the raisins to Scheidt at the packing-house commenced soon after the date of the packing agreement and was concluded early in 1945. Although the Association was empowered under the marketing agreement to set up quality standards regarding "sugar and moisture content" to "be met by all raisins delivered by the Grower[s]," it had not done so. However, it appears that fifty-five per cent of the raisin crop in question was under contract for sale to the United States Government, and the federal regulations, introduced in evidence, permitted a moisture content of "not more than 18 per cent." Gauged by this standard, there was substantial evidence that some of the raisins delivered by the eight grower members of the Association against whom judgment was rendered had a higher moisture content so that they could not be run through the stemmer and processed without further drying. Finding that such raisins "were not properly dried and cured but were too wet and contained too much moisture and were too heavy for processing and marketing," the trial court determined the exact weight of the defective delivery made by each of the eight defaulting growers and accordingly proportioned against them plaintiffs' recovery of liquidated damages.

All of the members' raisins, both wet and dry, were delivered at the packing-house, which was under the control of plaintiff Chris H. Scheidt. He received them, knowing at the time of delivery or shortly thereafter that some of them were wet. He did report that fact to the officers of the Association but the wet raisins were neither rejected nor returned, and both he and the Association continued to permit the delivery and acceptance of wet raisins, all of which were ultimately sold. Some of the growers who had delivered wet raisins offered to remove them from the packinghouse and properly cure them at their own expense, but they were not permitted to do so. However, it appears that under the Government regulations, all of the raisins —both wet and dry—were sold for $180 per ton and each grower received an additional $10 per ton as an "incentive payment" or reward for drying his grapes instead of selling them fresh, so that no one suffered any loss by reason of the delivery of wet raisins.

With these basic factual considerations at hand, the determinative issue is whether plaintiffs, as representative members of the Association, may enforce the collection of liquidated damages for the default in question, premised solely upon the allegation that after demand, the directors failed to act because three of them, a majority of the board, were interested parties, having themselves delivered wet raisins to the packinghouse. The answer to this problem lies in an analysis of certain provisions of the Association's marketing agreement with its members, in the light of applicable language in the Agricultural Code bearing upon the exception of cooperative marketing associations from the rules governing the enforcement of liquidated damage claims under the general law of this state as expressed in sections 1670 and 1671 of the Civil Code.

Section 1 of the marketing agreement reads: "The Association buys and the Grower sells to the Association annually from the date of the signing of the By-Laws of the Association and this agreement *all* of the raisins owned and grown by the Grower, and agrees to deliver the same and all thereof *properly cured and in good condition* to the plant of the Association." (Emphasis added.)

Section 7 of the agreement contains the following stipulation: "In the event that Grower should *fail to deliver raisins* hereby sold *in accordance with the terms of this agreement* and these By-Laws, such act will injure the Association to an amount that is, and will be impracticable and extremely difficult to determine and fix, and that is, therefore, *fixed at the amount of Twenty-five (25%) per cent of the average current seasonal price for each and every ton of raisins that the Grower fails to deliver in accordance with the terms hereof* and these By-Laws, and which amount the Grower agrees to pay, and shall pay, to the Association upon demand * * *." (Emphasis added.)

And section 13 of the agreement states in part: "It is expressly understood and agreed that Grower has by this agreement agreed to and *will deliver the raisins herein contracted to be delivered to the Association,* or in lieu thereof to pay *liquidated damages* therefor as by this agreement provided for his *failure so to do * * *.*" (Emphasis added.)

Section 1209 of the Agricultural Code provides: "The by-laws or the marketing contract may fix, as *liquidated damages,* specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the *sale* or *delivery* or *withholding of products;* * * * and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties." (Emphasis added.) And the first paragraph of section 1213 of said code states: "Any provisions of law which are in conflict with this chapter shall not be construed as applying to the associations herein provided for."

[1] The general rule in this state is that a contract which undertakes to fix the amount of damages in anticipation of a breach of an obligation is void to that extent (Civil Code, sec. 1670) except "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." Civil Code, sec. 1671. Accordingly, it is held that a party relying on a liquidated damage clause in a contract must plead and prove the facts validating his right to recover such predetermined amount. Dyer Bros. Golden West Iron Works v. Central Iron Works, 182 Cal. 588, 593, 189 P. 445; Robert Marsh & Co., Inc. v. Tremper, 210 Cal. 572, 576, 292 P. 950; Rice v. Schmid, 18 Cal.2d 382, 385, 115 P.2d 498, 138 A.L.R. 589; Kekich v.

Blum, 43 Cal.App.2d 525, 527, 528, 111 P. 2d 411.

[2] However, an important exception to the general rule on the remedy of liquidated damages prevails in the case of a nonprofit cooperative marketing association, as declared by section 1209 of the Agricultural Code above quoted. This exception permits such an association and its members to stipulate in advance the amount of damages to be paid upon the breach of an obligation in the particulars of "the sale or delivery or withholding of products" forming the object of their agreement. While such statutory language constitutes a grant of power, that power is confined to the three subjects specifically mentioned so that any undertaking on the part of the association to go beyond those stated limits must fall within the provisions of sections 1670 and 1671 of the Civil Code, which, as heretofore noted, permit the recovery of liquidated damages only where it would be impracticable or extremely difficult to estimate actual damages—a matter of pleading and proof resting on the party seeking such redress.

Even in the absence of statute it was well established in this state that a nonprofit cooperative marketing association might contract for the payment by a member of a stipulated sum for the violation of his agreement to deliver *all* of his product to the association for processing and marketing. Anaheim Citrus Fruit Association v. Yeoman, 51 Cal.App. 759, 764, 197 P. 959; Poultry Producers of Central California, Inc. v. Murphy, 64 Cal.App. 450, 455, 221 P. 962; California Canning Peach Growers v. Downey, 76 Cal.App. 1, 11, 12, 243 P. 679; California Canning Peach Growers v. Harris, 91 Cal.App. 654, 655, 267 P. 572; see, also, Poultry Producers of Southern California, Inc., v. Barlow, 189 Cal. 278, 280, 281, 208 P. 93; California Bean Growers' Association v. Rindge Land & Navigation Co., 199 Cal. 168, 183, 248 P. 658, 47 A.L.R. 904. The validity of such a liquidated damage provision stemmed from the principle that the whole business scheme of the marketing association necessarily depended upon its ability to hold and control the subject matter of its operations, a consideration demonstrating the disrupting effect which a member's failure to deliver all of his product to the association would have on its successful functioning and the consequent elements of damage which would not be capable of any exact estimation. As was so aptly stated with regard to such breach in delivery to the citrus fruit cooperative involved in the Anaheim case, supra, 51 Cal.App. at pages 763, 764, 197 P. at page 961: "The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the nontransgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern. The argument would be the same, regardless of the quantity of fruit which might have been delivered by the defendant, whether it composed but a small fractional part or one-half or more of the entire product designed to be marketed by the plaintiff agency [the association]. Enough has been said, we think, to show that the case falls within the class as to which the law permits damages to be liquidated by contract in advance of their occurrence [Civ. Code, sec. 1671]. It follows as a necessary conclusion that plaintiff was entitled to recover the exact amount fixed in its contract as the sum per box which defendant should pay by reason of his failure to market [his] fruit in the manner agreed." The same line of reasoning was followed in Irwindale Citrus Association v. Semler, 60 Cal.App.2d 318, 323, 140 P.2d 716.

But all of these cases involved the *quantity* of the product contracted for delivery to the marketing association and the significance of a member's breach in that respect, so that a part of his product was released for distribution through other channels in competition with the cooperative enterprise and to the detriment of all the members thereof. The *quality* of the fruit delivered was not an issue and was not considered. The same distinguishing observations apply with respect to delivery breaches discussed in similar cases from other jurisdictions. See Phey Co. v. Salem Fruit Union, 103 Or. 514, 201 P. 222, 205 P. 970, 25 A.L.R. 1113; supplemented in Tobacco Growers'

Co-operative Ass'n v. Jones, 185 N.C. 265, 117 S.E. 174, 33 A.L.R. 247; 47 A.L.R. 936; Watertown Milk Producers Co-operative Ass'n v. Van Camp Packing Co., 199 Wis. 379, 225 N.W. 209, 226 N.W. 378, 77 A.L.R. 405; Neith Co-operative Dairy Products Ass'n v. National Cheese Producers Federation 217 Wis. 202, 257 N.W. 624, 98 A.L.R. 1406. In the instant case the *quantity* of the raisins delivered is not a point of dispute, as it is admitted that the members delivered *all* of their raisins to the Association for marketing. Rather here it is the *quality* of the raisins that is at issue, so that the present problem transcends the scope of the decided cases. However, they are significant because of their discussion of the economic considerations which tend to indicate the design of the statutory law expressive of the legislative policy with regard to the availability of liquidated damages in protecting the integrity of a cooperative marketing association.

[3, 4] Pursuant to these preliminary remarks, there is to be considered at the outset whether or not the grower members of the Association who delivered wet raisins to the packing-house violated their marketing agreement in any of the particulars specified in section 1209 of the Agricultural Code—that is, in regard to "the sale or delivery or withholding of products," as those terms are used in said section. Section 1 of the marketing agreement contemplates a sale of the raisins by the grower to the Association when it provides that "the Association buys and the Grower sells to the Association * * *" his crops of raisins—a sale with future delivery. This brings into operation the provision of section 1208 of the Agricultural Code that if a contract of sale is made, "it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery." So here a sale of the raisins occurred and was completed upon delivery to, and acceptance by, the Association and the packer Scheidt. In contrast to such "sale" arrangement as here prevails, cooperative marketing agreements frequently provide for an agency relationship, under which the grower agrees to deliver his crop to the association and appoints the association his agent to handle and market the crop for him and to return the net proceeds to him—a mere "delivery" arrangement whereby title to the crop does not pass to the association. But the equal importance of faithful performance of either type of obligation is expressly recognized in section 1209 in the specific mention of "sale or delivery * * * of products." The third reference in section 1209, the "withholding of products," would appear to apply to any act of the grower in holding back from the association any part of the crop which he has either sold or is otherwise bound to deliver to the association for marketing. As each grower member admittedly turned over *all* his raisins to the Association, and therefore made no default in performance with respect to quantity, we are of the opinion, for the reasons hereinafter stated, that a proper construction of the provisions of said section 1209 leads to the conclusion that plaintiffs failed to show a breach of any of the three conditions enumerated as the premise for the recovery of liquidated damages.

[5] The above view of the qualifying language of section 1209 of the Agricultural Code follows the theory that the right to delivery of its members' products is the most important right of a cooperative marketing association, a matter that was forcefully adjudicated in this state in the Anaheim and succeeding cases above cited, and which principle of judicial decision presumably governed the legislature's correlative statutory action on the subject. 23 Cal.Jur. 783, sec. 159. It was the *quantity,* not the *quality,* feature of the members' delivery that was considered the lifeblood of the cooperative and essential to the maintenance of its place in the competitive market. That such was the legislature's concept of the need for liquidated damages as a protective measure for cooperatives appears from other related sections of the Agricultural Code. Thus section 1210 provides that "in the event of any *such* breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific per-

formance thereof." (Emphasis added.) In so making the remedies of injunction and specific performance available to a cooperative marketing association on the same basis as the remedy of liquidated damages—that is, for the type of breach mentioned in section 1209, one "regarding the sale or delivery or withholding of products"—the legislature must have intended such judicial enforcement with relation to the members' promised delivery in *quantity* rather than to have the court undertake detailed supervisory measures to insure delivery not merely as to amount but likewise as to the *quality* of the product, depending on the performance of various farming operations which would yield the desired standard. Likewise section 1211 provides that "in any action upon such marketing agreements, it shall be conclusively presumed that a landowner or landlord or lessor is *able to control the delivery of products produced on his land* by tenants or others, * * *; and in such actions, the foregoing remedies for nondelivery or breach shall lie and be enforceable against such landowner, landlord or lessor." (Emphasis added.) In so recognizing that a grower might attempt to evade his obligation as to delivery under the marketing agreement by leasing his land to another thus supposedly divesting himself of control over the crop, and in rendering such device ineffectual, the legislature again evinced its intent that the matter of delivery within the landowner's control would be the *quantity,* not the *quality* dependent on various practices of husbandry that might prevail on the farm. In other words, these provisions all point to the fundamental tenet of exclusive dealing between such association and its members, in the sence of full delivery of the promised product, as the limit of legislative concern, and not the added consideration of variance in the condition of the product delivered with the involvement of multiple details as to farming operations.

[6] While plaintiffs do not cite any section of the Agricultural Code that specifically permits contracting for the recovery of liquidating damages for breach of an agreement as to the *quality* of the product to be delivered, they claim that such would be within the scope of the reference in section 1209 to "*any* provision of the marketing contract regarding the sale or delivery or withholding of products." In pursuance of this position, plaintiffs argue that in section 1 of the marketing agreement each grower contracted to deliver his raisins "properly cured and in good condition," and that this covenant was breached by the delivery of wet raisins; that in section 7 each grower agreed to pay the liquidated damages if he failed to deliver his raisins "in accordance with the terms of this agreement"; that this covenant was broken by the delivery of wet raisins which were neither "properly cured" nor "in good condition"; that thereupon the agreement to pay liquidated damages came into effect and could be enforced within the intent of the "omnibus provisions" of section 1209. They also argue that under the quoted language of section 1213 of the Agricultural Code, the provisions of section 1670 and 1671 of the Civil Code have no application in this case. But to construe section 1209 as an "omibus" provision would in effect eliminate any premise of limitation consistent with the three particulars mentioned as the basis for the contracting for liquidated damages and would allow such remedy for the breach of "any provision of the marketing contract," without qualification. However, the statute does qualify the availability of the remedy and, as above construed, it refers to "delivery" as embracing an agency relationship in contrast to a "sale," as here prevails. Accordingly, the word "delivery" cannot be said to connote there, as plaintiffs contend, "time, place, manner, object, quantity and quality"—an "omnibus" concept which would far exceed the idea of the fact of delivery of the promised amount as a measure of assurance to the cooperative marketing association that its whole scheme of organization would not be nullified by some of the product of its members reaching the public market through outside competitive channels, to its disadvantage and, perhaps, to its ultimate break-up. Since upon the record plaintiffs' claim involves the *quality,* not the *quantity,* of raisins delivered, the provisions of sections 1670 and 1671 are not in conflict with the provisions of the Ag-

ricultural Code insofar as the facts of this case are concerned, and section 1213 of the latter code does not aid their position.

[7, 8] Moreover, a study of the entire marketing agreement leads to the conclusion that it was the intention of the contracting parties to provide for the recovery of liquidated damages only when a grower member failed or refused to deliver *all* his raisins to the Association. Such overall examination accords with the fundamental rule that the determination of the meaning of a contract depends, in each case, upon the intent of the parties as evidenced by the entire agreement construed in the light of the circumstances under which it was made. Civ. Code, secs. 1636, 1641; Ogburn v. Travelers Insurance Co., 207 Cal. 50, 52, 276 P. 1004. In other words, the "sense and meaning of the parties to any particular instrument should be collected *ex antecedentibus et consequentibus;* that is to say, every part of it should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done." Balfour v. Fresno Canal and Irrigation Co., 109 Cal. 221, 227, 41 P. 876, 878.

So pertinent are these considerations of language in the parties' marketing agreement. Section 13 appears to be a summary of the prior provision on the subject of liquidated damages. It conditions the agreement to pay such sum upon the fact of failure to deliver. Likewise section 7, containing the agreed terms for the liquidated damages, suggests that it was intended to apply upon failure to deliver the full amount of the product, and not upon failure in the quality of the product. In addition to other provisions, the section expressly states that it would be "impracticable and extremely difficult to determine and fix" the damages "in the event that Grower should fail to deliver raisins hereby sold in accordance with the terms of this agreement," and accordingly, the damage liability is related directly to the circumstance of default in the promised tonnage of raisins. It has been held that such declaration is a true statement of a fact in the case of the failure to deliver to a cooperative marketing association, as the subject has been exhaustively discussed in the above-noted decisions in this and other jurisdictions. But the same result does not prevail in the case of the delivery of substandard raisins for the reason that raisins are graded, and each grade has an ascertainable market value which may vary from season to season and from time to time. Raisins not properly cured, of course, have a less market value than those properly cured. The loss from a violation of the contract specification as to *quality* may be ascertained and determined under the ordinary rules of the law of damages. Rice v. Schmid, supra, 18 Cal.2d 382, 385, 386, 115 P.2d 498, 138 A.L.R. 589. That the parties had such principle in mind for the assessment of damages in the event of delivery of a substandard lot of raisins appears from their failure to provide in their agreement a variable pecuniary standard, according to the degree of default, for the computation of liquidated damages rather than a flat rate which might be far in excess of the actual damages sustained where the default in quality was slight, and the resultant damage obligation would partake of the nature of a penalty, contrary to "the effort of the law" to "work [an] equitable result" in casting "upon the delinquent party a liability to respond to" a reasonable assessment of damages. Anaheim Citrus Fruit Association v. Yeoman, supra, 51 Cal.App. 759, 761, 197 P. 959; Mente & Co., Inc., v. Fresno Compress & Warehouse Co., 113 Cal.App. 325, 330, 331, 298 P. 126. Likewise the flat rate of liquidated damages provided in the marketing agreement might be wholly inadequate if the fruit delivered was greatly below the promised standard or the nature of the defect was such that the substandard lot might contaminate the other lots of raisins of the Association with which it was mixed, and so cause a very substantial loss, which the parties could not have reasonably anticipated in predetermining the damage liability as a "fair compensation for the loss sustained." Rice v. Schmid, supra, 18 Cal.2d 382, 386, 115 P.2d 498, 500.

In the light of the foregoing discussion, plaintiffs' position on this appeal cannot be sustained. The provisions of the Agricultural Code do not authorize a contract for the recovery of liquidated damages because of the inferior quality of the product delivered to and accepted by a nonprofit cooperative marketing association; and an analysis of the particular marketing agreement here in question does not show such damage liability to have been within the contemplation of the parties.

The judgment is reversed.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

TRAYNOR, Justice (dissenting).

I dissent.

In my opinion section 1209 of the Agricultural Code is not restricted to breaches of a cooperative marketing contract with respect to the quantity of products to be delivered, but applies to the breach of any provision of the marketing contract with respect to sale or delivery of the product by a member to the cooperative marketing association. The very wording of section 1209 precludes the construction advanced by the majority opinion: "The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of *any provision* of the marketing contract *regarding* the sale *or* delivery *or* withholding of products * * * and any such provision shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties." (Italics added.)

In restricting the enforceability under section 1209 of the contract provisions for liquidated damages to breaches of the marketing contract with respect to quantity, the majority opinion relies on Anaheim Citrus Fruit Association v. Yeoman, 51 Cal. App. 759, 763, 197 P. 959, 960, decided before the enactment of section 1209. The opinion suggests that because this case involved only breaches with respect to quantity, it is authority for the view that liquidated damages should not be available for breaches as to quality. The reasoning of the case, however, does not support such a conclusion. The Anaheim case established an exception to the general rule under sections 1670 and 1671 of the Civil Code that in order to enforce a provision for liquidated damages the plaintiff must prove that "it would be impractical or extremely difficult to fix the actual damage." See Sun-Maid etc. Co. v. Moseian & Sons, 90 Cal. App. 1, 6, 265 P. 828, and cases there collected. The reason for this exception was that "The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead costs to the nontransgressing members, but, we may assume, to some extent affect the prestige and standing of the association as a marketing concern." Anaheim C. F. Ass'n v. Yeoman, supra, 51 Cal.App. at page 763, 197 P. at page 961. Delivery of substandard products would in many cases likewise tend to increase the overhead costs by requiring extra sorting of produce and could easily affect the prestige and standing of the association as a marketing concern to the same extent as the failure of the member to deliver the proper quantity of the product.

If a cooperative association enters into contracts for future delivery of a specified quantity of its products of a specified standard, the injury to the association's reputation and prestige is the same whether it is unable to meet those obligations because some of its members fail to deliver the proper quantity or the proper quality of the product. It cannot normally meet the deficiency by purchases on the open market, because cooperative associations generally are not organized to handle products of others than their members. See California Bean Growers' Ass'n v. Sanders, 86 Cal. App. 689, 694, 261 P. 717. The injury to the association therefore cannot be measured by the value of the goods or the monetary loss on the contracts between the association and the purchaser regardless of the cause of the default.

It is evident that section 1209 of the Agricultural Code was adopted to clarify the position taken by the courts with reference to liquidated damages in cooperative marketing contracts. Before the adoption of section 1209 such contracts were held as a matter of law to involve elements of damages that would be impractical or extremely difficult to fix within the meaning of sections 1670 and 1671 of the Civil Code.

The Agricultural Code accomplishes the same result by making sections 1670 and 1671 inapplicable to clauses of cooperative marketing contracts for liquidated damages for breaches of the provisions of the contracts regarding the sale, delivery or withholding of products. See sec. 1213 of the Agricultural Code.

Although it is stated in the majority opinion that no one suffered any loss by reason of the delivery of wet raisins, the trial court found that the raisins in question were "too wet and contained too much moisture and were to heavy for processing." There was also evidence that the failure to deliver properly dried raisins embarrassed the association in its attempts to meet its contracts. Since the trial judge could have concluded that the breach as to quality prevented the association from meeting its contracts on time and caused substantial injury to the reputation or prestige of the association, the provision for liquidated damages was properly enforced by the trial court and the judgment should be affirmed.

SCHAUER, J., concurs.

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85 Cal.App.2d 686

PEOPLE v. HOUSER.

Cr. 589.

District Court of Appeal, Fourth District, California.

May 26, 1948.

1. Criminal law 🔑566

To sustain conviction it is not necessary that identification of defendant as perpetrator of crime be made positively or in a manner free from inconsistencies.

2. Criminal law 🔑741(2)

It is function of jury to pass on strength or weakness of identification and uncertainties of witness in giving her testimony.

3. Criminal law 🔑1160

In prosecution for lewd and lascivious conduct, question of strength or weakness of prosecutrix' testimony as to identification of defendant as perpetrator of crime was for jury, and trial court on motion for new trial.

4. Criminal law 🔑566

Evidence identifying defendant as perpetrator of crime was sufficient to sustain conviction for lewd and lascivious conduct. Pen.Code, §§ 261, 287, 288, 288a.

5. Criminal law 🔑486

Evidence was sufficient on which to base expert's opinion identifying defendant's shoe as the shoe that made footprint at scene of crime.

6. Criminal law 🔑1137(5)

Where defendant's counsel signed written stipulation that operator of lie detector was an expert and that results of test and operator's opinion should be received in evidence, defendant could not, on appeal, claim that operator was not an expert and that results of test were inadmissible.

7. Stipulations 🔑13

Where defendant was charged with rape by force, statutory rape, and with lewd and lascivious conduct and his counsel signed written stipulation that operator of lie detector was expert and that results of test should be received in evidence, dismissal of charges of rape by force and statutory rape did not modify stipulation to such extent that defendant was entitled to be relieved of stipulation, but value and weight of evidence was for jury.

8. Criminal law 🔑1171(1)

Where certificate of honorable discharge of defendant from army was offered as an indication of character of defendant and on cross-examination prosecuting attorney asked defendant about a certain notation and, without objection being interposed, defendant voluntarily answered that the notation had to do with venereal disease, the prosecuting attorney did not commit prejudicial misconduct. Articles of War, art. 107, 10 U.S.C.A. § 1579.

9. Witnesses 🔑274(2)

Cross-examination of defendant's character witnesses as to whether they had heard of specific reports or rumors adverse to the trait of character involved was not improper.

10. Criminal law 🔑429(2)

Where defendant's character witnesses were cross-examined as to whether they had heard specific reports or rumors adverse to trait of character involved and defendant later admitted facts in reference to foundation for the reports as to his former arrest and conviction, but apparently did not enlighten jury correctly as to facts, admission of records and the people's reference thereto establishing certain facts contrary to defendant's story was not error.

11. Criminal law 🔑1144(10)

On appeal, presumption existed that district attorney conscientiously discharged his duty as he understood it.

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

William Jack Houser was convicted of offense of lewd and lascivious conduct, and he appeals.

Affirmed.

Rae B. Carter, of Fresno, and John T. Fuller, of Porterville, for appellant.

Fred N. Howser, Atty. Gen., and Wm. E. James, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged in an information with three counts of felony, committed on July 4, 1947: Count One, with rape by force; Count Two, statutory rape; and Count Three, with lewd and lascivious conduct upon the body of one Patsy Ann Jeter, eight years of age. On motion of the people, the first and second counts were dismissed. A trial by jury resulted in a verdict of guilty on the third count. A motion for new trial was denied. The appeal followed.

Patsy Ann was in the third grade at school. She said she knew what it was to tell a lie and that the answers to the questions about to be propounded would be the truth. On the evening of July 4, 1947, she was left in her mother's parked car with her little sister, aged three, on a street in front of a bank near the "Lindsay Club". The mother went into this club to ask her husband, who was playing cards in the back room, to come home with her. During this waiting period she returned several times to see if the children were all right. She last saw Patsy about 10:30 p. m. Around 11 p. m. a man approached the car and asked if Patsy would "like a pound box of candy". She got out of the car and walked down the street with the man. She said he told her the box of candy was in a near-by orange grove She went with him. She was barefooted and after they entered the grove for some little distance Patsy's panties and dress were removed, her body was violated and acts denounced by sections 288a, 261, 287 and 288 of the Penal Code were committed upon her. The man left her in the orchard. She then ran back to the place where the car had been parked. Her parents drove to their home a short distance away, looking for her. On their return they found her near the place where the car had been parked with nothing on except her panties. She immediately told the officers of her experience and described the claimed culprit: "He was bare headed * * * his hair was brownish black, his nose was pointed, his shirt was khaki colored—his pants were kinda bluish and he wore a belt. He had his sleeves rolled up. His clothes looked clean and he smelled like whiskey."

The child was taken immediately to a doctor and examined. According to his report there was substantial evidence of the commission of the acts described.

Defendant makes no contention in this regard, but relies principally on the question of identification and lack of evidence connecting him with the commission of the offense.

Patsy showed the officers where she went with the man into the orchard. Her bare feet tracks were reflected in the dirt as well as the shoe prints of the culprit.

A plaster of Paris cast was made of one of the most prominent of the shoe prints.

The next morning the officers took two suspects to Patsy's home for possible identification and they were rejected by her. Defendant was then picked up and taken to her home and identified by her. As to this identification she testified in the Justice's Court, where defendant was having the preliminary hearing without the aid of counsel:

"Q. And when you saw this man you think that (he) did it? A. Yes. * * *

"Q. And when you think, are you sure this is the man who did it? A. Yes.

"Q. You are really sure, you are not saying because I suggested, I want you to tell the court the truth, was he, he was the man you thought at that time that done it? A. Yes. * * *

"Q. And as you look at this man now, do you think he is the man who did that to you in the grove? A. Yes. * * * He looks like him. * * * He had a moustache."

She later testified at the preliminary hearing in response to a question by the District Attorney as to whether "the man who did this to you was in the court?" She replied: "I don't know". The defendant was then pointed out to her and she was asked: "Is this the man", and she said: "I don't know". She testified at the trial that she was not sure at the preliminary but she was sure now and she pointed out the defendant from a group of men and described the clothes the defendant was wearing on that night as "kind of brown looking pants with a cream-colored shirt"; that she "did not know if he had a moustache * * * It looked dark under his nose"; "he didn't hardly have a moustache * * * he had a kind of a few hairs under his nose". She was then shown a shirt and a pair of trousers which defendant claimed and other witnesses testified he was wearing that night. She described the shirt as a "blue-white color to her" and the trousers were "green looking". She then stated that she smelled whiskey on the man's breath after she had "walked a ways with him" toward the orchard; that while accomplishing the act the man's trousers were down and he was kneeling on the ground; that thereafter he took her dress and wiped himself with it. Knee prints were discernible to the officers on July 8th, 1947, and they found her dress buried in the dirt near by, with evidence of human excreta and blood stains upon it.

The officers asked defendant as to his whereabouts the night of July 4th. He stated that he had been drinking quite heavily that day but was not intoxicated; that that evening he had made the rounds of the local bars; that he was in the Lindsay Club and saw men playing poker at one of the tables; that a short time before 11 p. m. he left the club by the rear entrance and went home. He specifically described to them, block by block, and street by street, the exact route he said he took in going home at that time. The officers then took him to his near-by home where he lived with his invalid father and eight-year-old sister. They asked to see the clothes he wore the night before. He had washed them early that morning and they were hanging on the line with other family clothes that he had also washed. He was asked to see the shoes he had worn and he pointed them out to the officers. These shoes had been cleaned and shined that morning. The shoes, a blue sport shirt and a pair of blue-colored pants were taken and are exhibits in the case. The officers repaired to the spot in the orange grove and measured the footprints for size and observed identifying marks between the shoe and the footprints in the dirt. The plaster of Paris cast, the shoes, several samples of soil in the orchard and Patsy's dress were forwarded to the State Bureau of identification for examination, photographing and for a comparison.

Mr. Bradford of that department qualified himself as an expert and testified that it was impossible to get the blood grouping from the dress because is was contaminated with dirt and fecal material; that as to People's Exhibit 6, the plaster of Paris cast of the shoe print, and as to the shoe, he had made and examined photographs of both of these exhibits (Photo Exhibit 7) and he proceeded to describe the points of similarity between them from the photographs. The first point was the similarity in the wear of the heel; second, a trade-mark which was on the rubber heel of the shoe "REGENT" which also appeared in the cast of the footprint; third, the characteristic thickness of the shoe as to the outside curve of the shoe sole and also the inside curve of the heel; fourth, as to the curvature of the heel and a circle on the heel below the trade-mark about the size of a 25-cent piece, which circle plainly showed in the plaster of Paris cast. Other similarities were the amount of heel wear on that circle, in addition to the brad marks, and the size of the heel, which comparison he said was a perfect fit. He thoroughly described and discussed the significance of eight points of similarity and concluded that there was one chance in 100,000,000 that the imprint was not made by the shoe in evidence; that for all practical purposes they were identical and it was his considered opinion that the footprint shown by the cast was made by that same shoe.

Another expert witness, employed by the Berkeley Police Department, testified that he was assigned to conduct an interrogation of defendant with the aid of the Keeler polygraph (Lie Detector). This test, apparently, was consented to by defendant and his attorney, in writing, and it was agreed that the result thereof might be considered as evidence in this case either on behalf of the people or on behalf of the defendant. The machine was displayed to the jury and its mechanism and the manner in which the test was given was explained and interpreted to the jury. He explained that he asked the defendant a series of ten questions to be answered by "yes" or "no". Some questions related to matters immaterial to the charge and others were directly pertinent to it. The graph was introduced in evidence. The expert concluded and stated that he was of the opinion from the test given defendant that defendant Houser was not then telling the truth in respect to the accusations made.

Defendant testified as to his army record and counsel for defendant offered his honorable discharge in evidence, without objection, and it was read to the jury in detail. He then testified that since his discharge he had been working rather steadily, supporting his father and sister, but that he had also been drinking quite a bit; that on July 4th he purchased a one-half pint of whiskey, had been swimming, and on that day, as was usual, he was clean shaven; that he went home about 7:30 that evening and was so intoxicated he did not recall whether or not he had anything to eat then; that he was home less than 30 minutes; that he went to the "White Swan", had a beer, played cards, and then drank two drinks of whiskey; that he lost $5.00 in 45 minutes and left; that he then went to the Lindsay Club "in and out two or three times" that evening; that sometime during the evening he ceased to remember; that he did not remember how or when he went home; that about 7:30 a. m. he arose, went to the store, and purchased some soap and did the family washing and shined his shoes; that he went to town about 10 a. m., dressed in a white tee-shirt, khaki pants, and work shoes; that while sitting in a bar an officer asked him to go with him; that he was taken to Patsy's home and Patsy said: "It looks like" the man, "I don't know, it looks like him"; that he did not know the nature of the charge against him but since he had heard discussed at the bar that morning the fact that some girl had been mistreated the night before, he "thought that was it." He testified that he had no recollection of any acts committed on the person of Patsy; that his own conviction was that he would never do such things. He stated that he believed his description to the officer of the course he took home on July 4th from the Lindsay Club related to the time he returned home in the afternoon. The officer emphatically told the jury that defendant related the course he took home on the night of July 4th at about 11:30 p. m.

Several character witnesses were called by defendant, who testified as to his general reputation as to the "traits involved * * * truth, honesty, integrity and morality", and, as suggested by the prosecutor "whether he is law-abiding or not". These witnesses testified generally that his reputation was good, or that they never heard anything against it. On cross-examination of the witnesses, over objection, the witnesses were asked if they had heard a report that prior to July 4, 1947, defendant was charged with, had pleaded guilty to, and was sentenced to the road camp for the offense of driving an automobile without the owner's consent, and was then on probation and ordered not to frequent places where intoxicating liquor was sold; or a report that he had been charged with and pleaded guilty to an offense of public intoxication and paid a fine; or a report that he was suspected of committing an act of sodomy on a ten-year-old Lindsay boy last December. Some of the witnesses admitted hearing of some of the reports above suggested. One character witness was impeached by showing that he himself had been convicted of a felony (statutory rape). Defendant took the stand and endeavored to explain the factual background of these claimed reports and to minimize the seriousness of his previous convictions. A record of the facts, contrary to his explanation, was then produced by the people.

Counsel for the defendant made a plaster cast from defendant's shoe and had photographic exemplars made. He produced the exemplars and endeavored to explain to the jury and likewise to this court wherein the exemplars cast of the footprint taken by the prosecution were dissimilar.

The defendant's first point on appeal is the claim that Patsy's testimony as to her identification of him is unworthy of credence and should be rejected. In her testimony at the trial she positively identified the defendant as the man who took her to the grove. She rejected two other suspects and identified the defendant with the words: "If not him it sure looks like him". Her first identification of the defendant to the officer was that his shirt was khaki colored. She nevertheless described his pants as "kinda bluish" and that he "smelled like whiskey". She did attach a moustache to his first description but later described it as "kind of a few hairs under his nose". These variations, when considered with her age and probable excitement at the time, may have been satisfactorily accounted for to the jury. Likewise, as to her statements at the preliminary examination with reference to defendant's identification. The committing magistrate testified at the trial that toward the latter part of her testimony defendant stood immediately in front of Patsy, with other officers of the court, because they could not hear, and that he noticed when defendant came close to her, while on the witness stand "she was much more hesitant in answering the questions put to her"; that she was "hesitant—and before she would answer, she would look at the defendant and then hesitated in answering certain questions". It is the people's argument that the position taken by the defendant in front of Patsy frightened her, and accordingly confused her in failing to answer the questions as she had previously answered them. This is not unlikely and the jury had the right to consider that factor.

[1, 2] In order to sustain a conviction it is not necessary that the identification of the defendant as the perpetrator of the crime be made positively or in a manner free from inconsistencies. It is the function of the jury to pass upon the strength or weakness of the identification and the uncertainness of the witness in giving her testimony. People v. Griggs, 114 Cal.App. 133, 299 P. 555.

The same contention as here made, was advanced in People v. Slobodion, Cal.Sup., 191 P.2d 1, 3, and it was there said: "Since the testimony of the prosecutrix was, so far as the record shows, worthy of belief, minor inconsistencies not destructive of her story were for the jury to pass upon". See, also, People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814.

[3, 4] The question of the strength or weakness of the prosecutrix' testimony as to the identification of the defendant as the perpetrator of the crime was for the jury and for the trial court to determine on the motion for new trial. People v. Quinn, 12 Cal.App.2d 752, 754, 55 P. 2d 1277. From the record before us we are unable to say that, as a matter of law, there was no substantial evidence to support the identification of the defendant by the prosecutrix. People v. Friday, 18 Cal. App.2d 197, 63 P.2d 303.

[5] The second point is that the identification of defendant's shoe as being the

shoe that made the footprint is so "shot with inconsistencies and so contrary to the physical facts" that such identification and opinion based thereon is "wholly without evidentiary value", citing Estate of Redfield, 116 Cal. 637, 655, 48 P. 794. The same argument made to this court in this respect, was made to the jury and to the trial judge on a motion for new trial and by them rejected. The expert endeavored to account for such claimed inconsistencies as were pointed out by defendant's counsel. The jury also made their own examination of the exhibits and considered them in connection with that testimony. This comparison was a factual question for the jury, which was, as expressed by counsel for the people, a "constitutional arbiter". There was sufficient evidence upon which the opinion of the expert could be properly based.

[6] The next point involves the testimony pertaining to the lie detector test. It is claimed that such evidence has no evidentiary value and that such class of evidence is not regarded by the courts and therefore it was improperly admitted. It appears from the written stipulation signed by defendant and his counsel, that the operator thereof, Mr. Riedel, is an expert operator and also an expert in interpreting results of such test. It was likewise stipulated that such evidence, i. e., "the question propounded by said operator and the answers given by said defendant and the recordings of said defendant's reactions thereto and everything appertaining to said test and the entire results of said tests including the opinions of said operator be received in evidence either on behalf of the people or on behalf of the defendant * * *" and that "said defendant hereby waives his constitutional privilege against self-incrimination to the extent that the same may be involved in the presentation in evidence of the foregoing matters." It would be difficult to hold that defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible, merely because it happened to indicate that he was not telling the truth when he denied to the officers that he took the girl to the orange orchard and committed the acts alleged upon her. People v. Hills, 30 Cal.2d 694, 698, 185 P. 2d 11.

[7] The claim that the dismissal of the first two counts of the information by the people modified the terms of the stipulation to the extent that the defendant was entitled to be relieved of the stipulation is not meritorious. The value and weight of the evidence produced on this subject was for the jury to determine.

[8] Defendant next charges prejudicial errors in certain claimed misconduct of the prosecutor. One involved a series of questions pertaining to a social disease known as syphilis. The first mention of such disease emanated from counsel for defendant and it appeared during the cross-examination of Dr. Mickel. There he interposed a request that Patsy be examined to ascertain whether or not she was thus affected. Thereafter Mr. Carter stated:

"Q. In the interests of time, counsel, so far as this case is concerned, the only real point of interest there is whether or not this defendant was afflicted with such a disease, isn't it?

"Mr. Stevenson: It is, but counsel, you have opened up the line of questioning upon that and I intend to introduce the evidence on that.

"Mr. Carter: Introduce the evidence? He is not afflicted and never has been."

The prosecuting attorney then stated to Mr. Carter:

"I presume you can make arrangements for Mr. Houser to have tests along the same lines.

"Mr. Carter: No, counsel, and I assign your remarks as error prejudicial to this defendant."

The medical examination of Patsy showed that she was not thus affected. At this point there was no evidence offered that defendant had been affected and no attempt on the part of the prosecution was made to establish that fact. During the direct examination of defendant, his counsel introduced in evidence and read in detail to the jury a certificate of honorable discharge of the defendant from the army, which certificate contained his service record. It was offered as an "indication of the character of this defendant". The prosecutor stated that he did not really think it was material but he did not wish to impede the presentation of the defendant's case and he made no objection. It was accordingly admitted and so read to the jury. After the defendant testified in detail as to all the good points indicated by the record, on cross-examination the prosecuting attorney asked about a certain notation thereon (Articles of War, art. 107, 10 U.S.C.A. § 1579). No objection was interposed and defendant voluntarily answered: "It has reference to—that is 62 days bad time * * * that has to do with venereal disease; that is covered by the army law." Articles of War 107 covers many matters and there is no showing of bad faith on the part of the prosecutor in propounding the question or that he had reason to believe that a venereal condition would be revealed. No mention was made to strike the answer. The matter was immediately dropped by both counsel.

Counsel for defendant now argues that a serious "blow was struck by the prosecutor", and since the admission of the discharge certificate in evidence was immaterial, and known by the prosecutor to be immaterial the question propounded on cross-examination was cross-examination on an immaterial matter and should have been stopped by the trial court even though no objection was made thereto by defendant's counsel, citing People v. Westek, Cal. Sup., 181 P.2d 108. A hearing was granted in the Westek case cited and relied upon by the defendant. See People v. Westek, Cal.App, 190 P.2d 9. In fact this later authority supports the conclusion that since defendant "opened the case" for the introduction of evidence on the question of his good moral character and his unimpeachable moral status and proceeded to establish this by his record pertaining to his honorable discharge, the prosecution had the right to cross-examine the witness as to what his complete record did in fact show, which fact tended to contradict, weaken, or modify its effect. No prejudicial misconduct on the part of the prosecutor appears. People v. Buckley, 143 Cal. 375, 389, 77 P. 169; People v. Turco, 29 Cal.App. 608, 610, 156 P. 1001; People v. Hoffman, 199 Cal. 155, 162, 248 P. 504; People v. Tuthill, Cal.Sup., 187 P.2d 16.

[9-11] The next complaint involves certain questions propounded on cross-examination by the prosecutor to the character witnesses produced by defendant. The questions as promulgated, i. e., as to whether or not the witnesses had heard of specific reports or rumors adverse to the trait of character involved, were carefully framed and clearly bring them within the rule set forth in People v. Westek, supra, 190 P.2d at page 15, stating that there is a "vast difference between inquiring about reports, rumors and the like, of a character witness, and questions as to what the witness knows of defendant." See, also, People v. Burke, 18 Cal.App. 72, 122 P. 435; People v. Smith, 100 Cal.App. 344, 347, 279 P. 1022. The questions as propounded were not objectionable under the circumstances here related. Defendant took the stand later and admitted the facts in reference to the foundation for the reports as to his former arrests and convictions and offered evidence as to the purported rumor of having been suspected of an act of sodomy on a ten-year-old boy. Defendant, apparently, did not enlighten the jury correctly as to the facts surrounding his previous arrests and confinement. Objection was made respecting the admission of certain records and the people's reference thereto establishing certain facts contrary to defendant's story. We see no merit to these objections. Likewise, there is no showing that the questions propounded of the character witnesses on cross-examination were made in bad faith. It must be presumed on appeal that the district attorney was conscientiously discharging his duty as he understood it. People v. Burke, supra, 18 Cal.App. at page 89, 122 P. 435.

Similar objections were made to certain portions of the prosecutor's argument to the jury. The entire transcript of the testimony, the record of counsel's argument, and the exceptions taken thereto, have been thoroughly read and examined in detail and we conclude that no prejudicial error resulted and that defendant was accorded a fair and an impartial trial.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.

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85 Cal.App.2d 708

PEOPLE v. VEZERIAN.

Cr. 4198.

District Court of Appeal, Second District, Division 1, California.

May 27, 1948.

Hearing Denied June 24, 1948.

1. Homicide ⚷250

Evidence sustained manslaughter conviction.

2. Criminal law ⚷1159(2)

An appellate tribunal is not authorized to retry a case and to make inferences from the facts proved because such function belongs to the arbiters of the facts, and the appellate tribunal is limited to a determination of whether, on face of the evidence, contradicted or uncontradicted, it can justly be held that from evidence as a whole sufficient facts could not have been found to warrant inference of guilt.

3. Criminal law ⚷770(2)

A defendant is entitled to have an instruction given on his theory if there is any substantial testimony on which to base such theory.

4. Homicide ⚷298, 301

In homicide prosecution, evidence warranted instructions of defendant's defense theories that in committing the homicide defendant acted in lawful defense of his brother against great bodily injury and that defendant was acting in a lawful attempt to arrest deceased for allegedly having committed a felony. Pen.Code, § 197.

5. Homicide ⚷303

In homicide prosecution, evidence warranted giving of defendant's requested instruction on retreat when defendant was assaulted on his own premises, though court instructed in regard to the law that an assailed person need not retreat. Pen.Code, § 197.

6. Homicide ⚷301

In homicide prosecution, defendant's requested instruction concerning an assault by deceased with a deadly weapon on defendant or defendant's brother should have been given, where there was evidence that a bottle of wine was hurled at defendant and his brother. Pen.Code, § 197.

7. Homicide ⚷298

In homicide prosecution, refusal to give defendant's requested instruction advising jury of right of any person to make an arrest if he has reasonable cause to believe that person sought to be arrested committed a felony was error, where evidence showed that defendant had three times been the victim of felonious acts committed by deceased and his companions, and mere reading of section of Penal Code dealing with justifiable homicide was not sufficient. Pen. Code, § 197.

8. Homicide ⚷300(7)

In homicide prosecution evidence warranted giving of defendant's requested instruction that defendant may act on reasonable appearances in defending himself if a reasonable man, situated as defendant was situated, would have been justified in believing himself in danger. Pen.Code, § 197.

9. Homicide ⚷341

In homicide prosecution, cumulative effect of court's refusal to give defendant's requested instructions required reversal of judgment of conviction. Pen.Code, § 197.

YORK, P. J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Dan Vezerian was convicted of manslaughter, and he appeals.

Judgment reversed.

Morris Lavine, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and Wm. E. James, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Defendant was charged in an information with the crime of murder following the shooting by him of Richard Carreon on August 24, 1946. He was tried twice. In the first trial the jury was deadlocked and the court declared a mistrial. The cause was reset and a new jury sworn which found defendant guilty of manslaughter, a lesser offense and one included in the crime of murder, as charged in the information. Judgment was pronounced and defendant was sentenced to state prison with a recommendation that he be confined at Chino, and that the Parole Board favorably consider his application for parole. This appeal is prosecuted from such judgment of conviction and also from the order denying his motion for a new trial.

It is here urged (1) that the evidence is insufficient to support the verdict and that the verdict is contrary to the law and the evidence; and (2) that the court misdirected the jury in matters of law, in that it refused to give certain instructions requested by defendant.

An examination of the record discloses that on the night of August 24, 1946, the Fernando Briones were entertaining about twenty couples at a barbeque in their home and between ten and eleven o'clock they ran out of beer, whereupon Theodore and Eddie Duron, brothers of Mrs. Briones, Charles Porter and Richard Carreon, all boys between the ages of 17 and 19, volunteered to go out and purchase more beer. Theodore Duron testified that he and his companions went walking around the block from the Briones house, called at one liquor store but were unable to get any beer there, and that he went ahead of the others, entered the liquor store of defendant and inquired of the latter and his brother, John Vezerian, if they had any beer and if he could get two cases. They answered him in the affirmative, and defendant began to fill cardboard cases with the beer; meanwhile the other boys arrived, and the witness' brother, Eddie Duron, asked the price of the beer. Defendant replied it was $6.70 a case "or something like that"; whereupon said Eddie Duron stated that was too much and asked what make it was. Defendant made some reply and he and Eddie Duron began to argue about the beer. Said witness testified that defendant told Eddie that if he didn't like the beer he could get out; "to get the hell out." The witness stated they were still arguing but that all of the boys started to walk out and that Bob Porter said "we will get out", and as they were walking out defendant put his hand on Eddie and pushed him and that Eddie turned around and he and defendant started fighting in the middle of the store. The witness Theodore Duron stated he heard defendant say something about getting a gun, and that he in turn made a motion across his body and said, "don't get it, don't get it, because I got one too", in an attempt to "bluff" defendant. Said witness was wearing no coat, only a khaki shirt. He testified that Eddie Duron and defendant were fighting back of the counter and that he jumped over the counter to stop defendant from getting to the cash register and thus prevent appellant from getting his gun; that he managed to stop defendant before he got to the cash register; that he pushed defendant as far as he could and hit him a few times; that defendant put his hands down and the witness thought he had hurt him, so he jumped over the counter, grabbed his brother Eddie and ran out of the store; that they ran east on Fourth Street 50 or 60 yards, turned into a vacant lot and ran home, and that as they ran they heard "three straight shots"; that none of the boys had a gun; that said witness had had two or three glasses of beer and one shot of whiskey at the party.

The witness Eddie Duron testified that on the evening of August 14, 1946, he attended a wienie bake at the home of his sister, Mrs. Betty Briones; that about twenty couples were present; that they had four cases of beer to start with and when it ran out late in the evening, his bother-in-law asked him and his brother, Theodore Duron, to go out and buy more beer. That, accompanied by Bob Porter and Richard Carreon, they walked around the block and went into a liquor store but were unable to get any beer; that meanwhile, his brother Theodore had gone ahead and was in defendant's liquor store talking to him when the other three boys arrived; that defendant was standing in front of the refrigerator; that the witness then asked defendant what the beer would cost and was told $7.80 a case; that the witness asked why it was so high and defendant replied that it was Mexican imported beer, "so I picked up one bottle and looked at the label. It was Mexican imported beer. I forget now the name of it. I put it back and told him that was too much for us, that the beer wasn't really worth that much to us. * * * I told the boys, 'Let's not get it. It's too high.' * * * At that time Dan Vezerian for one reason or another he got sore and he said, 'If you don't like the price get the hell out of here.' And Bob Porter said, 'We are going.' At that time Ricke (Carreon) was standing toward one side and my brother was on the other side and Bob Porter was near the middle of the store, toward the entrance there, so when he said that we turned around and started to walk out. At that time Dan Vezerian followed me. He pushed me on the shoulder. He pushed me hard enough to knock me down, but I was lucky. I more or less expected it because he got mad when I told him it was too high price to pay for the beer, so I didn't fall. I turned around and we both started fighting. * * * he struck me the first blow by striking me in the back while my back was turned, and I was going out toward the door. All four of us were going out. At any rate, when the fight started I remember just then Dan Vezerian saying, 'Well, I am going to get a gun,' and he jumped over the counter. * * * He jumped right over and started to go to the cashier's box. * * * before that when he pushed me we started to swing at each other. That took a very little while, and he said he was going to get a gun and Bob Porter said, 'Wait a while. I will get them out of here.' * * * We didn't know what he (defendant) would do with the gun. He was mad and naturally we thought he was mad enough to shoot us and my brother who was a soldier then, he had his uniform on, his summer uniform with just a shirt. He threw a bluff, what you call a regular bluff. He said, 'I have a gun too, so don't go for your gun.' * * * When my brother made the statement that he had a gun Dan Vezerian had gone over the counter just then and I jumped in front of him, that is between Dan Vezerian and the cash register where I thought he had the gun. * * * So right there me and him both started fighting. I did my best to force him up towards the entrance there. * * * And I hollered to Bob Porter and Ricke and my brother, I turned around and hollered to them to get out of there. * * * Ricke and he (Bob) went out the door. My brother stood in the door. * * * I thought at first he was going out with them, but he didn't. I pushed Dan Vezerian up there. What I wanted to do was push him up far enough that I could jump over the counter, run out the front door and get a chance to run away without getting shot. Dan Vezerian got away from me. I tore his shirt. I remember I tore his shirt sleeve trying to hold him. He got away from me and he ran around the counter. I remember that very clearly. And he (my brother) stopped with Dan Vezerian right before he got to the cash register, just about a foot and a half away from it and I jumped over the counter to the middle of the store. My brother pushed Dan Vezerian up to the end; then he jumped over and we both ran out of the front door. * * * The fighting took place in the aisle-way. It was more pushing than fighting. * * * I wasn't able (to knock him down) * * * he is too big for that." This witness also stated that he saw John Vezerian when he walked into the store but did not get to see him later; that he did not see John and Richard Carreon in a fight; that no bottles were thrown, that he heard one fall but did not remember hearing it break; that he was not more than 20 feet away from the entrance of the store when he heard the first shot, which defendant admitted was the shot that hit Richard Carreon.

Charles R. Porter, referred to by the other witnesses as Bob, testified that when he and the other boys entered defendant's store, the latter was near the refrigerator filling some cases of beer; that defendant's brother, John Vezerian, was also in the store; that one of the Duron boys asked the price of the beer and was told that it was $7.62 a case plus deposit on the bottles; that Eddie Duron picked up a bottle in his left hand and said, "I don't think that is the right price for this kind of beer." That Eddie was holding the bottle with his left hand and pointing to the label with his right; that defendant said, "If you don't like the beer, you get the hell out of here", to which the witness replied, "It is all right. We didn't want the beer." This witness did not recall appellant or anyone else saying anything about a gun, and he proceeded to walk very fast out of the store; that he did not stop when he reached the sidewalk and did not look back inside the store; that he proceeded west and was alone. That he walked to the corner and then looked back; that he took 10 or 15 steps around the corner and then came back to the corner; that he looked back toward the liquor store and saw Richard Carreon and John Vezerian; "They came out of the door fighting * * * It looked to me like they were exchanging blows this way", i. e., trying to strike each other with their fists, right in front of the store. He then continued going south and shortly thereafter heard three shots; that he kept on going and met Theodore and Eddie Duron around the corner; that none of the boys appeared to him to be intoxicated, although he had seen them drinking. On cross-examination, this witness testified he did not recall seeing the deceased, Richard Carreon, pick up a bottle of wine and throw it across the store.

Police Officer Asdel testified that he arrived at the scene of the shooting about eleven o'clock in the evening; that he saw a person being taken from the scene in an ambulance and that he went into the liquor store near by; that he asked what had happened and appellant said there had been a holdup, and described the four suspects who had come into his store, ordered two cases of beer and after he started to put the beer in the case the suspects grabbed up a bottle, threw it at him; that there was a fight; that then they ran out of the store and he went outside and shot at the suspects. This witness identified the gun used by appellant in the shooting, and also testified that appellant told him that when he shot, he thought he hit one of the bandits because one of them grabbed his stomach, bent over, then straightened up and continued running. This witness also testified that he observed the shelves in the liquor store and that there were a few bottles tilted over and some broken glass on the shelves; that he did not notice any other broken bottles there; that he observed a scratch on appellant's face.

Police Officer McCreadie, a commander of Hollenbeck Detective Bureau, made an investigation of the liquor store on August 26, 1946, at which time appellant told him that nothing had been touched inside the store since the previous Saturday night. This witness read to appellant the police report that he had made to officer Asdel with regard to the attempted robbery on Saturday night and asked appellant if it contained everything and if it was true, and appellant answered that it was; that after he had read the report to appellant, the latter told him that these suspects had started a fight with him and had thrown beer bottles from the cases; that the witness looked around for broken beer bottles, but did not find any, whereupon he said to appellant: "Well, in your report here you stated that they threw these full beer bottles at you, but I can't find any beer bottles." That they looked around and found a broken wine bottle or two and appellant said, "Well, they must have thrown a broken wine bottle." This witness further testified that defendant showed him where the fight took place behind the counter, stating that "there was one man on each side of him hitting him, and I asked him how come that none of the bottles were disturbed, and I said, 'When I could hardly get through with one of my police partners without bumping into those bottles,' he says, 'Well, I don't know, none of them got knocked down.' I says, 'Well, they were shoving, pulling and pushing there,' and he said, 'Yes.' I said, 'Well, that is funny.' * * * we walked around from behind the counter and got into the center of the store again and I said, 'Dan, where were you when you ran for your gun?' He said, 'Well, when * * * the last boy let go of me and ran for the front door, I went to get my gun.' * * * it was near this cash register, he stated as they were going out he ran around here towards the front of the store and he told me that he fired at this last man in front of the store. And I spoke up and asked him how many more shots he fired and he stated he fired two shots at the boys as they were running east on Fourth Street from in front of the store, which was three shots."

John Vezerian, the brother of defendant, testified, that he was in the store helping the latter and that when the argument started about the price of the beer, he told the group of boys that if the price was too high to call the whole deal off; that appellant went toward the telephone to call the police, whereupon Theodore Duron said not to go for a gun, because he had a gun too; and that Richard Carreon said the same thing; that he saw Richard Carreon throw a bottle of Roma wine; that said Carreon reached over the candy counter, took the wine bottle and threw it at the witness; that the bottle missed him and hit the Royal Host wine shelf on the south wall of the store; that thereafter Richard Carreon "came at me and threw me, pushed me and slugged me out of the store." That thereafter the fighting between them was outside of the store. This witness also testified that the Duron boys ran out of the store followed by defendant; that Richard Carreon turned around and saw appellant. "At the same time he went under his coat and I hollered to my brother, 'Look out, Dan, look out, he's got a gun.' And Dan shot him. * * * Richard Carreon. He was in a crouched position. * * * Then he grabbed his stomach, headed to the east and ran east."

The defendant took the stand in his own defense and testified he was the owner of the liquor stock and merchandise therein here in question and had been engaged in business there for ten months; that he had never seen the Duron brothers, Bob Porter or Richard Carreon previous to the evening of August 24, 1946; that about 10:30 or 11:00, Theodore Duron came in and asked if they had any beer, and if he could get two cases, and was answered in the affirmative; that the beer was imported from Mexico and he had no local beer; that presently the three other boys came in at which time appellant and his brother, John Vezerian, were filling the cold bottles of beer from the refrigerator into the cases; that he was asked the price and he stated the beer cost $7.20 a case, plus the deposit, which was sixty cents; that the boys got into a huddle and when they heard what the price was they didn't want it any longer; that Eddie Duron immediately picked up a bottle from the case to see whether it was imoprted beer and that he read the label and insisted that the beer was bottled in Los Angeles; that he could see that there was going to be trouble and he immediately told them to get out of the store, but that Eddie Duron took the bottle in his hand and shook it and said it wasn't worth the money, whereupon defendant grabbed the bottle out of his hand and said, "Get out of the store. I wouldn't sell it to you anyhow." Defendant also testified that at the other end of the refrigerator Theodore Duron was picking up bottles and shaking them at John Vezerian saying, "What are you going to do about it?" That John said, "Let's keep it quiet, boys. We don't want no trouble."; that at this time Bob Porter was saying, "We don't want any trouble. I will get them out of here." That also, at this time, Theodore Duron said, "Don't get your gun. I have a gun too."; that immediately after Richard Carreon said the same thing; and Bob Porter also said to him, "Don't get your gun, I will get them out of here."; that defendant said, "I wish you would, because I am going to call the police if you don't get them out of here." Defendant further testified that he went between the counter and the east end of the refrigerator, and as he rounded the corner toward the cash register, he saw a bottle flying which hit a shelf over his head but did not hit him; that it broke into pieces; that he did not know who threw it; that he saw Richard Carreon and Theodore Duron make motions toward their chests or sides to show they had guns, but that he did not see any guns on these two boys. Further, he stated that he owned a gun, a German Mauser which he kept concealed under a white handkerchief on the south shelf of the store; that he finally got to the telephone and dialed 116, when Eddie Duron jumped over the counter on top of him and started beating him over the head with his fists and that Theodore Duron came around the counter to his brother's assistance and started beating defendant from the other side; that from the time Eddie jumped over the counter, appellant was unable to see what his brother John was doing, but the last time he saw him he was being pushed out the front door of the store by Richard Carreon; that "I ducked down on top of those cases, put my hands over my head and face, and sort of got into a crouch and let them both beat away all they could on my hands and face, and wherever they could get a blow in and, well, when I was there more or less helpless, Eddie jumped over the counter and said, 'Come on, Sal, let's get out of here,' he run around the counter by the register and went out the door with his brother. They turned to the east and ran. Well, I got up, there was no one in the store and I went to that shelf that I—where the case is, where the gun was, and got the gun and come out to the front of the store and kicked the door open * * * an awful fast step * * * I had the gun in my hand * * * When I hit the front door I kicked the door open, I was at the threshold, I noticed Richard Carreon fighting with my brother and as the door swung open both of their attention turned to the door and me. Well, just about that time, Richard turned to me with the * * * left side of his body and went under his coat. * * * And my brother said, 'Look out, Dan', and I thought he was going to use that gun that he had previously said he had in the store, and I thought he was going to use it on me or my brother so I shot him right then and there. After the shot he whirled to his right and sort of, I don't know, his hand was still there, whether he held his stomach or what it was, and he ran east down the sidewalk * * * He ran off the curb by the telephone pole into the street and then he came back up the driveway, and then went down the sidewalk. * * * Then I saw Eddie Duron and Theodore Duron go about fifty yards away on the same sidewalk running ahead of Richard and I ran to the end of the building and then I fired two shots in the air, more or less one for each. I don't know why I did it. * * * Officer Asdel came and I told him just what had happened and he said, 'after you have closed up the store will you come down to the Hollenbeck Station and make a report,' and I said I would and that is just what I did."

On cross-examination, appellant testified as follows:

"Q. Now, when you made that statement, 'Stop! Stop! or I will kill you,' were you making that at Richard Carreon or were you making it at the two boys that preceded you out of the store? A. At the two boys that preceded me out of the store.

"Q. So, as I understand it, when you followed these two boys out of that store and you had that gun, your mind was on these boys? A. Yes, sir.

"Q. When you opened the door there was your brother and Carreon fighting? A. Yes, sir.

"Q. Were Carreon and Dan Vezerian looking at you when you came out of that store? A. Do you mean John Vezerian?

"Q. John, yes. I beg your pardon. A. The minute the door flew open both of their attentions turned on me.

"Q. As a matter of fact, their attention was on that door? A. They didn't know I was coming out.

"Q. As a matter of fact, two men had preceded you, hadn't they? A. That is correct.

"Q. Were they fighting when you came out? A. They must have been.

"Q. I don't want you to guess. A. They were standing in a close position.

"Q. When you said, 'Stop! Stop! or I will kill you,' did you fire the shot then? A. No.

"Q. What happened then? A. I kicked the door open and as I said both of their attentions were turned to me and as the attentions were turned Richard turned away and put his hand under his coat, under his jacket, and my brother said, 'Look out, look out,' and I thought he was going to use the gun, that he said that he had, previously in the store, so I shot him then.

"Q. And it wasn't until that time then, at that particular moment that you had any fear for your life or your well being? A. Well, no, I was afraid of my life, when I was being beaten behind the counter.

"Q. You weren't in fear of your life when you were chasing the two boys out of the store? A. No, I wasn't.

"Q. In other words, you were then satisfied that your life was not in danger? A. Correct.

"Q. But it was only in the flash of a statement when your brother made this statement to you, is that right? A. Yes.

* * *

"Q. And your brother rather than stepping into Richard when Richard reached for something—A. He backed away.

"Q. He didn't run away? A. No.

"Q. You were afraid for your life at that time? A. Yes. * * * I was afraid for my brother's life also.

"Q. When you got out of the door there did Carreon have a gun in his hand? A. I didn't see any. * * * I could see both his hands.

"Q. And he didn't have a gun in his hand? A. No, sir. * * *

"Q. * * * After you fired the first shot at Richard Carreon and he ran along the street, you were not afraid of your life any more, were you? A. No, sir.

"Q. You still shot two more shots? A. In the air, yes. * * *

"Q. Dan, before those two boys ran out of that store you had not been able to get hold of your gun? A. No, I had not.

"Q. In other words, they had already gone out of the store on a run before you got your gun? A. Yes, sir."

[1, 2] Under the foregoing epitome of the evidence produced at the trial, we can not agree with appellant's first contention that the evidence is insufficient to support the verdict rendered. An appellate tribunal is not authorized to retry the case and to make inferences from the facts proved. That is a function which belongs to the duly constituted arbiters of the facts. We are limited to a determination of whether, upon the face of the evidence, contradicted or uncontradicted, it can justly be held that from the evidence as a whole, sufficient facts could not have been found to warrant the inference of guilt. People v. Ohman, 67 Cal.App.2d 467, 474, 154 P.2d 463. In the face of the record before us, were we to substitute our inferences for those drawn by the jury upon conflicting evidence, we would clearly be invading the province of the jury by passing upon the weight of testimony and the credibility of witnesses.

Appellant's second contention that the court committed prejudicial error in refusing to give certain instructions requested by him must be sustained.

The homicide having been admitted by appellant, the question of guilt depended upon the claim of justification or self defense. There was nothing inherently improbable in appellant's account of the shooting, nor can it be said from a reading of the record, that the jury could not have reconciled all of the established circumstances with the theory of appellant's innocence.

This was the second trial of appellant. At his first trial the jury was discharged as "hopelessly deadlocked". And the state of mind of the trial judge as to the verdict rendered is reflected in his statement made following the pronouncement of judgment wherein he stated: "* * * The court recommends favorable consideration by parole board of application for parole."

It is because of the foregoing state of the evidence that the instructions of the court should be subjected to a critical examination.

The altercation and subsequent tragedy occurred after the entry of four men, including the deceased, into appellant's store where he was legally, lawfully and quietly conducting his business, and was the aftermath of the boisterous and argumentative manner in which the men objected to the price appellant asked for certain merchandise. The deceased and his friends had previously attended a party where some of the guests, including the deceased, had been served intoxicating liquor, including several glasses of beer and several "shots" of whiskey. It was when the supply of liquor at the party was exhausted that the deceased and his friends departed therefrom and went to appellant's store to obtain additional liquor.

The county autopsy physician, Dr. Fredrick G. Newbarr, testified that an examination of the blood of the deceased showed the presence of .16 per cent ethinol, and "That indicates that he was intoxicated." It is true that other witnesses testified that in their opinion the deceased was not intoxicated, but, that he and his associates had been drinking is uncontradicted.

The fight which took place in the store and the threats made by the deceased and one of his companions are hereinbefore set forth.

At the trial, appellant advanced the defense of justifiable homicide, based upon three separate theories: (1) That in committing the homicide he acted in lawful defense of himself; (2) in lawful defense of his brother; and (3) in a legal and lawful attempt to arrest the deceased for allegedly having committed a felony.

[3] Under well settled rules, requiring no citation of authority, it is established that a defendant is entitled to have an instruction given on his theory of the case, if there is any substantial testimony upon which to base such theory.

[4] Except for the reading of Section 197 of the Penal Code, no instructions were given as to appellant's right of justification in the defense of his brother against great bodily injury or with reference to appellant's right of justification if he were engaged in an attempt by lawful means to apprehend a person for the commission of a felony. Appellant had a right to an instruction on these issues based upon his own theory of the case.

[5] Appellant offered and the court refused to give the following instruction:

"You are instructed that the defendant, Dan Vezerian, being the tenant and entitled to the possession of those premises known as 3101 East 4th Street, was entitled to the possession of such premises and that the defendant, Dan Vezerian, when assaulted upon his own premises is not bound to retreat to avoid violence, even though a retreat may safely be made. An intruder who refuses to leave, within a reasonable time, after being requested to depart may be ejected legally by the lawful occupant of the premises, and if such intruder resists his ejection and assaults the lawful occupant of the premises the latter may protect his person and property and may take the life of the intruder if he has reason to believe that his own life, or the life of a member of his family or his property, is in danger, or that he or a member of his family is in danger of receiving great bodily injury."

This instruction should have been given. People v. Hubbard, 64 Cal.App. 27, 32, 33, 34, 220 P. 315; People v. Reese, 65 Cal. App.2d 329, 340, 341, 150 P.2d 571. Respondent contends that appellant's rights were protected by an instruction given by the court in regard to the law that an assailed person need not retreat. We do not think so. It was of the utmost importance to appellant's case that the jury should be fully advised as to his right to eject the deceased and his companions from the premises, lest the jury not being advised as to appellant's rights with reference to ejecting the foregoing persons from the premises and as to what force might rightfully be used for that purpose, might have believed that in endeavoring to remove the persons in question by force, appellant himself was thereby guilty of a crime.

[6] And, based on the right of appellant to have the jury instructed upon his theory of the case, we are persuaded that the following proffered and refused instruction should have been given:

"You are instructed that every person who commits an assault upon the person of another with a deadly weapon or instrument likely to produce great bodily injury is guilty of a felony and if you find from all of the evidence in this case that the deceased Richard R. Carreon did commit an assault upon either the defendant, or his brother, John Vezerian, with a deadly weapon or instrument likely to produce great bodily injury you then and in that event will find that the deceased had been guilty of having committed a felony.

"A deadly weapon or instrument likely to produce great bodily injury may include various types of agencies, employed by the attacker, such as a filled wine bottle, which although not inherently dangerous, may assume such characteristics depending upon the manner of its use and if you find from all of the facts and circumstances in this case and beyond a reasonable doubt that such filled wine bottle was a weapon or instrumentality which, in the hands of the deceased Richard R. Carreon was capable of being used or was used by him in a dangerous or deadly manner and that the said Richard R. Carreon intended to so use, or did use it as a weapon, should the circumstances require, and had the present ability to commit a violent injury upon the person of the defendant, Dan Vezerian, or his brother, John Vezerian, then the character of the instrumentality is established as being a dangerous or deadly weapon.

"You are further instructed that in order for you to find that the deceased Richard R. Carreon was guilty of an assault with a deadly weapon or instrument likely to produce great bodily injury it is not necessary that it be proven that the said Richard R. Carreon actually succeeded in or made an attempt to strike, or hit with, or use the said filled wine bottle upon the person of either the defendant, Dan Vezerian, or his brother, John Vezerian, or anyone."

It was appellant's contention that the deceased did commit an assault with a deadly weapon or instrument likely to produce great bodily injury upon him and his brother, when, as disclosed by the evidence, the bottle of wine was hurled at them. The matters covered by this instruction were not included in any other instructions given by the court.

[7] It was error for the court to refuse to give appellant's proposed instruction advising the jury of the right of any person to make an arrest if he has reasonable cause to believe that the person sought to be arrested had committed a felony and setting forth the amount of force that may be used in effecting such arrest. This instruction had to do with one of appellant's theories of defense, viz., that the evidence showed that he had three times been the victim of felonious acts committed by the deceased and his companions. Because the record contains some substantial testimony on which to base appellant's theory, he was for the reasons heretofore advanced entitled to have the jury instructed thereon. We do not agree with the Attorney General that a mere reading of Section 197 of the Penal Code was a sufficient compliance with appellant's rights.

[8] We are convinced that under the circumstances here present it was of the utmost importance that the following instruction proffered by appellant and refused by the court should have been given:

"You are instructed that under the law a person may act upon appearances; the rule being that a person may have a lively apprehension that he is in imminent danger and believe that his apprehension is based on sufficient cause and supported by reasonable grounds, and that such apprehension is reasonable and warranted from appearances as they present themselves to him. If, however, he acts on these appearances he does so at his peril, because the law leaves it to no man to be the exclusive judge of the reasonableness of the appearances upon which he acts but prescribes a standard of its own, which is, that not only would the person acting on the appearances himself believe that he was in deadly peril or in danger of great bodily injury, but would a reasonable man situated as the defendant was, seeing what he saw, and knowing what he knew, be justified in believing himself in such danger. The jury is not to consider whether or not the defendant was, when he fired on the deceased, in actual peril or danger, but only to consider whether the indications or appearances were such as to induce the defendant as a reasonable man into believing he was in such peril or danger. If you find that he believed reasonably that he was in such peril or danger and that he fired at the deceased under such belief, even though it should appear that the deceased was not armed, you should acquit the defendant."

We are persuaded that the refusal to give the foregoing instruction deprived appellant of the right to have the jury give proper consideration to a defense upon which he mainly relied.

[9] The cumulative effect of the refusal to give the foregoing instructions forces us to the conclusion that the errors were such as to require a reversal when consideration is given to the probable effect of such errors upon the jury's determination of guilt in a case where the evidence admits either of a theory of the guilt or of the innocence of the defendant. Under the facts of the case now engaging our attention, we cannot say that it is not improbable that a conviction would not have ensued but for the errors hereinbefore discussed.

The judgment and the order denying defendant's motion for a new trial are, and each is, reversed.

DORAN, J., concurs.

YORK, P. J., dissents.

85 Cal.App.2d 577

PEOPLE v. TOLEDO.

Cr. 4188.

District Court of Appeal, Second District, Division 1, California.

May 21, 1948.

Rehearing Denied June 3, 1948.

Hearing Denied June 17, 1948.

1. **Homicide 🔑109**

The right of necessary self-defense, which will render a homicide justifiable, deals with an emergency situation in which a certain degree of elasticity is essential if defense is to be of any practical value to person assaulted. Pen.Code, § 197.

2. **Homicide 🔑116(2)**

Reasonably apparent danger, as distinguished from actual danger, may be sufficient to justify a killing in self-defense. Pen.Code, § 197.

3. **Homicide 🔑244(3)**

In homicide prosecution, defense of self-defense need not be proved beyond a reasonable doubt or even by a preponderance of the evidence, but merely by evidence sufficient to create a reasonable doubt in jurors' minds. Pen.Code, § 197.

4. **Homicide 🔑174(7)**

Circumstances of flight may, in a proper case, furnish some evidence of guilt of homicide, particularly where the defendant's identity is in question.

5. **Homicide 🔑109**

Fact that ignorant and frightened person of foreign origin fled after killing deceased did not, as bearing on issue of self-defense, indicate that he was guilty of manslaughter.

6. **Homicide 🔑244(1)**

Evidence was insufficient to sustain manslaughter conviction of one pleading self-defense.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Jesus Toledo was convicted of manslaughter, and he appeals.

Reversed and cause remanded for a new trial.

William B. Neeley, Public Defender, of Los Angeles, for appellant.

Fred N. Howser, Atty.Gen., Frank Richards, Deputy Atty.Gen., and Wm. E. Simpson, Dist.Atty., and Jere J. Sullivan, Deputy Dist.Atty., both of Los Angeles, for respondent.

DORAN, Justice.

The defendant, Jesus Toledo, was charged with the murder of one Andres Lopez, the crime being alleged to have occurred on February 23, 1947. A jury being waived, the matter was tried by the court upon a stipulation that the cause be submitted on the testimony presented at the preliminary examination, subject to the right to present other evidence. After reading the transcript of the preliminary examination and listening to additional evidence, the trial court found the defendant guilty of manslaughter; a motion for a new trial was denied and the defendant sentenced to State Prison.

The record discloses that the defendant, Jesus Toledo, and one Pedro Mendez, lived in a small, two-room shack in El Monte, California; that on the evening of February 22, 1947, the deceased, Andres Lopez, a friend, came over to the shack. Joe Lopez, a neighbor, and not related to the deceased, was also present several times during the evening, the last time being about 1:00 A.M. Sunday, February 23d. The parties were all Mexicans; the age of the deceased was 62, while the defendant was 38 years old. There was considerable drinking during the evening, and according to the testimony of Joe Lopez, about one o'clock Sunday morning, the defendant and the deceased were both intoxicated. It appears that at this time the defendant, who was either sitting or lying on the bed, requested Andres Lopez, the deceased, to be quiet, or to leave, whereupon the deceased struck the defendant over the head with a bottle, breaking the bottle. Joe Lopez then upbraided the deceased for striking the defendant, and testified: "I told him he shouldn't do it, that it wasn't right. And right at the time he (the deceased) took his knife out. * * * He had it in his hand with the knife open." This knife is elsewhere referred to as a "Boy Scout" knife.

Following this initial difficulty, Joe Lopez started to go home and was followed out of the shack by the deceased, who then, after an obscene comment, struck with the knife and knocked Joe Lopez to the ground. The latter testified that a wrist cut resulted from this assault, and in the language of appellant's brief, "As Joe Lopez got free of the deceased he picked up a piece of board lying on the ground and as the deceased again advanced with the knife, he struck the deceased with the board," and then ran home.

There is evidence that the defendant, hearing the sound of the struggle outside the door, went out, took hold of the deceased's collar, and pulled the deceased away from Joe Lopez. According to the defendant, the deceased struck at defendant with the knife, cutting a leather jacket worn by the latter. Jesus Toledo, the defendant, then picked up a piece of pipe which was on the ground nearby, and struck the deceased twice as deceased advanced with the knife. With the striking of the second blow the deceased fell to the ground. It was the defendant's testimony that there was no intent to kill, and upon being asked, "Why did you kill him?" replied, "Because if he killed me I was afraid."

The defendant first covered the deceased with a piece of canvas; later on, concluding that Andres Lopez was dead, defendant and Pedro Mendez buried the body in a shallow excavation nearby. Defendant slept under a bridge Sunday afternoon and night, went to Los Angeles the next day, and on the third day took a bus to King City, remaining there until arrested on May 8, 1947. There is evidence that when arrested the defendant denied being in El Monte or knowing the deceased. Later defendant made a statement to the officers which was in substantial conformity with the testimony at the trial.

On this appeal it is contended that "the verdict of the trial court finding the defendant guilty of the crime of manslaughter is contrary to and unsupported by the evidence," and that such verdict "is contrary to the law." The gist of appellant's argument is that "Where the undisputed evidence shows that the deceased had attacked the defendant with a knife and had shortly prior thereto attacked the defendant with a bottle, the defendant was justified in defending himself and even taking the life of the aggressor where there is no evidence of undue advantage." In this connection appellant claims that "the evidence presented in behalf of the people in itself proves that the conduct of the defendant toward the deceased was that conduct defined in Section 197 of the Penal Code and for which there is no criminal responsibility," and that under Section 1105 of that code, "there was no necessity for the defendant to present any evidence in his own behalf."

Section 1105 of the Penal Code provides that "the burden of proving circumstances of mitigation, or that justify or excuse it (the homicide), devolves upon him (the defendant), *unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable"*. (Italics added.) The respondent insists that "The evidence is sufficient to sustain the judgment, as a matter of law and fact, and that the trial cour did not err in denying defendant's motion for a new trial."

Justifiable homicide, as defined in Section 197 of the Penal Code, includes homicide committed "1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or, 2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony," etc.; "or 3. When committed in the lawful defense of such person * * * when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, * * * if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed."

[1-3] The right of necessary self defense, long recognized and protected by the law, obviously deals with an emergency situation in which a certain degree of elasticity is essential if the defense is to be of any practical value to the person assaulted. For example, it is well established that reasonably apparent danger, as distinguished from actual danger, may be sufficient to justify a killing in self defense. Likewise, as appellant's brief points out, the defense need not be proved beyond a reasonable doubt or even by a preponderance of the evidence. In the language of People v. Carson, 43 Cal.App.2d 40, 44, 110 P.2d 98, 100, "it is necessary only that defendant produce evidence the weight of which is sufficient to create in the minds of the jurors a reasonable doubt as to the existence of the alleged circumstances which justify the homicide." There can, of course, be no doubt that these rules apply as forcibly in a case tried by a judge as in one where a jury is empanelled.

In the instant case, as appellant's brief asserts, "the record is silent of any evidence to bring home to the defendant any violent act committed by him toward the deceased," other than done is repelling the knife assault of the deceased. "Unless," as appellant says, "we arbitrarily see fit to believe only those words of the defendant's statement and testimony wherein he acknowledges striking the decendent and disbelieve all the rest of his statement and testimony and further disbelieve the testimony of other witnesses as to the circumstances leading up to the blows being struck by Toledo, it cannot be determined that a criminal homicide was committed. The prosecution having presented as a part of its case the statement of the defendant which justified the homicide is bound by that evidence in the absence of proof to the contrary."

In this connection may be noted the case of People v. Salaz, 66 Cal.App. 173, 181, 225 P. 777, 780, where the court said: "The jury could not have found, from the evidence for the people, that the killing was done by appellant except upon the latter's admissions, which carried, in close and immediate connection with proof of the killing, circumstances of necessary self-defense. * * * No presumption of guilt weighed against the presumption of innocence." So also in People v. Estrada, 60 Cal.App. 477, 482, 213 P. 67, 69, the court made use of the same doctrine and said: "As the defendant pictured the encounter, no particular interval of time elapsed between the acts of assault committed by deceased until the fatal blow was struck. There was no duty resting upon the defendant to retreat under the circumstances."

From the record herein it is indicated that the previous relations between the deceased and the defendant had been of a friendly nature, but that on the occasion in question the deceased was quarrelsome and threatening; that the deceased inaugurated the difficulty by breaking a wine bottle over the defendant's head; that immediately thereafter the deceased violently assaulted another member of the party, Joe Lopez, with a knife; that defendant attempted to intervene, whereupon the deceased, as testified to by the defendant on cross examination, "came toward me with a knife, and then was the time I fell. * * * He came toward me and I picked up the pipe. * * * He turned around and struck at me toward here (indicating the neck). * * * I only got it and told him not to—that I didn't want to fight. He told me he was going to kill me, and then is the time that he struck at me." On direct examination the defendant had previously stated: "I told him that I didn't want to fight, and he still came toward me with the knife, and when I felt that he cut me it was the time when I hit him." As hereinbefore indicated the defendant's jacket showed a knife cut almost entirely across the left side of the jacket, "across the abdomen." The defendant also testified that the deceased struck with the knife "many" times before the jacket cut was made, "but I got away from him." In answer to the inquiry, "You kept backing away from him, did you?", the defendant replied, "Yes, very much."

The following excerpt from appellant's brief, is eminently pertinent: "Can it be reasonably urged that such an attack was not more than sufficient to create in the mind of any reasonable person the very positive belief that the person so assaulted was in great danger of death or sustaining great bodily harm? This was no apparent danger. This was a very real and substantial danger." The record nowhere indicates that the killing was perpetrated "in a spirit of revenge for the assault previously made upon him (defendant) in the shack with a bottle," as suggested by the respondent.

[4-6] Respondent's brief lays considerable stress upon alleged "incriminating" circumstances such as the fact that after burying the body, defendant fled to King City, and when apprehended more than two months later at first denied knowing the deceased or being at El Monte at the time in question. While doubtless, circumstances of flight, etc., may, in a proper case, furnish some evidence of guilt, particularly where the defendant's identity is in question, in the instant case and as bearing on the issue of self defense, such facts cannot be deemed indicative of guilt. As appellant's brief suggests, these circumstances may easily be accounted for "as the act of an ignorant, frightened person of Mexican national origin." In the final analysis, defendant's conviction is not supported by the record.

The order appealed from is reversed and the cause remanded for a new trial.

YORK, P.J., and WHITE, J., concur.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.

85 Cal.App.2d 811

ROBBINS v. YELLOW CAB CO.

Civ. 16268.

District Court of Appeal, Second District, Division 2, California.

June 3, 1948.

1. Workmen's compensation 🔑617

For an injury to occur in "course of employment", employee must be engaged in work he has been hired to perform, it must occur within period of his employment, and at a place where he may reasonably be for that purpose while engaged in performance of his duties or while doing something necessarily incident thereto. Labor Code, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

2. Workmen's compensation 🔑706

In order for an industrial injury to come within Workmen's Compensation Act, personal activity of employee must have been natural incident of his duties or a momentary interruption thereof, and voluntary visit of an employee to premises of his employer to attend to a strictly personal matter is not such an act as employee might reasonably be expected to do in performance of his duties. Labor Code, § 3600.

3. Workmen's compensation ⚷612

The test for determining whether Workmen's Compensation Act is applicable to claim of an injured employee excludes an injury which comes from a hazard to which the workman would be equally exposed apart from the employment. Labor Code, § 3600 (c).

4. Workmen's compensation ⚷706, 2090

Where employee, in order to obtain her pay check and that of her husband, took advantage of liberal policy of employer and entered employer's premises at time other than when her work shift began and was injured while on employer's premises, injury was not one "arising out of and in course of employment", nor while she was "performing service growing out of and incidental to employment" nor "proximately caused by the employment", and recovery for injury was not within exclusive jurisdiction of Industrial Accident Commission so as to preclude a common-law action for injuries. Labor Code, §§ 3600–3602.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of and in the Course of the Employment", "Performing Service Growing Out of and Incidental to Employment" and "Proximately Caused by the Employment".

5. Workmen's compensation ⚷51

The provisions of the Workmen's Compensation Act are to be liberally construed. Labor Code, § 3202.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Martha Gough Robbins against Yellow Cab Company, a corporation, for injuries when plaintiff employee slipped and fell while on defendant employer's premises. From judgment dismissing the action, plaintiff appeals.

Judgment reversed.

J. Merrill Brown and Richard B. Newton, both of Los Angeles, for appellant.

Reginald I. Bauder, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Appellant sued for damages on account of injuries suffered by her as an invitee on the premises of respondent. As a separate and distinct defense respondent alleged its employment of appellant, her presence on its premises solely by reason of such employment, and "that exclusive jurisdiction lies with the Industrial Accident Commission." Upon the submission of the cause upon such issue the court below held "that the jurisdiction of this case lies solely and exclusively under the provisions of the Workmen's Compensation Laws and that under section 3601 of the Labor Code * * * plaintiff is not entitled to proceed against the empolyer in this case," and entered its judgment of dismissal of the action. The sole issue on this appeal is the validity of the trial court's conclusion.

Appellant was respondent's cashier and worked on the "graveyard" shift—midnight to 8 o'clock a. m. Her husband was also employed by respondent but he worked in the daytime in the trim department. The accident occurred on pay day. Instead of waiting until midnight to collect her wages she called at the office about 3 p. m. where she received and cashed her check. She then visited the trim room to get her husband's check. Not having received it he asked her to call for it at the administrative office. It was the custom to allow wives of employees to receive the latters' paychecks. While proceeding from the trim room along the route customarily used by employees and their families, in traversing a washrack she slipped and fell, receiving serious injuries.

Appellant contends that the special issue of jurisdiction was erroneously decided against her for the reason that she was neither at work nor doing any act that could fairly be construed as within the scope of her employment or as an aid to her employer, and that therefore the Industrial Accident Commission did not have exclusive jurisdiction of her cause. Reason and authority clearly establish the correctness of her thesis.

[1, 2] Compensation may be awarded by the commission only for an injury "arising out of and in the course of the employ-

ment." Labor Code, sec. 3600. For the injury to occur in the "course of the employment" the employee must be engaged in the work he has been hired to perform; it must occur within the period of his employment and at a place where he may reasonably be for that purpose while engaged in the performance of his duties or while doing something necessarily incident thereto. Griffin v. Industrial Acc. Comm., 19 Cal.App.2d 727, 732, 66 P.2d 176. In order for an industrial injury to come within the purview of the Workmen's Compensation Act the personal activity of the employee must have been the natural incident of his duties or a momentary interruption thereof. The voluntary visit of an employee to the premises of his employer for the purpose of attending to a strictly personal matter is not such an act as the employee might reasonably be expected to do in the performance of his duties. State Department of Institutions v. Industrial Acc. Comm., 46 Cal.App.2d 439, 442, 116 P.2d 79. The statute makes this more specific by providing that the employee must be "performing service growing out of and incidental to his employment." Labor Code, § 3600, b. Thus, generally, the employee must be performing acts within the scope of his duties and in conformity with the directions of his employer.

[3] Another basic requirement for a compensation award is that the injury must be one arising out of the employment, or that it must be "proximately caused by the employment." Labor Code, § 3600, c. The test for determining whether the Workmen's Compensation Act is applicable to the claim of an injured employee excludes an injury which comes from a hazard to which the workman would be equally exposed apart from the employment. Kimbol v. Industrial Acc. Comm., 173 Cal. 351, 353, 160 P. 150, L.R.A.1917B, 595, Ann. Cas.1917E, 312.

[4, 5] In the instant case the appellant was a cashier on the graveyard shift. She could have received her pay check at the commencement of her shift that evening. Instead, she took advantage of the liberal policy of respondent and entered the premises at 3 o'clock in the afternoon. Such policy was for the convenience of its employees, not of respondent. The procurement of her check and that of her husband was an extra-curicular endeavor by her in no way related to her employment. Appellant herein might just as readily have been subjected to the hazard of the washrack even though she had never worked a day for respondent. Thus her injury was neither one "arising out of and in the course of the employment," nor while she was "performing service growing out of and incidental to his employment," nor "proximately caused by the employment." Labor Code, § 3600. That the provisions of the act are to be liberally construed "with the purpose of extending their benefits for the protection of the persons injured in the course of their employment" (Labor Code, § 3202) is admitted; but even a most liberal construction does not preclude the applicability of section 3601, which provides an exclusive remedy "where the conditions of compensation exist," and section 3602, which provides "in all cases where the conditions of compensation do not concur, the liability of the employer is the same as if this division had not been enacted."

It was therefore error for the trial court to conclude that the cause came within the exclusive jurisdiction of the Industrial Accident Commission. The trial court, having decided that it was without jurisdiction to try the cause, was powerless to determine that plaintiff was contributorily negligent.

Respondent's authorities, Freire v. Matson Navigation Company, 19 Cal.2d 8, 118 P.2d 809, and Bethlehem Steel Company v. Industrial Accident Commission, 70 Cal.App.2d 382, 161 P.2d 59, are readily distinguishable. Both cases apply the so-called "going and coming rule." In the instant case the employee was neither going to nor coming from work when the injuries were sustained. Employers' Liability Assurance Corporation v. Industrial Accident Commission, 37 Cal.App.2d 567, 99 P.2d 1089, is likewise not controlling for there the "bunkhouse rule" is applied, and an employee compelled to live on the employer's premises and injured thereon was held entitled to compensation. In the instant case the employee entered the employer's premises by her own volition and many hours before her regular working period. Industrial Indemnity Exchange v. Industrial Accident Commission, 26 Cal. 2d 130, 156 P.2d 926 was concerned with the initial establishment of the employment relationship. In the instant case the employment is admitted but no lexicon defines cashier as an employee continuously "in the course of employment" whether on or off duty.

The judgment is reversed.

McCOMB and WILSON, JJ., concur.

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85 Cal.App.2d 740

DAYTON v. YELLOW CAB CO. OF SAN FRANCISCO et al.

Civ. 13518.

District Court of Appeal, First District, Division 2, California.

May 28, 1948.

Rehearing Denied June 26, 1948.

Hearing Denied July 22, 1948.

1. Carriers 🔑280(1)

Doctrine of highest degree of care pertains only to contract of carriage, though contract does not begin and end absolutely upon passenger's boarding and alighting from vehicle of carriage.

2. Carriers 🔑247(1), 249, 262, 266, 280(1)

Passengers carried for reward owe carrier obligation to pay fare, and carrier owes utmost care and diligence for safe carriage and must give them all such accommodations as are usual and reasonable and must treat them with civility and give them a reasonable degree of attention, and such contract is not at an end until both parties have waived or fully performed their mutual obligations. Civ.Code, §§ 2100, 2103.

3. Carriers 🔑262, 283(3), 325

Statutes requiring passengers carried for reward to pay fare, and obligating carrier to utmost diligence for their safe carriage, does not deny reciprocal obligation on part of passengers to use all reasonable care within their power for their own safety or to accord the same civility to carrier, its agents or employees, as is required from them toward passengers and does not deny agents or employees of carrier attacked by aggressor passenger, whether in a dispute over fare or otherwise, the same right to self protection as anyone else would have. Civ.Code, §§ 50, 2100, 2103.

4. Carriers 🔑247(4)

In dispute over fare between cab driver and passenger at destination, while they still remain in each other's presence actively carrying on the dispute, passenger is not discharged under the contract of carriage, and carrier, its agents, or employees, remain bound to exercise highest degree of care in refraining from initiative conduct which would jeopardize passenger's safety. Civ.Code, §§ 50, 2100, 2103.

5. Carriers 🔑321(4)

In assault action by passenger against cab company and driver for injuries sustained in dispute over fare at destination after passenger had left cab, charge to effect that cab company and employee had duty to exercise highest degree of care for safety of passengers but that, if passenger became aggressor and attacked driver, then driver could use such force as might be necessary to protect himself from wrongful injury in self-defense, was proper. Civ. Code, §§ 50, 2100, 2103.

◆

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Pleasant Dayton against Yellow Cab Company of San Francisco and Robert Blanc for assault and battery. From the judgment, defendants appeal.

Affirmed.

Linforth, Cannon & Miller, by Jesse H. Miller, all of San Francisco, for appellants.

James O'Gara Jr., of San Francisco, for respondent.

FINLEY, Justice pro tem.

Defendants appeal from a judgment in favor of plaintiff, following the verdict of a jury, awarding plaintiff the sum of $6,000 for personal injuries.

The action arose as a result of a quarrel involving physical encounter between plaintiff and the defendant Robert Blanc, a cab driver for defendant Yellow Cab Co.

Plaintiff and his wife hired the Yellow Cab driven by defendant Robert Blanc at about 10:00 o'clock P. M., on May 31, 1944, at 10th and Market streets in San Francisco, and were driven to their residence at 33rd Avenue and Taraval Street. From this point on there is a conflict in the evidence as to just what happened.

It is unquestioned that prior to the cab ride home that evening plaintiff and his wife had consumed an undetermined amount of intoxicating liquor and had partaken of dinner. On the ride home plaintiff's wife became ill and vomited. There is a dispute as to whether this took place within or upon a portion of the cab. At any rate when the cab arrived at 33rd Avenue and Taraval plaintiff's wife left the cab and entered her home. Thereafter a dispute arose between plaintiff and defendant Robert Blanc, the driver, over the amount due as fare or for cleaning the cab as the alleged result of vomiting by plaintiff's wife. Physical encounter between plaintiff and the cab driver followed in which it is admitted that plaintiff sustained a broken leg.

Both sides agree that there is a substantial conflict in the evidence concerning the encounter and which party was the aggressor. No claim is made by appellant that there is insufficient evidence to sustain the verdict. The sole point raised on appeal is that the court erred by giving an instruction on the degree of care owed by a common carrier to a passenger when according to defendant's theory the relationship of carrier and passenger had ended when plaintiff and his wife safely alighted from the cab and were upon the sidewalk at their destination.

The instruction complained of was offered by plaintiff and reads: "It is the duty of a cab company and its employees to exercise the highest degree of care for the safety of passengers." Immediately following this the court gave these instructions:

"The basic question for you as a jury to to decide in this case is which one of the participants in the struggle which has been described to you wrongfully interjected the use of physical force into the settlement of the conversation which was taking place. If you find that the cab driver was the original wrongdoer by virtue of the fact that he interjected the use of physical force, you are hereby instructed that if thereafter the passenger, Dayton, took steps or took such an action which any reasonable person would take in attempting to defend himself, and that his action coupled with the action of the cab driver resulted in physical injury to the plaintiff, then I instruct you that you must render a verdict in favor of the plaintiff for the amount of damages which are shown to have resulted from the injury.

"If you find that the cab driver was the assailant or the one who started the attack in this case, you are instructed that Dayton had the right under the law to defend himself against this attack by using such force as was reasonably necessary to resist the attack of the cab driver. If you find that during the scuffle that followed that plaintiff was injured, either by reason of action of the cab driver alone, or by reason of the combined action of Dayton and the cab driver, in a fray wrongfully started by the cab driver, then I instruct you that you must render a verdict of this matter in favor of the plaintiff."

"If you find from the evidence in this case that the plaintiff Dayton kicked at and attacked Robert Blanc, who was the cab driver of the cab in question, without any cause or provocation and that Mr. Blanc, the cab driver, in self defense used only such force as was reasonably necessary to repel the attack of plaintiff, then it is your duty to render a verdict against the plaintiff and in favor of the defendants Yellow Cab Company of San Francisco and Robert Blanc, for it is the law of this State that one attacked may use such force as may be necessary to protect himself from wrongful injury attempted to be inflicted upon him by another."

On pages 13 and 14 of their opening brief defendants outline their objection to the instruction first quoted above as follows:

"We do not question but that there was a duty to exercise no more than necessary force in repelling the assault, if the plaintiff were the aggressor. This, of course, is the rule in any assault and battery case. Civil Code, Section 50. It was, however, most prejudicial to confuse the true basis of the responsibility of the defendants with the doctrine of the highest degree of care. The latter pertains only to the contract of carriage. It was conclusively shown by the evidence that such contract of carriage had been completely performed.

"The jury in all likelihood surmised that, under the doctrine of 'the highest degree of care', the cab driver should have left the scene and abandoned his cab. However, under the doctrine of reasonable care, if that had been properly given to the jury, the latter would have had leeway to decide that the defendant driver was warranted in taking the course adopted by him.

"That the relationship of passenger and carrier had terminated, at the time of the incident involved in this case, permits of no doubt. The defendants were therefore no longer liable to the plaintiff in the operation 'as a carrier' nor were the defendants bound to use 'the highest degree of care'; defendants were, at the most, liable under general rules of tort."

[1] While it is undoubtedly true that doctrine of the "highest degree of care" pertains only to the contract of carriage we cannot agree with defendants that such a contract begins and ends absolutely upon the passenger's boarding and alighting from the vehicle of carriage. In so holding we are not unmindful of the rule approved in the early case of Falls v. San Francisco & N. P. R. R. Co., 97 Cal. 114, 31 P. 901, 902, cited by defendants which rule is outlined in that opinion as follows:

" 'The passenger while in actual progress upon his journey is exposed to countless hazards, gives himself wholly in charge of the carrier. * * * But a rule properly ceases with the reason for it; therefore, as a passenger's entrance to the carrier's station is characterized by none of the hazards incident to the journey itself, the rigor of the rule above announced (that is the rule of the highest degree of care) is justly relaxed, in that at such a time and place the carrier is bound to exercise only a reasonable degree of care for the protection of its passengers.' "

[2] This rule of "a reasonable degree of care," however, refers primarily to the condition and maintenance of equipment or premises provided for use of passengers and cannot be interpreted as a relaxation of the rule of utmost care as it applies to active negligence or personal treatment of passengers by the carrier, its agent, or employees, while obligations under the contract of carriage are still unfulfilled. Such a contract involves mutual rights and obligations the same as any other. Passengers carried for reward owe the carrier an obligation to pay their fare and the carrier owes passengers the utmost care and diligence for their "safe carriage" (Civil Code, section 2100), and also "must give to passengers all such accommodations as are usual and reasonable, and must treat them with civility and give them a reasonable degree of attention" (Civil Code, section 2103). Such a contract is not at an end until both parties have waived or fully performed their mutual obligations.

[3] The Civil Code provisions just referred to do not of course deny a reciprocal obligation on the part of passengers to use all reasonable care within their power for their own safety or to accord the same "civility" to the carrier, its agents or employees, as is required from them toward passengers. They do not mean that if a carrier or an agent or employee of a carrier are attacked by an aggressor passenger whether in a dispute over fare or otherwise that they have not the same right to self protection as would anyone else. Civil Code, section 50. In this case the jury was properly instructed upon that point.

We cannot agree with defendant that the giving of the instruction complained of was error. It is true that such an instruction, as commonly used, applies more specifically to the element of negligence, to carelessness rather than to active and wilful misconduct. But in the language of Falls v.

San Francisco & N. P. R. R. Co., etc., supra, when a passenger "gives himself wholly in charge of the carrier" the passenger so remains until both carrier and passenger have fully performed the contract and the passenger is discharged with no further active obligation on the part of either.

[4] In the Falls case just referred to a passenger who had been sitting for a time on the platform of a flag station arose upon approach of the train and in broad daylight stumbled and fell over some milk cans sitting on the platform thus sustaining an injury. The complaint was that the carrier was negligent in leaving freight on the platform. The Supreme Court reversed a judgment in favor of plaintiff and approved the rule quoted above holding that when passengers were in the carrier's station that the carrier was bound to exercise only reasonable care for their protection. That case does not purport to extend the doctrine of ordinary care to a case such as where an employee of the carrier through active negligence or wilful misconduct injures a passenger, for until the passenger reaches a place outside the sphere of any activity of the carrier which might reasonably constitute a mobile or animated hazard to the passenger, the rule of utmost care and diligence set forth in Civil Code, section 2100, still applies and would include the case of a dispute over the fare between a cab driver and a passenger. While they still remain in each other's presence actively carrying on the dispute the passenger is not "discharged" under the contract of carriage, and the carrier, its agents or employees are still bound to exercise the highest degree of care in refraining from initiative conduct which would jeopardize the passengers' safety. Boa v. San Francisco-Oakland Terminal Ry., 182 Cal. 93, 187 P. 2; Sims v. Knoxville Railway & Light Co., 1919, 141 Tenn. 238, 208 S.W. 610; Blomsness v. Puget Sound Electric, 47 Wash. 620, 92 P. 414, 17 L.R.A.,N.S., 763; Fowler v. Randle, 1940, 284 Ky. 164, 143 S.W.2d 1049; Knoxville Traction Co. v. Lane, 103 Tenn. 376, 53 S.W. 557, 46 L.R.A. 549. Also see cases 17 L.R.A.,N.S., 768.

[5] Defendant does not contend that the instruction complained of is not a proper statement of the law as applied to the duty owed by a carrier while the passenger is in actual course of transit. Assuming then for the moment that the instruction was surplusage still we do not consider that the jury could in reason have been misled by it. The instructions immediately following clearly and correctly set forth the reciprocal rights and duties of the parties under the circumstances of this case and under any finding that the jury could have made concerning which party was the aggressor. As will be observed from a reading of the excerpt from the instructions set forth above, which excerpt embodies the only instruction given relevant to the issue here, the jury was told in effect: "It is the duty of a cab company and its employees to exercise the highest degree of care for the safety of passengers, but if a passenger becomes an aggressor and attacks a cab driver then the cab driver may use such force as may be necessary to protect himself from wrongful injury, and if you find that in self defense he used only such force it is your duty to render a verdict against plaintiff and in favor of both defendants."

In other words even accepting the rule of "highest degree of care" if the cab driver were attacked he would be in no different position than anyone else in the exercise of his right to protect himself.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

DI CORPO v. DI CORPO. *

Civ. 16213.

District Court of Appeal, Second District, Division 1, California.

May 21, 1948.

Rehearing Denied June 7, 1948.

Hearing Granted July 15, 1948.

1. Divorce 🔑263, 311

In a proper case execution will issue for enforcement of installment decrees for alimony or support in same manner as if decree or order were a judgment. Code Civ.Proc. §§ 681, 1007.

2. Divorce 🔑263, 311

Though divorce decree has been entered over five years before, execution will issue for installments for alimony or support falling due within the five year period; but for installments accruing prior to five years before issuance of the execution, the writ can only issue by judgment founded upon supplemental proceedings as provided by statute. Code Civ.Proc. §§ 681, 685, 1007.

3. Execution 🔑73

An order under statute providing that judgment may be carried into execution after lapse of five years, may only be made if, during five years following entry of judgment, creditor exercised due diligence in locating debtor or in following available information to point where a reasonable person would conclude that there was no property subject to levy within that time. Code Civ.Proc. § 685.

4. Appeal and error 🔑946

A court cannot be said to have "abused its discretion" unless it be established that in the exercise thereof the court has exceeded the bounds of reason, all circumstances before it being considered.

See Words and Phrases, Permanent Edition, for all other definitions of "Abuse of Discretion".

5. Divorce 🔑311

On application of divorced wife for issuance of execution more than five years after entry of judgment awarding support money, evidence disclosed insufficient diligence in making inquiry concerning circumstances of debtor to discover property subject to execution, and exercise of sound discretion required denial of motion for execution after the five year period had elapsed. Code Civ.Proc. §§ 681, 685, 1007.

6. Divorce 🔑311

Under statute providing that a party in whose favor judgment is given, may at any time within five years after entry thereof have a writ of execution, issuance of execution as to support money installments unpaid within five year period preceding motion for execution may upon a sufficient showing, be denied. Code Civ.Proc. §§ 681, 1007.

7. Divorce 🔑263, 311

Although issuance of execution upon a divorce judgment requiring monthly payments may be denied upon equitable grounds, proof that installments have accrued within five years establishes a prima facie right to execution, and burden is upon judgment debtor to establish facts justifying an order denying the writ. Code Civ. Proc. § 685.

8. Execution 🔑73

Though a creditor may have satisfied court that he has proceeded with due diligence to enforce its judgment under statute providing that a party may at any time within five years after entry of judgment have a writ of execution, court may deny him its process, if debtor shows circumstances occurring subsequent to five year period, upon which in exercise of its sound discretion, court should conclude that creditor is not now entitled to collect his judgment. Code Civ.Proc. § 681.

9. Divorce 🔑311

Where had wife holding a divorce decree ordering payment of support money for minor children exercised slightest diligence, she would have discovered existence of property owned by debtor husband as well as his address, trial court did not abuse its discretion in denying wife's motion for execution for unpaid support installments accruing within five years after decree, especially where enforcement would now work a hardship upon husband. Code Civ. Proc. §§ 681, 1007.

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* Subsequent opinion 200 P.2d 529.

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action by Mary Di Corpo against Michele Di Corpo for divorce. From orders denying writs of execution to satisfy unpaid installments under decree for support of minor children, plaintiff appeals.

Orders affirmed.

Krag & Sweet, and Donald O. Krag, all of Alhambra, for appellant.

W. H. Sullivan and Kenneth K. Scott, both of Los Angeles, for respondent.

WHITE, Justice.

This appeal is taken from two orders made by the Superior Court of Los Angeles County. The first was entered July 1, 1947, denying a motion by plaintiff for the issuance of a writ of execution under Section 685 of the Code of Civil Procedure, to satisfy certain unpaid installments for a period prior to five years immediately preceding, and accruing under a decree of divorce which awarded the custody of two minor children to plaintiff with provision that defendant should pay $40.00 per month for their support.

The second order was entered July 11, 1947, granting a motion made by defendant to recall an execution theretofore issued for the five-year period immediately last passed, pursuant to the provisions of Section 681 of the Code of Civil Procedure.

By her affidavit supporting her motion made under Section 685 of the Code of Civil Procedure, plaintiff averred that on April 27, 1932, she was granted an interlocutory decree of divorce from defendant wherein the foregoing order was made for support of the minor children whose custody was awarded to her. That certain payments were made pursuant to said decree and an order to show cause made and determined prior to the entry of the interlocutory decree. That at the time she filed her motion under Section 685 of the Code of Civil Procedure there was an accrued unpaid balance of $5,361.00. It is then averred "That plaintiff has been unable prior to this time to find any property of the defendant in this State which might be applied to the satisfaction of this judgment; that more than five years have elapsed since the entry of said judgment; that there is now in this State property of the defendant subject to execution which may be seized to satisfy this judgment."

Defendant filed an affidavit in opposition to the motion wherein he alleged that in the foregoing divorce action he was, pursuant to an order to show cause, ordered to pay plaintiff the sum of $12.50 per week for her support and the support of the minor children, $125.00 attorneys fees and $15.00 court costs, as set forth in the plaintiff's affidavit; that on May 28, 1931, he was cited to appear and show cause why he should not be adjudged in contempt of court for disobeying said order. That after the service on him of this order to show cause he made all payments up to and beyond the 22nd day of June, 1931 by payment of the sum of $161.50 on account of support and maintenance, $15.00 court costs, and the further sum of $130.00, making a total of $306.50. That subsequently the order to show cause was ordered off calendar.

That on July 21, 1931, plaintiff and defendant by and through their respective counsel, entered into a stipulation whereby defendant would withdraw his answer filed in the divorce action and the plaintiff would proceed with the action as a default matter. That on the said 21st day of July, 1931, "The plaintiff and defendant entered into a property settlement agreement in writing, both being at the time represented by their respective counsel, which said agreement provided, among other things, that the defendant should convey all of his right, title and interest in the community property, then owned by the parties hereto, to the plaintiff." Then follows a description of the real property, and the further averment that "By the terms of said agreement the plaintiff agree to give defendant a credit of $2,200.00 on account of moneys then due or to become due under and by virtue of that certain order for support and maintenance of the plaintiff and the said minor children, made on the said 2nd day of April, 1931, which said $2,200.00 credit made the payments of this defendant under said order for a period of 184 weeks, or approximately 3½ years in advance, a copy of which property settlement agreement is hereto attached, marked Exhibit 'A' and made a part hereof." Examination of the property settlement agreement introduced in evidence shows that the same was unsigned.

It is then averred that on July 21, 1931, in answer to said agreement, the defendant executed and delivered to the plaintiff a deed whereby he conveyed to her all his right, title and interest in and to the real property above referred to.

It is then alleged in defendant's affidavit that from and after the date of the property settlement agreement and execution and delivery of the aforesaid deed and up to May 12, 1947, "or more than 15 years thereafter, the said plaintiff made no demand whatever on this defendant for payment of any sum or sums due and payable on said order or judgment, although for a number of years after said 21st day of July, 1931, this defendant operated a bakery wagon in the vicinity where plaintiff resided, and sold bakery products on the same street on which plaintiff was residing, and on numerous occasions this defendant went to plaintiff's home and asked her to let him see his children, but she would in each instance refuse him admittance to her home, and defendant would only get to see his children at such intervals when they would be playing with other children on the sidewalk or in the street."

It is then averred that the only demand ever made by plaintiff for the payment on said order or decree of divorce was made by a letter dated May 12, 1947, a copy of which is attached to the affidavit. That at no time after the aforesaid 21st day of July, 1931, was defendant ever "cited into court for failure to make payments on said former order or judgment, nor at any time was any demand whatever made on him, although the plaintiff knew his address for many years. That affiant had been informed that the plaintiff had remarried many years ago, but he had no knowledge of the Interlocutory Decree of April 27th, 1932, wherein the plaintiff obtained an order requiring him to pay the sum of $40.00 per month for the support and maintenance of said children, nor was any certified copy of said order, or any copy of same, or any letter or demand whatever, ever served on him, and his first knowledge of said decree and order was obtained on or about the 3rd day of June, 1947, at which time the Sheriff of Los Angeles County levied an execution, obtained upon application to the Honorable Caryl Sheldon, Judge of the Superior Court of the State of California, in and for the County of Los Angeles, on the 2nd day of June, 1947, in the sum of $2400.00, on property now owned by this affiant". It is then alleged that said execution "purports to cover the period from the 29th day of May, 1942 to about the 12th day of June, 1947, or approximately five years last passed." It is then averred that the property upon which execution was levied was purchased by defendant on June 11, 1941, more than five years and nine months prior to the issuance of the execution on June 2, 1947. That said execution "purports to cover the period of five (5) years prior to the date of said execution; that plaintiff and judgment creditor, by reason of the recordation of the said deed on August 19, 1941, aforesaid had constructive notice, but made no attempt to have execution issued for more than five (5) years and nine (9) months after the same was recorded as aforesaid."

It is then averred that for the fiscal years 1941, 1942, 1943, 1944, 1945, and 1946, "the above described real property was assessed in this defendant's name on the tax rolls of the County Assessor's Office of Los Angeles County, showing this defendant's address as 703 East 92nd Street, Los Angeles, California, and from which the said plaintiff and judgment creditor could have ascertained that this defendant and judgment debtor owned real property subject to execution for more than five (5) years and nine (9) months prior to the levy of the execution on June 3, 1947, and for the same time prior to the application for execution herein."

It is then averred that by reason of failure of plaintiff for more than fifteen years to demand or attempt to have execution issued, defendant has been greatly prejudiced in that "this defendant would no doubt have made arrangements to pay any delinquencies in monthly installments, but now after he has worked hard for many years last past to accummulate his home, the property heretofore described, and by reason of the fact that some months ago he sustained a severe injury to his back, and is unable to work, to issue and enforce execution against his home, would work great hardship upon him, and would amount to confiscation of his said home."

It is further averred that at the time defendant entered into the aforesaid property settlement agreement on July 21, 1931, he had been in the United States from Italy for only a few years and at that time "did not understand nor speak English very well" and that he "believed that said conveyance was in settlement of all claims of the plaintiff for support and maintenance". It is then averred in the affidavit that while defendant is willing to contribute to the best of his ability to the support of his minor children, "and fully intended to devise his property to them by will", that plaintiff has failed to exercise diligence in the matter before the court.

To the foregoing affidavit by defendant in opposition to the motion to issue execution, plaintiff filed a counter affidavit in which she alleged that defendant discontinued operation of his bakery truck prior to the entry of the interlocutory decree of divorce and subsequently thereto stated to plaintiff that he had no moneys with which to support her children. That after terminating the operation of the bakery route up until approximately one year ago, "affiant was wholly unaware of the whereabouts of the defendant or as to any property belonging to him". It is then averred that plaintiff "consulted with a deputy of the District Attorney's Office in Los Angeles County, who advised her that unless she could prove that defendant had an income, there was nothing she could do to collect the judgment for support. That your affiant did nothing further by reason of the information supplied by the said Deputy District Attorney, in the year 1933."

It is then averred that in the year 1944 defendant "called at the home of one Milli Costa and stated to said party that he wanted to know the whereabouts of your affiant and his two children, as he then wanted to contribute some money towards their support."

Finally, with reference to the foregoing property settlement agreement referred to in defendant's affidavit, it is alleged by plaintiff that she "has no recollection of signing a property settlement agreement."

In support of his motion for an order to recall and set aside the execution issued June 2, 1947, covering the period commencing May 29, 1942, and ending May 29, 1947, defendant filed an affidavit which, except for an averment that the minor children of the parties were then of the age of seventeen and eighteen years, respectively, and were capable of earning their own support, contained averments similar to those set forth in his affidavit hereinbefore referred to.

[1, 2] In a proper case, execution will issue for the enforcement of installment decrees for alimony or support under Section 681 of the Code of Civil Procedure, in accordance with Section 1007 of the Code of Civil Procedure which provides that enforcement of such decrees or orders may be effected by execution in the same manner as if the decree or order were a judgment. Cochrane v Cochrane, 57 Cal.App.2d 937, 938, 135 P.2d 714, 715. And, in the case just cited it is held that "even though the decree was entered over five years before, execution will issue under Sec. 681 for installments falling due within the five-year period", but, that for installments accuring prior to five years before the issuance of execution, the writ can only issue under Section 685 of the Code of Civil Procedure.

[3] Giving consideration first to plaintiff's motion for the issuance of a writ under Section 685 of the Code of Civil Procedure, it was held in Lohman v. Lohman, 29 Cal.2d 144, 148, 173 P.2d 657, 659, that with reference to such an order, "It may only be made if, during the five years following entry of judgment, the execution creditor exercised due diligence in locating and levying upon property owned by the debtor, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time. And even if the court is satisfied as to the diligence of the creditor in this respect, it may deny its process if the debtor shows circumstances occurring subsequent to the 5-year period upon which, in the exercise of a

sound discretion, it should conclude that the creditor is not now entitled to collect his judgment."

[4] A court cannot be said to have abused its discretion unless it be established that in the exercise thereof, the court has exceeded "the bounds of reason,—all the circumstances before it being considered." Kosloff v. Kosloff, 67 Cal.App.2d 374, 379, 154 P.2d 431, 434.

[5] We are satisfied that under the recent decisions of the appellate tribunals of this state (Butcher v. Brouwer, 21 Cal. 2d 354, 132 P.2d 205; Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 132 P.2d 207; Hatch v. Calkins, 21 Cal.2d 364, 132 P.2d 210; Lohman v. Lohman, supra; Mills Organization, Inc., v. Shawmut Corporation, 29 Cal.2d 863, 179 P.2d 570), no sufficient showing of diligence was made herein to justify the issuance of execution under Section 685 as to those installments which fell due more than five years before the motion for issuance of execution was made, and so far as such installments are concerned, the order of the trial court was manifestly correct.

[6] A different question is presented with regard to the installments falling due within five years of the date of the motion. Under Section 681 the plaintiff was entitled to execution for their satisfaction, and the determination of the plaintiff's right to enforce payment of amounts due not more than five years before the date on which the motion was made rests upon different principles. However, the courts have held that issuance of execution even as to such installments may, upon a sufficient showing, be denied. Cochrane v. Cochrane, supra, 57 Cal.App.2d at page 939, 135 P.2d at page 715.

[7] In Lohman v. Lohman, supra, 29 Cal.2d at page 150, 173 P.2d at page 660, the Supreme Court stated:

"Although issuance of execution upon a judgment requiring monthly payments may be denied upon equitable grounds, proof that the installments have accrued within five years establishes a prima facie right to execution and the burden is cast upon the judgment debtor to establish facts justifying an order denying the writ."

We are convinced that in the instant case the defendant met and overcame the burden cast upon him by facts stated in his affidavit, which justified the order of the court denying issuance of the writ on equitable grounds. At no time did plaintiff resort to the courts to obtain an order to show cause why defendant should not be adjudged in contempt of court for failing to comply with the support order contained in the decree of divorce, although that course was open to her. Her affidavits fail to disclose why she did not take this course, or what efforts, if any, she made to locate any property belonging to defendant during the interim of fifteen years.

Plaintiff relies mainly upon the claim that she was advised by a deputy district attorney that there was nothing she could do unless she could prove that defendant was possessed of property or income, yet she made no efforts to locate either property or income of which he might be possessed. Nor is there any showing that she consulted at any time with her attorney or applied to him for advice or relief.

By his counter-affidavit, defendant showed that he was the record owner of property in Los Angeles County and paid taxes thereon during the years 1941 to 1946, inclusive. That the tax rolls of Los Angeles County showed his address.

While averring in her affidavit that she was unable "prior to this time to find any property of defendant in this state which might be applied to the execution of this judgment", this was a mere conclusion, unsupported by any facts from which the trial court could conclude that she had exercised due diligence.

[8] In Mills Organization, Inc. v. Shawmut Corporation, supra, 29 Cal.2d at page 865, 179 P.2d at page 571, we find the following:

"There is a further reason why the order should be affirmed. We have held that 'even though the creditor may have satisfied the court that he has proceeded with due diligence to enforce his judgment under section 681, the court may still deny him its process if the debtor shows circumstances occurring subsequent to the five-year period upon which, in the exercise of a sound discretion, it should conclude that he is not now entitled to collect his judgment.' Butcher v. Brouwer, 21 Cal.2d 354, 358, 132 P.2d 205. Defendant's reliance on the assurance that the judgment would not be enforced against him, the failure to make any demand on him for payment of the judgment, the lapse of time and change in his position in relation to his principals, and the prejudice resulting therefrom, were sufficient to bring the case within this rule."

[9] Where, as here, the facts show with certainty that, had the judgment creditor exercised even slight diligence, such as securing an order to show cause, in re contempt, a search of the tax collector's and assessor's records, following the entry of the decree of divorce, such diligence would have disclosed the existence of property owned by the judgment debtor, as well as his address, it cannot be said that the trial court abused its discretion in making the orders appealed from. Added to this are the circumstances shown as occurring subsequent to the five-year period, which also support the conclusion of the court in the exercise of a sound discretion, that the plaintiff is not now entitled to collect her judgment.

The orders appealed from are, and each of them is affirmed.

YORK, P. J., and DORAN, J., concur.

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85 Cal.App.2d 772

CASTELLO et al. v. CENTRAL EUREKA MINING CO.

Civ. 13589.

District Court of Appeal, First District,
Division 2, California.
June 2, 1948.

Hearing Denied July 29, 1948.

1. Mines and minerals 🔑104

Resolution of mining corporation that assessment of ten cents a share was levied on stock of record on September 20, that notice should be mailed immediately to all shareholders notifying them of assessment and that it was payable immediately to corporation at specified address, that any shares on which assessment should remain unpaid on October 22, would be delinquent, and that shares would be sold at corporation's office at specified address on November 7, at 2 p. m. to pay delinquent assessments together with penalty of 5 percent, or be forfeited to corporation, sufficiently complied with statutes. Corporations Code, § 2701.

2. Mines and minerals 🔑104

In suit in equity by stockholders in mining corporation to set aside a forfeiture of their stock because of their failure to pay assessments, testimony of secretary of corporation supported finding that resolution of corporation's directors levying the assessment was adopted by directors. Corporations Code, §§ 2701, 2708.

3. Mines and minerals 🔑104

Where resolution of directors of mining corporation for assessment on stock in corporation complied with statute, and stockholders failed to pay assessments within time specified in resolution, and no buyers appeared on date specified in resolution for sale of stock to pay delinquent assessment, forfeiture of stock by corporation in accordance with resolution was valid and would not be set aside in suit in equity by stockholders, though assessment and statutory penalties amounted to only ten and one-half cents a share, and stock was selling on the exchange for $2.05 a share, and though no bidders appeared at the sale as in all previous assessment sales. Corporations Code, §§ 2701, 2708.

4. Mines and minerals 🔑104

Officers of mining corporation had no duty to contact stock exchange in effort to secure bidders at sale of stock for delinquent assessments when no bidders appeared at the sale, before forfeiting the stock in accordance with resolution of directors that had been mailed to stockholders. Corporations Code, §§ 2701, 2708.

5. Corporations 🔑93

Where a statutory method of forfeiture of stock in a corporation for delinquent assessments on the stock has been provided, and that method has been strictly followed by corporation, equity can afford no relief to stockholders whose stock has been forfeited. Corporations Code, §§ 2701, 2708.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Suit in equity by Louise Castello and others against the Central Eureka Mining Company, a corporation, to set aside a forfeiture of plaintiffs' stock in defendant corporation. From a judgment denying relief, the plaintiffs appeal.

Judgment affirmed.

Samuel S. Stevens, Richard Guggenhime, Caspar W. Weinberger, and Heller, Ehrman, White, & McAuliffe, all of San Francisco, for appellants.

Morrison, Hohfeld, Foerster, Shuman & Clark, J. F. Shuman and J. B. Phelps, all of San Francisco, for respondent.

DOOLING, Justice

Plaintiffs appeal from a judgment denying them relief. They sought by a suit in equity to set aside a forfeiture of their stock in defendant corporation, the stock having been forfeited pursuant to that portion of section 336 Civil Code (now section 2708 Corporations Code) which provides: "If no bidder offer to pay the amount due on the shares, together with the penalty of five per cent thereof, the shares shall be declared forfeited to the corporation in satisfaction of the assessment and penalty thereon."

The resolution levying the assessment was in the following language:

"Resolved, that an assessment of ten cents per share be levied on stock of record September 20, 1945, and that the following notice be mailed immediately to all shareholders:

" 'You are hereby notified that at a meeting of the directors of Central Eureka Mining Company held on September 20, 1945, an assessment No. 69 of ten cents per share was levied upon the capital stock of the company, payable immediately to Central Eureka Mining Company at Room 2012, 111 Sutter Street, San Francisco 4, California. Any shares upon which this assessment shall remain unpaid on the 22nd of October will be delinquent, and unless payment is made prior to delinquency, the said shares or as many of them as may be necessary, will be sold at the office of the company, Room 2012, 111 Sutter Street, San Francisco 4, California, on the 7th of November, 1945, at the hour of two o'clock p. m. of said day, to pay the delinquent assessment, together with a penalty of five per cent of the amount of the assessment on such shares, or be forfeited to the corporation.' "

[1] It is claimed that this resolution is defective in that the directors did not specify therein to whom and where the assessment was payable nor fix a day on which unpaid assessments should become delinquent, nor the day, hour and place of sale, all as required by sec. 332 Civil Code (now sec. 2701 Corp. Code). All the required matters were included in the notice which, as a part of the resolution, the directors provided should be immediately mailed to all stockholders. This was a sufficient specification and fixing of the matters, times, places and dates to satisfy the code requirement. Nothing of substance would have been accomplished by providing in more specific language that they were "specified" and "fixed" and no one reading the resolution would have any doubt that the directors had specified and fixed them.

Brown v. St. Paul Consolidated Oil Co., 101 Cal.App. 263, 281 P. 646, relied on by appellants, is readily distinguishable. In that case the court said of the evidence at page 268 of 101 Cal.App., at page 648 of 281 P.: "It utterly fails to show any agreement or action by a majority of the board. * * * The testimony of neither officer measures up to that held sufficient to establish the passage of a resolution * * *."

[2] The testimony of the secretary of the corporation in the case before us sufficiently supports the finding of the court that the resolution above quoted was adopted by the directors. He testified that the

resolution had been written out by the corporation's attorneys, that Mr. Prior, the president, read it to the directors and that after the reading the directors all voted to adopt it. While appellants claim that the secretary's testimony was confused and confusing as to what actually occurred the weight to be given it, in view of any contradictions or discrepancies, was entirely in the discretion of the trial court.

[3] The main attack upon the proceedings leading to the forfeiture stems from the fact that the stock was listed on the San Francisco Stock Exchange and on the day of the forfeiture shares of the same stock sold on that exchange for $2.05 per share, while appellants' stock was forfeited to satisfy an assessment which with the statutory penalties amounted to only 10½ cents per share. It is conceded that every statutory step required to be taken by secs. 333, 334 and 336 Civ.Code (now secs. 2702, 2703, 2707 Corp.Code) was taken in strict compliance with the code requirements, and particularly that the statutory notice was served and published exactly as required by Civ.Code sec. 334. Despite these facts no bidders appeared at the time and place fixed for the sale and after waiting at least one hour the secretary declared the shares of the delinquent stockholders forfeited, also in strict compliance with the provision of sec. 336 quoted at the outset of this opinion.

[4, 5] Appellants recognize that even gross inadequacy of consideration in the absence of some fraud, mistake or other inequitable conduct in the matter of the sale, is not a ground of equitable intervention. Sargent v. Shumaker, 193 Cal. 122, 129, 223 P. 464; Engelbertson v. Loan & Building Ass'n, 6 Cal.2d 477, 479, 58 P.2d 647; Prudential Insurance Co. v. Sly, 7 Cal.2d 728, 731, 62 P.2d 740; 25 Cal.Jur. 90. They seek to find ground for equitable intervention in this case by asserting that the officers of the corporation had an extra-statutory duty, when no bidders appeared in response to the statutory notice, to contact the San Francisco Stock Exchange in a further effort to secure bidders. No such duty was cast upon the officers by the legislature. It saw fit to provide the scheme for collecting delinquent assessments in the manner set out in the sections of the Civil Code above referred to and the respondent corporation, through its officers, followed every step of that statutory scheme to the letter. Where a statutory method of forfeiture has been provided and that method has been strictly followed "equity can afford no relief from it." (2 Pomeroy Equity Jurisprudence, 5th Ed., sec. 458, p. 311; 19 Am.Jur. 107; 30 C.J.S., Equity, § 56, page 394.) Following this rule the court said in Ruck v. Caledonia Silver Mining Co., 6 Cal.App. 356, 359, 92 P. 194, 195:

> "The reason for a strict construction in such case is that the sale, if regular and founded upon a valid assessment, forfeits the stock, and equity has no power to relieve from such forfeiture."

The question is a legislative, not a judicial, one. The legislature having imposed the conditions precedent to a valid forfeiture the courts cannot, without indulging in judicial legislation, add other conditions of their devising to those which the legislature has seen fit to make sufficient.

That bidders had always appeared at previous assessment sales held by respondent corporation is no ground, standing alone, for equitable intervention. The court found, on sufficient evidence, that appellants did not know of this fact or rely upon it.

The case is one of great hardship to appellants, but the respondent in good faith took every statutory step leading to the forfeiture of their stock and the forfeiture itself followed the failure of bidders to appear by reason of, and in accordance with, the provision which the legislature had seen fit to enact for that very contingency.

The judgment appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

Hearing denied; CARTER, J., dissenting.

85 Cal.App.2d 746

FOSTER v. A. P. JACOBS & ASSOCIATES et al.

Civ. 13549.

District Court of Appeal, First District, Division 2, California.

May 28, 1948.

1. Evidence 🔑**5(2)**

It is common knowledge that a slippery floor presents more than ordinary risk to those walking thereon.

2. Landlord and tenant 🔑**164(7), 167(8), 168(1)**

A landlord, creating on leased premises a condition less safe than before owes duty to apprise tenants or invitees, familiar with former condition, of increased risk, and failure to do so constitutes negligence, rendering landlord liable for injuries to tenant or invitee because of changed condition, unless injured person had full knowledge of all additional hazards resulting therefrom or hazard proximately causing injuries was so obvious that it could not reasonably have remained unnoticed.

3. Negligence 🔑**32(1), 52**

A land or building owner or occupant, directly or impliedly inviting or inducing others to go on land or in building, owes them duty to have premises in reasonably safe condition and warn them of latent or concealed perils.

4. Negligence 🔑**32(1), 48**

A land owner or occupant, expressly or impliedly inducing or leading others to go on premises by invitation for any lawful purpose, is liable for injuries sustained by them because of unsafe condition of land or its approaches, if known to him and not to them, but is not insurer of such persons.

5. Negligence 🔑**121(2)**

A presumption of land owner's or occupier's negligence does not arise merely on showing that injury was sustained by another while rightfully on premises.

6. Negligence 🔑**48, 66(1)**

A person injured on another's land may recover damages from owner or occupant thereof only when perilous instrumentality causing injuries and danger therefrom were known to owner or occupant and not to injured person, and there is no liability for injuries from obvious dangers or dangers as well known to injured person as to owner or occupant.

7. Landlord and tenant 🔑**165(1)**

Owners of office building in which a tenant's employee was invitee for several years, owed her duty, not only to maintain premises in reasonably safe condition, but to refrain from creating unsafe condition by active negligence.

8. Landlord and tenant 🔑**168(1)**

An employee of office building owners' tenant had right to continue with her work, though she observed changed condition of floor outside tenant's office because of uneven waxing thereof by owner's employee and realized that such change involved some additional risk from slipperiness of floor, if she concluded, as reasonable person, that she could do so through exercise of additional precautions, and she was not bound to quit her job or waive all recourse against owner for injuries sustained in fall on such floor.

9. Evidence 🔑**5(2)**

It is common knowledge that reasonably slippery floor surface can be walked on with comparative safety when slippery condition is uniform and recognized and suitable care in light of condition is exercised.

10. Landlord and tenant 🔑**169(11)**

An employee, injured in fall on slippery newly waxed floor of building corridor outside her employer's leased office, was not, as matter of law guilty of contributory negligence in walking on such floor with reasonable care after recognizing its slippery condition.

11. Negligence 🔑**66(1)**

An injured person's previous knowledge of defective condition causing injuries is not of itself conclusive evidence that she failed to exercise due care.

12. Appeal and error 🔑**996**

A reviewing court is not authorized to substitute its deductions for those of trial court as to plaintiff's freedom from contributory negligence, unless reasonable person could draw from evidence only one inference pointing unerringly to plaintiff's negligence proximately contributing to her injury.

13. Landlord and tenant ⚷169(6)

In action against office building owners and employee thereof for injuries to employee of owners' tenant as result of fall on slippery newly waxed floor of corridor outside tenant's office, evidence supported jury's implied findings of defendant employee's negligence in failing properly to distribute wax and both defendants' negligence in failing to inspect floor before accident or do anything about its slippery condition until after injuries.

14. Landlord and tenant ⚷165(4)

Building owners and janitor, as only persons having control over floors in building, were charged with knowledge of their condition, and knowledge of changed condition of floor, which inspection would have disclosed after janitor's rewaxing thereof, must be imputed to them, whether they made inspection or not, so as to render them liable for injuries to tenant's employee falling on such floor because of its resulting slippery condition.

15. Appeal and error ⚷1053(2)

Admission of evidence as to building janitor's treatment of floor of corridor outside tenant's office in building after injury to tenant's employee, falling on floor because of its slippery condition due to janitor's improper waxing thereof, was not prejudicial to building owners and janitor in such employee's action against them for damages, in view of instruction to disregard such evidence and instruction that condition of floor at time of accident was question for jury.

16. Appeal and error ⚷1064(1)

Where building janitor admitted that he was advised of slippery condition of floor in building shortly before injury to tenant's employee falling thereon, instruction that such employee was not required to prove that janitor or building owners had notice or knowledge of dangerous condition of floor, if janitor, acting on owners' behalf, negligently caused such condition by rewaxing floor, was harmless to owners and janitor in employee's action against them for damages.

17. Landlord and tenant ⚷169(10)

Where building janitor, acting for building owners, actively created slippery condition of floor in building by rewaxing it improperly and admitted that he was experienced with wax and floors, instruction that building owners, directly or impliedly inviting others to enter therein, including tenant's employee, owed such persons duty to have premises in reasonably safe condition and warn them of latent or concealed perils therein, was proper, as inspection of floor by janitor after rewaxing would have revealed true condition thereof.

◆

Appeal from Superior Court, San Francisco County; Robt McWilliams, Judge.

Action by Georgia M. Foster against A. P. Jacobs & Associates and another for personal injuries sustained in a fall on the floor of a hallway in named defendants' building. Judgment for plaintiff, and defendants appeal.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellants.

John J. Taheny, of San Francisco, for respondent.

FINLEY, Justice pro tem.

This is an appeal by defendants from a judgment for personal injuries entered upon a verdict for plaintiff in the sum of $7500.00. The injuries were sustained when plaintiff fell on the newly waxed linoleum floor of a hallway on the premises where she was employed.

At the time of her injury plaintiff was a posting clerk in the offices of the California Insurance Commissioner, a tenant of defendants. The offices occupied all of the seventh floor of the building numbered 333 Kearney Street, which building was owned by defendants Jacobs. Defendant Anthony Rivera was employed by said owners as a janitor and maintenance man for the building.

The seventh floor of this building was laid out as a straight hallway or corridor extending from north to south with rooms on both sides. According to the diagram admitted into evidence there were five doors opening into this corridor from the east and six from the west. At the north end was a lavatory, at the south a door which led into an elevator vestibule. Immediately opposite this door and across the vestibule was the elevator. Opening into the vestibule on the left was a door leading to a stairway. On the east was a door numbered 700 through which employees of the Insurance Commissioner entered and left the offices.

Numbers of the rooms opening into the corridor proper have no particular significance with the exception of two which opened into it from the east side. From south to north these were numbered 704 and 706. Between them in the corridor stood a row of some twenty filing cabinets which according to the diagram extended approximately from the north casing on door 704 to the south casing on 706. The floors in the corridor and elevator vestibule were covered with linoleum.

Plaintiff sustained the injury upon which this suit was brought during the afternoon of Monday, May 29, 1944. The previous day, Sunday, May 28th, defendant Rivera washed, shellacked and waxed the linoleum covering the floors of the vestibule and the hallway. On her return to work the following morning, Monday, May 29th, plaintiff noticed that the floor in the vestibule had been waxed and was "very slippery and glaring". She walked off the elevator, through the vestibule into room 700 and from there into 704–706, "the main room". During the morning she had occasion to go out to the files in the corridor three or four times. She went out through door 706, and to quote plaintiff's testimony "turned down to the files, looking for certain papers, knowing it was slippery underfoot and glarey and I took the precaution of holding on to the handles of the four door files." She observed that the floor had been waxed. On these occasions she did not slip.

On her way out to lunch at noon plaintiff slipped on the floor in the vestibule by the elevator but did not fall. Following is an excerpt from plaintiff's deposition read into the record:

"Q. Did you experience any difficulty in walking on it before your accident in any way? A. Well, I walked very carefully. I had to use the corridor, and I walked very carefully.

"Q. Well, I mean did you slip before the accident in question in any way? A. When I was going out to lunch, I noticed it then particularly, for my foot kind of went out from under me; and I halfway braced myself; and I said to myself, 'This is dangerous,' in my own mind."

After this incident plaintiff went back into the offices and spoke to her office manager who in turn reported the slippery condition to defendant Rivera.

Another excerpt from the record of plaintiff's testimony on cross-examination is as follows:

"Q. Did the outer lobby appear to be more heavily waxed than the interior corridor? A. No, it did not.

"Q. What would you say as to that? Did it appear to be or not, about the same? A. Yes, waxed at the same time —one fell swoop, I would say; he opened the door and went right through to the end of the corridor. That would be in my opinion.

"Q. What was the appearance of the wax that morning when you came to work? Outside of glaring, did it appear to have any excessive amount of waxing on the floor? A. That I am unable to say; to me it was very uncomfortable to walk on.

"Q. But you didn't take any particular notice of that? A. I didn't take any particular notice of it being worse in one spot than the other. It was all about the same.

"Q. As far as you could see, it all appeared to be about the same? A. Yes, it appeared about the same.

"Q. And you say it was all bad? A. To my mind."

Plaintiff returned from her lunch and there was no further incident until sometime later in the afternoon when she sought to cross the corridor to room 703 which was directly across from 704. As she stepped out through door 704 with her left foot she slipped on the linoleum, her left foot skidding forward which caused her to fall back striking her shoulder on the door jamb or casing which resulted in a fracture of her left arm and shoulder.

[1, 2] Beyond any question of doubt defendants by treating the linoleum floor in the vestibule and corridor by whatever method was used created a floor surface that was slippery. Defendants admit that it was slippery but contend that the linoleum was treated with a standard liquid wax applied according to the usual custom of defendant Rivera and that defendants were not negligent in its application. Defendants do not concede that the slippery condition constituted a dangerous condition to those using the waxed floorways but it is a matter of common knowledge that a slippery floor presents a more than ordinary risk to those walking upon it. It makes little difference whether this increase in risk factor be termed dangerous or merely less safe than the ordinary. If a landlord creates a condition on his premises which is less safe than before and where the hazards are not open and obvious in all particulars a duty is owed to tenants or invitees who were familiar with the former condition to apprise them of this increase in risk factor. It would undoubtedly constitute negligence not to do so and unless it should appear that a tenant or invitee who was injured by reason of this change in condition had full knowledge of all the additional hazards resulting from the change or unless the hazard proximately causing the injury was so open and obvious that it could not in all reason have remained unnoticed, the landlord would be liable.

Defendants' position on this point appears from the following statement in their opening brief: "But it must be remembered that plaintiff is not entitled to recover even if Rivera had been negligent. Plaintiff complains because she fell on the slippery floor. The uncontradicted testimony shows that she knew that that floor was slippery at the time and place she entered upon it; that knowing this, she failed to take the precautions that she had previously taken to avoid falling on this floor that she thought dangerous. She knew that the floor was slippery and that it was possible that it would cause her to fall. Her knowledge of this condition was greater, not less, than defendants."

In this connection defendants rely primarily on Mautino v. Sutter Hospital Association, 211 Cal. 556, 296 P. 76, 77. In that case plaintiff a private nurse employed by a patient in defendant Sutter Hospital slipped and fell on the waxed linoleum floor of the patient's room. She had worked one shift the day previous to her injury. She testified that on this first day the floor was slick and she could not keep her feet. She told the head nurse that the floor was slippery. The floor was equally as bad when she came to work at 7 o'clock the following morning, if not worse. It was highly polished and she could not keep her feet it was so slick. She told the head nurse that she (plaintiff) would slip and fall. At 9 o'clock she did slip and fall while walking past her patient's bed and in the fall was injured. She had judgment in the trial court which was reversed in the District Court of Appeal. The case was taken over by the Supreme Court for the purpose, as stated in the opinion, "to permit of further consideration of plaintiff's status, i. e., whether she should be adjudged an invitee or an employee of the defendant." The holding was that she was an invitee.

Since plaintiff in that case was held to be an invitee of the hospital so in this case plaintiff must be considered as an invitee of defendants. The nurse was an employee of the patient who was a tenant of the hospital. Plaintiff here was an employee of the Insurance Commissioner, who was the tenant of defendants. The same rules of law then must apply in both cases unless there has been subsequent modification of the rule in the Mautino case. On the facts they are certainly quite similar.

On the point of assumption of risk and contributory negligence the opinion in the Mautino case at pages 560, 561 of 211 Cal., at page 77 of 296 P., reads as follows:

"The court properly instructed the jury, at the plaintiff's request, that at the time of the accident she was 'an invitee of the defendant.' It is clear from the plaintiff's testimony that she had full knowledge of the condition of the floor during all the afternoon of September 28th and for two hours in the forenoon of the next day. It does not appear that the defendant's knowledge thereof was superior to that of the plaintiff. If it was negligence for the defendant to maintain the floor in the condition described by the plaintiff, there appears to be no escape from the conclusion that it was negligence for the plaintiff, with full knowledge of such condition, to continue in the use thereof.

[3-6] "'The authorities are entirely agreed upon the proposition that an owner or occupant of lands or buildings who directly or by implication invites or induces others to go thereon or therein owes to such persons a duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils. In the language of a recent opinion: "The law is well settled that an owner or occupant of land who by invitation, express or implied, induces or leads others to go upon premises for any lawful purpose is liable for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them." * * * The owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier merely upon a showing that an injury has been sustained by one while rightfully upon the premises. The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not to the person injured that a recovery is permitted * * * there is no liability for injuries from the dangers that are obvious, or as well known to the person injured as to the owner or occupant.' 20 R.C.L., pp. 55–57; Goldstein v. Healey, 187 Cal. 206, 211, 201 P. 462; Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793."

Factually the only essential difference between the Mautino case and the one at bar is that here plaintiff had been employed on and used the same premises over a period of several years. It was her regular employment. There was no evidence that floors of the vestibule or corridor had ever been waxed to this slippery condition at any time within plaintiff's previous experience. There was evidence that the floors had been waxed on previous occasions but on those occasions were never noticeably slippery. Prior to the time she left work on Saturday she had been able to and had used the vestibule and corridor in safety. When she returned Monday morning she found the vestibule and corridor, parts of the premises she had of necessity to use in course of entering and leaving the building and in working with the files, in an admittedly newly waxed and slippery condition. She had two alternatives; she could have refused to perform any duty or function involving use of the corridor until something was done to remedy this condition or she could have exercised what care she could for her own safety and continued with her duties. She chose the latter.

In the Mautino case plaintiff found the floor in a slippery condition when she first entered upon her duties. She was a special nurse, the employment would commonly be only temporary. She had a choice of assuming the risk along with the employment or in refusing the employment until the slippery condition was remedied. It was not a question of continuing the duties which had been previously assumed and carried on for several years on a non slippery floor over to one that had been made slippery by those having exclusive control of changing the condition of the premises.

It would seem that there is at least some difference between these two cases on this ground. Certainly defendants could not be denied the right to properly wax their floors in either case. In the Mautino case plaintiff was an invitee of the hospital only in the event that she chose to accept the conditions there as she found them. It was not a question of accepting an invitation under one set of conditions and then after such acceptance and the entering upon employment having these conditions changed over a week-end to others involving an increase in hazard to safety.

[7-9] In the case at bar we have an example of this latter situation. Plaintiff having been upon the premises as an invitee for several years it was the duty of the owner not only to maintain the premises in a reasonably safe condition but to refrain from creating an unsafe condition by active negligence. Plaintiff had every right to continue on with her work even though she observed a change in the condition and realized that it involved *some* additional risk if as a reasonable person she concluded that this could be done through the exercise of additional precautions. She could not in reason be expected to either quit her job or waive all recourse for using a floor that her duties of long standing required her to use just because her employer's landlord chose not to exercise ordinary care in maintaining the floor or chose, in the course of such maintenance, to apply wax in such manner at to make the floor slippery and dangerous when common experience and the testimony of an expert witness called on behalf of defendant established beyond all doubt that a standard linoleum wax properly applied does not create a dangerously slippery floor. It is quite true that plaintiff observed that the floor was slippery, and testified that she thought it was dangerous. She even slipped upon it in the vestibule on her way out to lunch. It is also true however, and is a matter of common knowledge that reasonably slippery surfaces can be walked upon with comparitive safety when the slippery condition is uniform, is recognized and suitable care in the light of the condition is exercised. Plaintiff here testified that the corridor had been polished on previous occasions. On these occasions she observed that it had been waxed but it was never slippery. She had worked there from August 1937 to October 1944. The same covering was on the floor during that entire period, but the only time she found it slippery was the day of the accident.

[10-12] Plaintiff also testified regarding her care and conduct while using the hallway on this particular occasion and the only proper inference to be drawn from the verdict for plaintiff is that the jury found such care and conduct reasonable under the circumstances. We cannot say that the evidence is insufficient to sustain this finding and that as a matter of law merely because plaintiff recognized a slippery condition of the floor which she felt to be dangerous and proceeded nevertheless to use the floor exercising the care and caution to which she testified, that she was contributorily negligent in so doing. "Previous knowledge of the defective condition is not, of itself, conclusive evidence that a plaintiff failed to exercise due care." Harris v. Joffe, 28 Cal.2d 418, 425, 170 P.2d 454, 459. See also Hughes v. Quackenbush, 1 Cal.App.2d 349, 356, 37 P.2d 99; Finch v. Willmott, 107 Cal.App. 662, 667, 290 P. 660. "Certainly it may not be said that a reasonable person could draw from this evidence only an inference pointing unerringly to the negligence of (plaintiff) proximately contributing to her injury. (see Flores v. Fitzgerald, 204 Cal. 374, 376, 268 P. 369), and a reviewing court is not authorized to substitute its deductions for those of the trial court." Harris v. Joffe, supra.

In Sommerfield v. Miratti, 49 Cal.App.2d 450, 121 P.2d 746, the plaintiff slipped and fell in a hotel on a waxed stairway of composition tile. The whole surface was waxed and a new application of wax was made once a week. This was done by an employee of the hotel. Plaintiff was familiar with the hotel and had used the steps many times during a period of four or five years before the date of the accident. She had observed the condition of the steps on these occasions and testified that she knew the steps were slippery. At page 455 of 49 Cal.App.2d at page 749 of 121 P.2d, the court after reciting these facts states as follows: "Possibly the evidence would have supported contrary findings on some or all of these matters, but we cannot interfere with the jury's conclusions, based, as they are, on sufficient evidence. The mere fact that there is some danger of falling in using a passageway provided for use of an invitee does not in every case convict him of contributory negligence for using it with knowledge of the condition. The question is whether he used ordinary care in so doing, and if to a man of ordinary prudence it would appear that in spite of the danger he can by taking available precautions safely use the passageway, he is not negligent in using it with those precautions." Citing Christy v. Ulrich, 113 Cal.App. 338, 342, 298 P. 135; Roseberry v. Edward F. Niehaus & Co., 166 Cal. 481, 137 P. 232; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128.

In Mautino v. Sutter Hospital, supra, the court states at pages 560, 561 of 211 Cal., at page 78 of 296 P., "The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. * * * There is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant: * * *." "It is clear from the plaintiff's testimony that she had *full knowledge* of the condition of the floor * * *. It does not appear that the defendant's knowledge thereof was *superior* to that of the plaintiff." (Emphasis added.)

[13] In the case at bar there was testimony that the floor in the hallway was not of uniform slipperyness throughout; that this was unknown to plaintiff but could by proper inspection have been ascertained by defendants. Defendant Rivera testified that he applied the wax with a brush by first dipping it into the liquid wax and then brushing it on the floor or by pouring the wax on the floor and then spreading it with the brush. He stated that the brush "was always pretty wet." He also testified that he did nothing further to the floor after applying the wax with the brush; that his employers, the defendants Jacobs, had provided him with an electric machine for scrubbing, polishing, etc., but that after applying the wax on this occasion he did not use the machine on this floor until after he had been informed of plaintiff's injury.

Further testimony of defendant Rivera was that after application of the wax he made no inspection or test of the floor to determine its condition. He stated: "I knew was proper to distribute the wax, because that wasn't my first experience, I had done it before."

"Q. You knew if it was not properly distributed it would be slippery? A. Yes sir, I did."

At another point:

"Q. And you knew that persons are liable to fall on it if they walk on it before it hardens? A. Yes sir.

"Q. You also knew that if put on too thick at any spot it takes a long time to harden? A. Yes sir."

Nevertheless defendants made no inspection of the floor on Monday morning following the waxing to determine its condition. He admitted that plaintiff's office manager informed him of the slippery condition of the floor sometime before noon but that he did nothing about it until after plaintiff was injured which was shortly after 1:00 p. m.

Plaintiff testified that the wax at the point in the hallway where she slipped was still damp; that a mark was left on the floor where her foot slipped and that subsequent examination of the sole of the shoe involved in the slipping disclosed a deposit of wax on the edge of the sole. An expert witness called by defendant testified that he would not put wax on so thick that on the following day a person's foot would make a streak on it; that the method he used was to dip a mop in the wax, wring it out and then apply the mop to the floor.

In view of this testimony we cannot say that the implied finding of negligence by the jury is not amply supported by evidence. Furthermore it indicates why plaintiff may well not have had full knowledge of the true condition of the floor. A finding that the wax was not uniformly thick or dry and thus not of uniform slipperyness would find ample justification in defendant Rivera's own testimony. There is no showing that such a condition would have been discernable by mere visual observation, particularly to one with no special knowledge of or experience with the waxing of floors and there is not even a hint that plaintiff had any such knowledge or experience.

[14] Defendants on the other hand had actual knowledge of a slippery condition of the floor an hour or more before the accident happened. In addition to that they as the only persons having control over the floors and premises were charged with knowledge of their condition and certainly where by positive action they wrought a change in conditions, any knowledge that an inspection would have disclosed must be imputed to them whether they made the inspection or not. Defendants applied the wax, knew the manner in which it was applied and according to defendant Rivera's testimony knew that if put on thick either uniformly or in spots it would take longer to harden where it was the thickest and that persons were liable to fall if they walked on it before it did harden. The testimony was sufficient to sustain a finding that the wax was thicker at some spots than at others and had not hardened at the spot where plaintiff slipped which was a condition of which plaintiff cannot be charged with knowledge superior to that of defendants.

The remaining points raised by defendant are that the court gave two erroneous and harmful instructions and ruled erroneously and harmfully on matters of evidence. We shall consider the latter first.

It would serve no useful purpose and would be impractical for us to discuss here each particular ruling on the evidence referred to by appellant. The two principal considerations urged are that the form and substance of some of the questions put to defendant Rivera were improper because of his alleged limited use of the English language and because some of them dealt with the condition of the floor and measures taken by Rivera in connection with it after plaintiff's injury.

An examination of the transcript covering Rivera's testimony indicates that contrary to appellants' contention Rivera handled and seemed to understand the English language quite well. That he was not an illiterate person can best be illustrated by quoting three of his longer answers picked at random from the transcript. In answer to questions put to him he replied as follows:

"A. I knew was proper to distribute the wax, because that wasn't my first experience, I had done it before."

"A. Answering this question, we used it, your Honor, not only for taking off excess wax from the floors but use it for scrubbing the floors; we use that machine for waxing floors, for sanding floors, all of the purposes used that machine for."

"A. I didn't use the machine to polish floors or anything like that, but this machine, I give consideration to the useful a person can gain by using it polishing floors, but I never did use it to polish my floors; it isn't necessary."

This is not the language of an illiterate person.

[15] Referring to evidence that had been admitted relative to Rivera's treatment of the floor after the accident the court admonished the jury in part as follows:

"* * * you are instructed to disregard and leave out of consideration altogether from now on the evidence that has been allowed with reference to the use of that machine referred to by the witness Rivera and to the witness' activities in leveling off the floor and attempting to make it smooth and even."

There followed a discussion between court and counsel relative to the court's reference to the condition of the floor whereupon the court further instructed as follows: "* * * the determination of the facts in the case is entirely within your province, and I have not attempted to intimate any views that I may have in regard to the condition of this floor, as to whether it was rough and uneven at the time of the accident, or what its condition was. That problem is for you to wrestle with after the testimony is all in and for you to adjudicate by your verdict. Is that satisfactory Mr. Sweet?"

"Mr. Sweet. (Counsel for Appellant). I think that is very complete, your Honor."

Viewing the situation with relation to the substance of the particular testimony given, the court's rulings and this admonition we do not consider that appellants' position was prejudiced.

The two instructions objected to by appellant read as follows:

> "* * * If you find that defendant Anthony Rivera, while acting on behalf of the owners of the property in question negligently caused the floor in question to become dangerous for use by the plaintiff, Mrs. Foster, then, if you so find, the plaintiff, Mrs. Foster, is not required to prove that he, Anthony Rivera, or the other defendants, had notice or knowledge of such dangerous conditions, if you find that it was dangerous * * *"
>
> " The owners of a building who, directly, or by implication, invite others to enter therein, and that includes plaintiff in this case, owe to such persons who thus enter a duty to have their premises in a reasonably safe condition, and to give warning of latent or concealed perils and dangers."

[16] The first of these instructions merely advised the jury that if defendants' *activity created* a dangerous condition that it was unnecessary for plaintiff to prove that defendants had knowledge of it. There is no question here of a concealed or hidden defect. Furthermore it was admitted by defendant Rivera that he was advised of the slippery condition of the floor an hour or more before the accident happened. It was not necessary that he should have been advised in minute detail of the actual condition of the floor for he created the condition. He was experienced in treating floors with wax. Assuming for the moment that due care would not have required an inspection before tenants and invitees were allowed upon the floor, certainly the exercise of due care did require one after Rivera had been warned. Therefore knowledge amounting to actual knowledge of the condition having been admitted by Rivera it was in any event unnecessary for plaintiff to prove it and the instruction is therefore harmless.

[17] In connection with the second instruction above, appellants refer to the rule discussed in Ellis v. McNeese, 109 Cal.App. 667, 293 P. 854. That rule has no application here for this was not a condition created by an agency over which defendants had no control or direction, such as the elements or some outside person. Here they themselves actively created the condition. Rivera was experienced with wax and floors by his own admission. To him an inspection would have revealed the true condition of the floor. To an experienced person its true condition would have been apparent and not latent or concealed.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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85 Cal.App.2d 600

BARRY v. CONTRACTORS STATE LICENSE BOARD.

Civ. 16044.

District Court of Appeal, Second District,
Division 3, California.

May 24, 1948.

1. Licenses 🔑3

Evidence sustained findings of Contractors State License Board that contractor had violated divers sections of the Los Angeles Building Code, the Health and Safety Code, and the Business and Professions Code, which justified revocation of contractor's license. Business and Professions Code, §§ 7028, 7110, 7114, 7116, 7118; Health and Safety Code, §§ 15000–17902, 16000, 16001, 16057.

2. Evidence 🔑60

Where one doing carpenter work was unlicensed, the presumption was that he was working for wages.

3. Licenses 🔑38

Evidence showed that contractor knowingly contracted with unlicensed contractors to do work contrary to Business and Professions Code providing for disciplinary action in such cases, and it was immaterial whether contractor, by the same act, aided and abetted others to evade another section of the code, since merely entering into contracts with unlicensed contractors did not constitute two separate offenses. Business and Professions Code, §§ 7048, 7114, 7116, 7118.

4. Licenses ⚿38

That licensed contractor, while engaged in dispute with owner over payment for work, wrote to Department of Building and Safety a letter containing false statements in order to involve owner in trouble with the authorities, was not a willful or fraudulent act which would justify disciplinary action against licensee within section of Business and Professions Code. Business and Professions Code, § 7116.

5. Licenses ⚿38

An order revoking contractor's license which provided as a condition to application for reinstatement that licensee should reconstruct addition to house to meet requirements of building code at no cost to owner was not in excess of discretionary powers of Contractors State License Board. Business and Professions Code, § 7095.

6. Municipal corporations ⚿601

Under the Building Code of the City of Los Angeles, any lawfully existing fixture, construction, or arrangement in a building may be replaced in kind, but a change such as the inclosure of a porch into a bedroom was a "change of use" and was required to comply with the requirements of the Code relating to a dwelling and to have the ceiling height and the floor clearance and ventilations specified for new bedrooms in dwelling.

See Words and Phrases, Permanent Edition, for all other definitions of "Change of Use".

7. Licenses ⚿38

Where hearing before deputy registrar ended and matter was ordered submitted on September 18th and on September 30th an order was made setting aside the submission and the matter was resubmitted as of that date, further decision of registrar on October 10th in proceeding to cancel contractor's license was not without jurisdiction because decision was not rendered within 20 days after original submission and provision requiring decision within 20 days was only directory. Business and Professions Code, § 7094.

8. Appeal and error ⚿911(1)

Where affidavit making general charges that trial judge was disqualified was acted on as a prima facie showing of disqualification, appellate court would assume on appeal that the attempt to disqualify the judge to rule on motion for a new trial was proper and timely.

9. Appeal and error ⚿991

Appellate court was bound by finding that judge entertained no bias or prejudice and was not disqualified to rule on motion for new trial where affidavit of judge fully met the charges made by party seeking to disqualify judge.

10. Appeal and error ⚿449

The fact that an appeal was taken from order holding judge not to be disqualified did not affect the validity of order denying motion for a new trial.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Mandamus proceeding by Milo Barry against Contractors State License Board to review an order revoking his license as a contractor. From an adverse judgment and certain orders, the petitioner appeals.

Affirmed.

Milo Barry, in pro per.

Fred N. Howser, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

Petitioner brought this action against the Contractors State License Board of the Department of Professional and Vocational Standards, in mandate, to review an order of said board revoking his license as a contractor. The trial court found, in accordance with the findings of the contractors board, and in response to the charges filed against petitioner, that while his license was under suspension he entered into a contract with one Albert Smith to furnish the labor and material to enclose a porch for use as a bedroom and to do certain other remodeling of a residence for the sum of $1,200, in violation of section 7028 of the Business and Professions Code (hereinafter referred to as the Code); that in violation of section 7110 of the Code he wilfully violated section 91.4809 of the Los Angeles Building Code and sections 16000 and 16001 of the State Housing Act (secs. 15000–17902, Health and Safety Code), in that he failed to have a clearance of 18 inches below the floor joists of subfloor in plank-type floor construction, and also failed to provide a sufficient number of openings with screens or lattice work to insure proper ventilation; that in violation of section 7110 of the Code, he wilfully violated section 91.4804 of the Los Angeles Building Code, and also section 16057 of the State Housing Act, in that he failed to construct said bedroom with the proper ceiling height, as requiired by said building codes, but constructed the same with a height of only about 6½ feet; that he violated section 7114 of the Code in that he did aid and abet two unlicensed contractors, Hadley and Tomlinson, to evade the provisions of said Code; that he violated section 7116 of the Code in that when a dispute arose over payment for the job he did wilfully notify the Department of Building and Safety of the city of Los Angeles that the work had been done in violation of the Los Angeles Building Code; and that he violated the provisions of section 7118 of the Code in that he knowingly entered into contracts with one Hadley and one Tomlinson, knowing that they were unlicensed as required by the contractors license law. It was found that petitioner had been fairly tried, that there was adequate competent evidence to sustain the findings, decision and order revoking petitioner's license, and that the order was not arbitrary, capricious, illegal, fraudulent, or an abuse of discretion. In the conclusions of law the court found that petitioner was guilty of the said violations charged, and that the order of the board should be sustained; and the judgment denied a peremptory writ. Upon the court trial transcripts of the proceedings before the board were received in evidence. The clerk's transcript of those proceedings contains the complaint and amendments thereto filed against petitioner, the answer, the findings, conclusions and recommendations of the hearing officer, the decision of the registrar, the applications for and order denying rehearing, and intermediate motions and orders. The reporter's transcript consists of 343 pages of the oral proceedings before the deputy registrar. Numerous letters and other writings, including portions of the building code of the city of Los Angeles, were received as exhibits, together with certain photographs of the building on which the work was done. No additional evidence was received at the trial. The trial court was called upon to determine, (1) whether the evidence adduced at the hearing before the board was sufficient to sustain all or any of the charges, (2) whether all or any of the acts proved were in violation of the Code in respects which justified disciplinary action, and (3) whether upon the facts established by the evidence the revocation of the petitioner's license was arbitrary and an abuse of discretion. Since, as we say, no additional evidence was produced at the trial, the factual issues were to be determined from an inspection of the reporter's transcript and the exhibits.

[1] Petitioner is and has been representing himself, throughout the proceedings. He has slight understanding of the questions which his appeal presents for decision. He has filed an opening brief and reply brief which, for the most part, are devoted to attacks upon the motives of the inspector who filed the complaint and of certain other persons, and he complains of irregularities in the proceedings before the deputy registrar. His briefs contain no discussion of the evidence given against him, or that which was given in his favor, and we are unable to find in his briefs any contention that the evidence does not support the findings. However, in the oral argument he did question the sufficiency of the evidence to prove that he had engaged in any contracting while his license was under suspension, and he also contended that the work he had done in adding an additional room to a residence and in making other alterations was not in violation of the city building code or State

Housing Act. Similarly, the brief of respondent board points to no evidence touching any of the alleged violations, although it is stated generally and without transcript reference, that in the hearing before the board petitioner admitted the commission of the acts which were charged to be in violation of law. We can understand the failure of petitioner to discuss the evidence as to the alleged violations. There was no evidence favorable to him. We have made an independent study of the record with respect to the sufficiency of the evidence and find it adequate in all respects to support the findings.

On October 30, 1943, in a proceeding instituted by Barry in the superior court, for review of an order of respondent board suspending his contractor's license, the court made an order purporting to reinstate petitioner's license "pending the review and trial de novo of said proceedings." On November 2, 1943, said order was vacated. It was petitioner's contention in the instant proceeding, and he testified, that his written agreement with Smith was signed by Mr. and Mrs. Smith and himself at his home in the forenoon of November 1, 1943, and it is upon this ground that he contends he was duly licensed at that time by virtue of the order purporting to reinstate his license. The time card of Mrs. Smith's employer, which was in evidence, showed that she was not absent from her work on November 1st. Both Mr. and Mrs. Smith testified that the agreement was signed on a date subsequent to revocation of the order of reinstatement, and the court found that it was entered into on November 9, 1943. Entering into this contract was a violation of the code and a cause for revocation of petitioner's license. Secs. 7028, 7115.

Petitioner's work included closing in an existing porch in a dwelling, which, when completed, had a ceiling height as low in places as 6½ feet and an average height of about 6 feet 9 inches, whereas the city building code and State Housing Act required a height of 8 feet. The floor of the room had no ground clearance beneath it and no ventilation, whereas the said codes required a clearance of 18 inches and also sufficient openings to insure proper ventilation. These violations of the building codes were ground for revocation of the license under section 7110, Business and Professions Code.

[2, 3] Petitioner entered into a written contract with Tomlinson to do brick work at a fixed price of $60, and a contract with Hadley for carpenter work for a fixed price of $85. Although these contractors were unlicensed, petitioner claims legality for the contracts because each was for less than $100, citing section 7048 of the Code. However, since the work of construction in each case was "only a part of a larger or major operation" the provision excepting contracts of less than $100 was inapplicable. Sec. 7048, par. 2. Tomlinson offered to do the work at daily wages and it was only upon petitioner's insistence that he took a contract for the work. Since Hadley was unlicensed it is to be presumed that he also was working for wages. Petitioner admittedly insisted upon having contracts because his compensation insurance had been cancelled and he had no insurance coverage for any employees. We think these facts were sufficient in this proceeding to charge petitioner with knowledge that Tomlinson and Hadley were unlicensed. Certainly, according to his own testimony, he did not act in the belief that they were licensed, since he claimed the right to contract with unlicensed contractors so long as neither contract exceeded $100. He was therefore guilty of a violation of knowingly contracting with unlicensed contractors, which is a ground for disciplinary action (sec. 7118). It is immaterial whether he was also by the same act aiding and abetting others to evade the act, in violation of section 7114, since merely entering into the contracts with unlicensed contractors, under the circumstances related, would not have constituted two separate offenses.

[4] While petitioner was engaged in a dispute with Smith over payment for his work he wrote a letter to the department of building and safety of Los Angeles, stat-

ing that the ceiling of the room he had added to the Smiths' house was less than 8 feet high, and that the room was being used as a bedroom, although he had constructed it for use as a den or library. The latter statement was false. His written agreement with Smith stated that the porch was to be enclosed for use as a bedroom. He had previously made threats to Smith that he would disclose to the building department the violations of the building code. His purpose in writing the letter was to involve Smith in trouble with the authorities and he undoubtedly was actuated by malice. Both respondent board and the trial court found that the writing of the letter was a violation of section 7116, which reads as follows: "The doing of any wilful or fraudulent act by the licensee as a contractor in consequence of which another is substantially injured constitutes a cause for disciplinary action." We do not believe that within the meaning of this section the notification to the building department was a wilful or fraudulent act which would justify disciplinary action. The letter was not written in the capacity of a contractor. Petitioner had long since discarded the role of contractor for that of litigant, in which latter role he proved to be as obnoxious as he had been in the former. He was given to the writing of scurrilous letters and the making of vicious accusations in connection with his various lawsuits, but this conduct was not within the regulatory scope of the act. Any annoyance that Smith may have suffered as a consequence of petitioner's tale-telling would not in our opinion have amounted to the substantial injury contemplated by the code section. Furthermore, the addition to the house was not condemned, and it appears that the only penalty imposed upon Smith was a notification by the building department that the room could not be thereafter used as a bedroom. Except in this one particular, the conclusions of the trial court are fully sustained by the record.

[5] The order revoking petitioner's license provided as a condition to application for reinstatement of the license that petitioner should reconstruct the addition to meet the requirements of the building code, at no cost to the owner. Such conditions may be imposed upon revocation of a license (sec. 7095). It would not be difficult for petitioner to meet these conditions and the terms of the order were not in excess of the discretionary powers of the board.

As a defense to all the charges of violations of the building code and the housing act, petitioner claims that it was lawful to enclose the porch so as to add an additional room without compliance with the requirements governing new construction. In this connection we are required to construe sections 15154 of the Housing Act, and section 91.0103(d) of the Los Angeles Building Code, which read as follows: 15154. "Except as otherwise permitted or required by this part: (a) Any alteration, installation, or change in, including use or occupancy, or reconstruction of, any building shall meet the requirements of this part relating to that building. (b) Any lawfully existing fixture, construction, or arrangement in a building may be replaced in kind."

Sec. 91.0103(d). "Additions conforming to the construction of the original building may be made to nonconforming one-story buildings outside of any Fire District provided the addition, in any two-year period, is not in excess of two hundred square feet (200 square feet) or 50 per cent of the area of the original building."

[6] Petitioner's contention appears to be that since the ceiling of the porch was less than seven feet in height, and clearance under the porch was less than 18 inches, section 91.0103, subdivision (d) of the building Code allowed the conversion of the porch into a bedroom with the same ceiling height and lack of clearance and ventilation. The words, "additions conforming to the construction of the original building," in section 91.0103(d), undoubtedly mean that the type of construction may be the same, but we do not understand them to mean that every non-conforming feature can be duplicated in new additions. Moreover, no contention is made that the original building had bedrooms with 6½ foot ceilings and no clearance or

ventilation under the floors. If section 91.0103(d) should be construed as allowing the conversion of a porch into a non-conforming bedroom, it would be in conflict with the State Housing Act, section 15154. Any lawfully existing fixture, construction or arrangement in a building may be replaced in kind; but a change such as the enclosure of a porch into a bedroom, being a change of use, must comply with the requirements of the act relating to that building. Since the building was a dwelling, as defined in the act, and we find no applicable exception to the provision quoted from the state law, it follows that the additional room was required to have the ceiling height and the floor clearance and ventilation specified for new bedrooms in a dwelling.

[7] Petitioner was fairly tried and found guilty of conduct justifying the order under review. We have fully considered his claims of irregularities of procedure before the hearing officer and find them unwarranted. Only one of them deserves particular mention and it is not doubtful. The hearing before the deputy registrar ended and the matter was ordered submitted on September 18th. On September 30th an order was made which recited that good cause appeared therefor and that the submission was set aside and the matter resubmitted as of that date. The further decision of the registrar was made October 10th. Petitioner's contention is that it is required by section 7094 of the code that the decision of the registrar be rendered within twenty days after the hearing and submission of the proceeding, that there is no authority for setting aside an order of submission, and that upon the expiration of the twenty-day period jurisdiction to proceed further expired. A decision after the expiration of this period is not forbidden by the statute, expressly or by implication, and the requirement is to be interpreted as directory only. City of Los Angeles v. Hammon, 79 Cal.App. 669, 673, 251 P. 247. There was a continuing jurisdiction and duty to carry the matter to a conclusion.

[8] Findings and judgment were signed and filed in the trial court September 25, 1946. On the following day petitioner caused to be filed an affidavit relating to proceedings during the trial, making general charges that the trial judge was disqualified by reason of bias and prejudice to render an impartial judgment. Petitioner gave notice of intention to move for a new trial. We may assume that the attempt to disqualify the judge to rule on the motion was proper and timely. See Krebs v. Los Angeles Ry. Corporation, 7 Cal.2d 549, 555, 61 P.2d 931. It was so regarded and was acted on as a prima facie showing of disqualification. The matter of the alleged disqualification was submitted to another judge of the same court who, on October 24th, determined from petitioner's affidavit and the answering affidavit of the trial judge that the latter had no bias or prejudice toward petitioner and was not disqualified. On a later date the trial judge denied petitioner's motion for new trial and his motion to vacate and set aside the judgment.

[9, 10] Petitioner's notice of appeal is directed in part against the order that the trial judge was not disqualified. The points involved on this phase of the appeal are not covered in the briefs. There is no merit to the appeal from the order. If petitioner's affidavit stated any facts, aside from conclusions, as grounds for his motion, which is doubtful, they were fully met by the affidavit of the judge, and we are bound by the finding that the judge entertained no bias or prejudice and was not disqualified to rule on the motion for a new trial. The fact that thereafter an appeal was taken from the order holding the judge not to be disqualified did not affect the validity of the order denying the motion for a new trial. Golish v. Feinstein, 123 Cal.App. 547, 11 P.2d 893.

The judgment and the orders specified in the notice of appeal are affirmed.

WOOD, J., and VALLÉE, Justice pro tem., concur.

CARTER v. SEABOARD FINANCE CO.*

Civ. 16019.

District Court of Appeal, Second District,
Division 3, California.

May 24, 1948.

Hearing Granted July 22, 1948.

1. Fraud 🔑11(1)

Honest expression of opinion of seller of truck as to its condition is not actionable as a fraudulent misrepresentation.

2. Fraud 🔑17

Where parties were dealing at arm's length with no confidential relationship existing in law or in fact, seller of truck was under no duty to buyer to reveal that vehicle had been in a wreck. Civ.Code, §§ 1572, subd. 3, 1709.

3. Fraud 🔑22(1)

Where purchaser of truck failed to pursue investigation sufficiently to ascertain true condition of motor where means and opportunity to do so were available to him, failure would be charged to his own negligence and he could not later claim that he was deceived by misrepresentations of seller. Civ.Code, §§ 1572, subd. 3, 1709.

4. Fraud 🔑13(2)

One may not be charged with fraud for concealment of facts of which he is totally ignorant.

5. Fraud 🔑58(1, 3)

In action by purchaser of trucks against seller for fraud, evidence was insufficient to support finding of actionable fraud on ground of affirmative misrepresentations of seller as to condition of truck under heavy loads, or intentional concealment of fact that vehicle had been in wreck or that motor number had been changed, causing deception as to size of crank shaft. Civ.Code, §§ 1572, subd. 3, 1709.

6. Chattel mortgages 🔑1

Generally, irrespective of language employed by parties, where purpose and effect of a transaction is to recognize obligor as owner and to create a lien on property as security for payment of a debt, it constitutes a "chattel mortgage." Civ.Code, §§ 2981, 2982.

See Words and Phrases, Permanent Edition, for all other definitions of "Chattel Mortgage".

7. Sales 🔑450

Conditional Sales Act intends to include chattel mortgages taken by seller to secure purchase price in whole or in part within meaning of term "conditional sale contract". Civ.Code, §§ 1776, 2981, 2982.

See Words and Phrases, Permanent Edition, for all other definitions of "Conditional Sale Contract".

8. Sales 🔑13

Word "seller" as used within Sales Act denotes either ownership of goods sold or existence of power or authority to make a sale of goods owned by some one else, and lack of ownership does not ipso facto preclude one from being a "seller". Civ.Code, §§ 1733, 1743, 1796.

See Words and Phrases, Permanent Edition, for all other definitions of "Seller".

9. Chattel mortgages 🔑162

Where chattel mortgagee repossessed property and, in accordance with terms of instrument, after five-day redemption period had expired, sold property to a second purchaser and took a second chattel mortgage, seller's interest upon repossession from the first purchaser was merely a lien unaffected by that possession. Civ. Code, §§ 2981, 2982.

10. Sales 🔑452

General purpose of statute relating to conditional sales of motor vehicles is to protect purchasers from imposition through exaction of usury in guise of unidentified and unjustified charges. Civ.Code, §§ 2981, 2982.

11. Sales 🔑479(14)

Under statute regulating conditional sales of motor vehicles, a conditional vendor would, on resale after repossession taken, be deemed a "seller". Civ.Code, §§ 2981, 2982.

See Words and Phrases, Permanent Edition, for all other definitions of "Seller".

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* Subsequent opinion 203 P.2d 758.

12. Sales 🔑452

Statute relating to conditional sales of motor vehicles should be liberally construed so as to bring within its embrace every case clearly contemplated by its purpose, spirit, and policy. Civ.Code, §§ 2981, 2982.

13. Sales 🔑452

Chattel mortgagee who repossessed motor truck and, after expiration of redemption period, sold it to second purchaser taking therefor a second chattel mortgage was a "seller" within statute regulating conditional sales of motor vehicles after repossession. Civ.Code, §§ 2981, 2982.

14. Sales 🔑481

In action by purchaser of trailer against seller to void contract of sale as an alleged violation of conditional sales law relating to motor vehicles, evidence sustained finding that defendant chattel mortgagee, who had no interest in trailer in nature of lien or otherwise, had no right to possession nor authority or power of sale, and received no commission or other payment because of its activities in connection with the sale, was not a "seller" within Conditional Sales Law. Civ.Code, §§ 2981, 2982.

15. Sales 🔑481

In action by purchaser of trucks against alleged seller to void contract for alleged violations of Conditional Sales Law applying to sale of motor vehicles, evidence sustained finding that defendant was neither agent of seller nor seller within Conditional Sales Law. Civ.Code, §§ 2981, 2982.

16. Usury 🔑117

Evidence sustained finding that charges for note and mortgage financing sale of motor truck, corrected to eliminate unintentional clerical errors effecting an overcharge, were proper and not in violation of Conditional Sales Law relating to motor vehicles penalizing charges in excess of those specified by allowing treble damage recovery. Civ.Code, §§ 2981, 2982.

17. Sales 🔑460, 461

Contractual requirements prescribed by Conditional Sales Act regulating sale of motor vehicles providing that such contracts "shall" be in writing and contain specified contents are a mandatory regulation designed for protection of purchasers on the installment plan from excessive usurious or other unwarranted charges by the device of insuring full disclosure by vendor of all items of cost. Civ.Code, §§ 2981, 2982.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall".

18. Sales 🔑461

Conditional sales contract failing to provide separate written agreement of sale of truck, failing to state full cash price of equipment separately or in total and to itemize fully all motor vehicle fees and other matters required by Conditional Sales Act, was void. Civ.Code, §§ 1667, 2981, 2982.

19. Sales 🔑464

Acceptance of benefits of conditional sale of motor truck for 3½ months, during which time there was partial performance by buyer, was not a waiver as would bar buyer from later asserting illegality of the contract, which was void for failure to comply with Conditional Sales Act requiring written statement of full cash price and other matters. Civ.Code, §§ 1667, 2981, 2982.

20. Estoppel 🔑52

Although one may waive a law designed for his personal benefit, even an express waiver will not be recognized where law is designed for public benefit or founded on public policy. Civ.Code, § 3513.

21. Contracts 🔑139

Where a complaining party to an illegal contract is within the class sought to be protected by a statute, he will not be deemed to be in pari delicto and thus be denied relief. Civ.Code, § 3513.

22. Contracts 🔑138(3)

Where a contract is illegal by reason of being malum prohibitum only and not malum in se, while courts will not enforce the contract, they will compel a restoration of money or property as justice and equity may require in order to avoid a harsh forfeiture. Civ.Code, § 3513.

23. Contracts ⚷266(1)

One who makes restitution of property must also pay a reasonable amount in compensation for use of the property.

24. Sales ⚷464

Where contract for conditional sale of truck and trailer was void for failure to state purchase price in writing as required by Conditional Sales Act, court would not enforce contract upon default of buyer, but would compel restoration of vehicles to seller subject to payment by buyer of a reasonable amount for use of the property while restoring to buyer money paid by him, notwithstanding difficulty of determining amount because of seller's failure to comply with the act. Civ.Code, §§ 2981, 2982.

25. Pawnbrokers and money lenders ⚷6

Brokers licensed under the Personal Property Brokers Act are not guilty of usury in making a loan at interest in excess of 10 per cent since specifically exempted from the general usury laws by the Constitution. Gen.Laws, Act 5825 (2d); Const. art. 20, § 22.

26. Usury ⚷117

In action by purchaser of motor trucks under conditional sales contract against seller, evidence was insufficient to establish charges under the contract as in violation of the general usury laws. Gen.Laws, Act 5825(2d); Const. art. 20, § 22.

27. Pawnbrokers and money lenders ⚷6

Failure of personal property broker in making a loan to comply with Personal Property Brokers Act in matters of form will not deprive him of his status under the act. Gen.Laws, Act 5825 (2d), § 17.

28. Usury ⚷12

In action by purchaser of trucks against seller to void conditional sales contract on ground of alleged usury, entry on seller's books of overcharge for interest made unintentionally and corrected when discovered could not constitute a basis for finding of usury. Gen.Laws, Act 5825 (2d); Const. art. 20, § 22.

29. Pawnbrokers and money lenders ⚷9

In action by purchaser of trucks against seller to void conditional sales contract on ground of alleged usury, evidence was insufficient to sustain finding that loan of over $5,000 was in fact several loans lumped together into a single loan to evade Personal Property Broker's Act limiting interest charges on loans of less than $5,000. Gen.Laws, Act 5825 (2d), §§ 4 (d), 21.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Austin Carter against Seaboard Finance Company, a Delaware corporation, upon three separate causes of action, alleging fraud in the sale of a motor truck, violation of the Conditional Sales Law allegedly rendering the contract void, and usury and various violations of the Personal Property Brokers Act arising out of the sale of four motor vehicles. From an adverse judgment, plaintiff appeals.

Judgment affirmed in part and reversed in part.

A. W. Brunton and Lauren M. Handley, both of Los Angeles, for appellant.

Bromley, Ritter & Lindersmith, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by plaintiff Austin Carter from an adverse judgment rendered on three separate causes of action against the Seaboard Finance Company (herein called Seaboard), a personal property broker duly licensed under the laws of this state. The litigation arose in the following manner. In the early part of 1946, Carter decided to enter the trucking business with one Spurgeon, a previous business associate. Together they had about $5,000 to invest in the venture. Negotiations were entered into with one Brace, who was the local truck manager for Seaboard, resulting in the purchase on March 11, 1946 of one General Motors truck and Weber trailer, and one Sterling truck and Fruehauf trailer.

At the time of sale, the General Motors truck was the property of Charles Moose, subject to a chattel mortgage to the Bank of America, and had been parked in the System Freight Company yards in Los Angeles. The Weber trailer was in the possession of

Maloney & Temple, used truck dealers, to whom it had been delivered by its owner, Northern Transportation Company, for the purpose of sale. The Sterling truck and Fruehauf trailer were the property of one Houston, subject to a chattel mortgage in favor of Seaboard. Pursuant to the terms of this mortgage, Seaboard had repossessed the two Houston vehicles after default by Houston, and, after giving the five days' notice of election to sell required by the terms of the mortgage, had placed them in the hands of the said Maloney & Temple for the purpose of sale.

The purchase of the four vehicles was consummated at the offices of Seaboard, in the presence of Mr. Lyon, the branch office manager. The transactions, however, were handled by Brace, who was the sole person with whom Carter dealt in negotiating and arranging for the purchase of the equipment. Carter paid $4,700 to Seaboard as a cash payment, and executed in Seaboard's favor a promissory note for $15,658.41 and a chattel mortgage as security, covering all four vehicles. The note called for payment in seventeen successive monthly installments of $1,000, beginning April 22, 1946, plus a final installment on September 22, 1947, in an unstated amount, covering any unpaid balance and charges then due. The charges were to be computed at the rate of 1½ per cent per month on the monthly unpaid principal balances. The note stipulated that, "The word 'charges' shall be deemed to include interest at 10% per annum."

Carter also signed a "Statement of Loan," which recited the terms of the note, and designated Seaboard as agent to receive out of the loan specified amounts for disbursement to certain named persons and firms. The undisputed evidence shows that, pursuant to these directions, payments were made as follows: (a) $7,685.72 paid to Seaboard Finance Company in satisfaction of the Houston mortgage on the Sterling truck and Fruehauf trailer; (b) $1,514.28 paid to Temple, of Maloney & Temple, for sales taxes, repairs, license fees, etc. on the Sterling truck; (c) $6,918.75 to the Bank of America, as the price for release of the General Motors truck from the Moose chattel mortgage; (d) $1,947.50 to Northern Transportation Company in full payment of the price of the Weber trailer; (e) $1,000 to Charles Moose as insurance broker, for insurance covering the vehicles; (f) $1,106.76 for tires purchased from third parties; (g) $185.40 for filing fees and taxes paid to the Department of Motor Vehicles. The amount of the promissory note, $15,658.41, represented the difference between the total of these disbursements and the down payment of $4,700. The "Statement of Loan" contained appropriate entries stating the "total amount paid for disbursement" to be $15,658.41, the "total retained by borrower" to be 0, the "estimated charges" to be $2,341.59, and the "estimated total to be repaid by borrower" to be $18,000.

Subsequently, under date of March 11, 1946, additional disbursements of $123.31 for tires and $780.35 for insurance were made by Seaboard for Carter's benefit, and added to his principal balance, pursuant to purported written authorizations by Carter. These additions brought the amount of the balance to $16,562.07, which amount was, however, reduced by an unexplained credit to Carter of $83.73, making a total balance of $16,478.34 as of March 11, 1946.

Spurgeon, who provided $2,500 of the down payment, was not a party to any of the foregoing instruments, and the vehicles were subsequently registered in the name of Carter alone. Although Carter provided only $2,200 of the down payment, he spent an additional $300 for the purchase of new beds for the General Motors truck and Weber trailer, thereby equating his initial investment with that of Spurgeon.

In due course, possession of the vehicles was taken by Carter and Spurgeon. The Sterling truck soon developed defects which rendered it unfit for use, and in order to restore it to suitable operating condition, it was found necessary to install a new motor and make other substantial repairs, at a total cost of $2,477.40. This sum was paid by Seaboard at Carter's request, and, pursuant to a written authorization signed by Carter, was added to his existing indebtedness, increasing the principal sum to $18,955.74. Due to the delay while the repairs were being made, Carter was unable to commence regular operation of the Sterling truck or Fruehauf trailer in the trucking business until more than a month after the date of purchase.

Carter's first payment to Seaboard was not made until May 14, 1946, at which time $400 was paid. Thereafter, five additional payments in varying amounts were made, the final one being on June 28, 1946. The six payments totaled $1,776.23. No other payments were made at any time.

About the beginning of July, Spurgeon called Brace and advised him that he did not have enough money to make the payments, and that Carter would not, and that he, Spurgeon, wasn't getting any benefit or income from the equipment and wanted to surrender possession to Seaboard. Brace directed Spurgeon to deliver the four vehicles to Maloney & Temple's lot, which was done. Brace thereafter gave Carter notice, as required in the chattel mortgage, that the equipment would be sold unless, within five days, Carter paid the entire unpaid balance and charges then due, amounting to more than $18,500.

Carter alone, without joining Spurgeon as plaintiff, thereupon commenced this action against Seaboard, and a temporary injunction was issued restraining the sale of the equipment pending the trial. The amended complaint set forth three separate causes of action, the first alleging fraud in the sale of the Sterling truck, the second alleging violation of the conditional sales law, Civ. Code, secs. 2981–82, which allegedly rendered the contract void, and the third alleging usury and various violations of the Personal Property Brokers Act. Gen.Laws, Act 5825(2d). A subsequent amendment to plaintiff's first cause of action, permitted to be made at trial, alleged that the "authorization to charge" the sum of $2,477.40 on account of repairs was filled in by defendant, without plaintiff's authorization or knowledge, on a blank form previously signed by plaintiff, and asked that it be surrendered up and cancelled.

The trial court found that Seaboard was not guilty of fraud in connection with any of the transactions here involved; that the conditional sales law was not applicable to the transaction, either in whole or in part; and that the defendant neither charged nor accepted any usurious interest from the plaintiff, and did not violate the Personal Property Brokers Act. The allegations of the amendment to the first cause of action were also found to be not true. Accordingly, judgment was rendered in favor of Seaboard on all three causes of action.

The First Cause of Action.

In reference to the cause of action for fraud, the complaint contained allegations that Seaboard had knowingly and falsely represented that the Sterling truck was in good mechanical condition suitable for operation with a heavy load, and that the motor had just been reconditioned and reworked. No other misrepresentations were charged. The allegations that these representations had been made were found to be not true. Appellant maintains that there is no evidence to support the finding. A review of the testimony will demonstrate the error in this contention. Brace denied that he made any "statement or representations to Carter as to the condition of the Sterling truck." On direct examination, Carter testified that, "Mr. Brace told me that this truck was in good condition. That they had spent a considerable amount of money, and he showed me some bills he had received from Garvey Truck Service in Stockton." On cross examination, however, Carter's testimony was somewhat altered: "He told me that they spent all that money on it; that the truck *should* be in good shape, and I shouldn't have no trouble with it for a long time." (Emphasis added.) Temple was the only other witness whose testimony related to the affirmative misrepresentations allegedly made by Seaboard's agents. He denied that any representations as to the condition of the Sterling motor were made by Brace or by anybody else in his presence at any time, with the exception of a statement by Brace that, "It should be in good condition" because he had spent a lot of money on it.

[1] The best that can be said for appellant's position is that the testimony was conflicting. There was evidence to support the findings that no misrepresentation was made, and it may not be disturbed on appeal. 12 Cal.Jur. 834, and cases cited. Furthermore, Carter's own testimony, corroborated by that of Temple, indicates that Brace's only statement as to the condition of the truck was an expression of opinion as to

what he thought its condition *should* be in view of the large repair bill. There was no evidence that this opinion was not given in good faith. It is well settled that an honest expression of opinion is not actionable. Neff v. Engler, 205 Cal. 484, 489, 271 P. 744; Finch v. McKee, 18 Cal.App.2d 90, 62 P.2d 1380.

[2, 3] In his brief, appellant appears to largely abandon the theory upon which his complaint was founded, and argues instead that even if no material representations of fact were made, Seaboard was nevertheless guilty of fraud in suppressing material facts known to it. Civ.Code, sec. 1572, subd. 3. The chief contention is that, although Brace knew the Sterling truck had been in a wreck, thereby necessitating payment of the above mentioned repair bill in the amount of nearly $3,000, he failed to convey this information to Carter. Upon analysis, we find no merit in the argument. The concealment of a fact is only actionable when done with intent to deceive by one who has a duty to disclose that fact. Civ.Code, secs. 1572, 1709. In the present case, there was no duty on the part of Brace to mention the wreck, for the parties were dealing at arm's length with no confidential relationship existing in law or in fact. Bacon v. Soule, 19 Cal.App. 428, 439, 126 P. 384; 12 Cal.Jur. 773. Furthermore, existence of an intent to deceive is refuted by the fact that Brace exhibited the itemized repair bill to Carter showing an expenditure of nearly $3,000. Not only were the various items on this bill (e. g. "remove cab, fenders, radiator, and replace," "straighten and align frame, cross members," etc.) sufficient to give Carter notice of serious damage to the truck, but the total cost alone was so unusually large as to put Carter on inquiry as to the reason for such extensive repairs. Carter's own testimony demonstrates that he was experienced in the operation and repair of trucks, and had often helped mechanics tear down and overhaul motors. Full opportunity for a thorough examination of the Sterling was afforded him, and he personally made several inspections of the truck before purchasing it. He even drove it about, unloaded, for some thirty minutes. The evidence further reveals that Carter originally proposed, with the full consent of Brace, to tear down the motor before buying, in order to ascertain the condition of the crankshaft, pistons, rods and bearings. Later he changed his mind and decided to forego the internal examination, apparently in order to avoid additional delay and expense. The failure to pursue the investigation sufficiently to ascertain the true condition of the motor, where the means and opportunity to do so were available to him, must be charged to Carter's own negligence and he will not now be heard to say that he was deceived by any misrepresentations of the party with whom he dealt. Carpenter v. Hamilton, 18 Cal.App.2d 69, 62 P.2d 1397; Placeres de Oro Co. v. Carpender, 38 Cal.App.2d 650, 656, 102 P.2d 407; Oppenheimer v. Clunie, 142 Cal. 313, 319, 320, 75 P. 899.

[4] A further concealment of material facts, however, is said to be the failure of Brace to reveal that the motor number on the Sterling truck had been changed. We shall dispose of this contention, although fraudulent concealment of this fact was not alleged. The evidence is undisputed that the number actually affixed to the engine denoted a model having a large crankshaft, whereas the engine was in fact an older model with a small crankshaft which would perform in a generally less satisfactory manner. However, there is not a shred of evidence in the record that at the time of sale Brace knew anything whatsoever about the discrepancy between the number on the motor and the size of the crankshaft. Appellant appears to concede this, but asserts that Seaboard would be responsible for the deception caused by the changed number, whether known to Brace or not. The cases cited in support of this proposition (Pacific Finance Co. v. McGowen, 105 Cal.App. 216, 287 P. 139; California Stearns Co. v. Treadwell, 83 Cal.App. 69, 256 P. 594; Pendell v. Warren, 76 Cal.App.2d 33, 243 P. 707) are not in point, for in each case, unlike the one at bar, affirmative misrepresentations as to the year model of a motor vehicle were made by persons having knowledge of the real facts. Appellant's contention that one may be charged with fraud for the concealment of facts of which he is totally ignorant is unsupported by legal doctrine or authority.

[5] The trial court also found the allegations of the amendment to the first cause of action to be untrue. In this regard there was a direct conflict in the testimony of Carter and Brace, and the finding is sufficiently supported. All other points argued by appellant in reference to the cause of action for fraud have been carefully considered and found to be equally devoid of merit. Accordingly, the judgment should be affirmed as to the first cause of action.

The Second Cause of Action.

The second cause of action was predicated upon alleged violations of the provisions of the statute regulating the conditional sales of motor vehicles. Civ.Code, secs. 2981 and 2982. By reason thereof it was alleged that the note and mortgage were unenforceable and void, and that appellant was entitled to damages in three times the amount of payments thereunder on pincipal and interest.

The pertinent provisions of Civil Code, sections 2981 and 2982 are the following:

"Sec. 2981. [Definitions] As used in this section and in Section 2982 of the Civil Code, unless the context otherwise requires:

"(a) 'Conditional sale contract' shall mean:

"1. Any contract for the sale of a motor vehicle, with or without accessories, under which possession is delivered to the buyer but the title vests in the buyer thereafter only upon the payment of all or part of the price, or upon the performance of any other condition.

"2. Any contract for the bailment or leasing of a motor vehicle, with or without accessories, by which the bailee or lessee agrees to pay as compensation a sum substantially equivalent to the value of the property, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of the property upon full compliance with the terms of the contract.

"3. Any contract for the sale of a motor vehicle, with or without accessories, under which possession is delivered to the buyer, and a lien on the property is to vest in the seller as security for the payment of part or all of the price, or for the performance of any other condition.

"(b) 'Seller' shall mean the person who sells or leases the property under a conditional sale contract. * * *

"(g) 'Unpaid balance' shall mean the difference between (e) and (f) [the cash price and the down payment], plus all insurance premiums, and all fees paid or to be paid to any public officer, in connection with the transaction, which are included in the contract balance.

"(h) 'Time price differential' shall mean any amount which the buyer agrees to pay to the seller in excess of the unpaid balance. * * *

"(j) 'Motor vehicle' shall mean any vehicle required to be registered under the Vehicle Code."

Section 2982 provides that certain requirements are to be observed in the execution of "every conditional sale contract for the sale of a motor vehicle." In particular, the section requires the recitation of the following separate items as such in the order given:

"1. The cash price of the personal property described in the conditional sale contract.

"2. The amount of the buyer's down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with a statement of the respective amounts credited for cash and for such property.

"3. The amount unpaid on the cash price, which is the difference between items 1 and 2.

"4. The cost to the buyer of any insurance, the premium for which is included in the contract balance.

"5. A description and itemization of amounts, if any, which will actually be paid by the seller or his assignee to any public officer as fees in connection with the transaction, which are included in the contract balance.

"6. The amount of the unpaid balance, which is the sum of items 3, 4, and 5.

"7. The amount of the time price differential.

"8. The contract balance owed by the buyer to the seller, which is the sum of items 6 and 7.

"9. The number of installments required to pay the contract balance, the amount of each installment, and the date for payment of the installments."

The statute further provides that "(c) The amount of the time price differential in any conditional sale contract for the sale of a motor vehicle, with or without accessories, shall not exceed 1 per cent of the unpaid balance multiplied by the number of months, including any excess fraction thereof as one month, elapsing between the date of such contract and the due date of the last installment, or twenty-five dollars ($25), whichever is greater, provided that such contract may provide for interest on any delinquent installment from and after the date of delinquency, and for reasonable collection costs and fees in the event of delinquency. If the seller, except as the result of an accidental and bona fide error in computation, shall violate any provision of this subsection (c), the conditional sale contract shall not be enforceable except by a purchaser for value, and the buyer may recover from the seller in a civil action three times the total amount paid on the contract balance by the buyer to the seller or his assignee pursuant to the terms of such contract."

The trial court held that the transaction in question was not governed either in whole or in part by the foregoing provisions of the Civil Code, basing its conclusion on two grounds: first, that the instrument executed by Carter to Seaboard was a chattel mortgage and not a conditional sale contract; and second, that Seaboard at no time owned any of the equipment purchased by Carter, and hence was not the seller of all or any part of that equipment.

[6, 7] The first question for consideration, then, is whether a security instrument in terms designated a chattel mortgage, and drafted in the usual form of a chattel mortgage, is within the contemplation of Sections 2981 and 2982 of the Civil Code. The definition of conditional sales contract, as found in section 2981, quoted above, is subdivided into three parts. Subdivision (1) is in accord with the well-established legal definition of such contracts. Van Allen v. Francis, 123 Cal. 474, 56 P. 339; Johnson v. Kaeser, 196 Cal. 686, 239 P. 324. The second subdivision refers to the bailment or lease device, which, with an occasional exception (see Blodgett v. Rheinschild, 56 Cal.App. 728, 206 P. 674), has generally been treated as another form of conditional sale. Lundy Furniture Co. v. White, 128 Cal. 170, 60 P. 759, 79 Am.St. Rep. 41; Silverstin v. Kohler & Chase, 181 Cal. 51, 183 P. 451, 9 A.L.R. 1177; U. S. Machinery Co. v. Intl. Metals Dev., Inc., 74 Cal.App.2d 5, 168 P.2d 37. Subdivision (3), however, departs from conventional legal conceptions of a conditional sale and employs terms traditionally associated with a purchase-money chattel mortgage. The general rule is well settled that, irrespective of the language employed by the parties, where the purpose and effect of the transaction is to recognize the obligor as the owner and to create a lien on the property as security for the payment of a debt, it constitutes a mortgage. Teater v. Good Hope Dev. Corp., 14 Cal.2d 196, 209, 93 P. 2d 112. See Hannin v. Fisher, 5 Cal.App. 2d 673, 43 P.2d 815; Mercantile Acceptance Corp. v. Pioneer Credit Indem. Co.' 124 Cal.App. 593, 12 P.2d 988; Bonestell v. Western Auto-Motive Finance Corp., 69 Cal.App. 719, 232 P. 734. Furthermore, it is clear that since subdivision (3) speaks of possession being delivered to the buyer, it cannot refer to the unpaid seller's lien for the price, for that lien is extinguished by such delivery. Civ.Code, sec. 1776. We are thus led to the conclusion that it was clearly the purpose, in enacting sections 2981 and 2982 of the Civil Code, to include chattel mortgages taken by the seller to secure the purchase price in whole or in part, within the meaning of "conditional sale contract."

Legislative history appears to support the conclusion reached. As originally introduced in the 1945 session of the State Legislature as Assembly Bill 466, the act proposed to regulate all installment contracts for the retail sale of motor vehicles, defining such contracts as those "in which the price * * * is payable in one or more installments over a period of time, and in which the seller has either retained title to the goods or has taken or retained a security interest in the goods under a form of contract designated either as a conditional sale, chattel mortgage or otherwise." The bill was subsequently completely rewritten in committee. As reported to the assembly, on April 9, 1945, the rewritten version contained what are now subdivisions (1) and (2) of section 2981, subsection (a), but not subdivision (3). This latter definitional provision was added by amendment on April 20, 1945 in the assembly.

The foregoing course of legislation seems to indicate that subdivision (3) was expressly inserted in order to broaden the scope of the statute beyond those transactions covered by subdivisions (1) and (2), thereby returning to the wider coverage contemplated by the bill in its original form. That subdivision (3) was intended to embrace chattel mortgages is evident in the fact that, were this not so, this subdivision would not only constitute meaningless surplusage, but the statute could be easily evaded and the legislative purpose thwarted through the use of chattel mortgage forms rather than conditional sale or lease forms.

[8] We next inquire into the soundness of the second, and alternative, ground for the trial court's determination that the statute was inapplicable, namely, that since Seaboard never owned any of the equipment, it was not a seller. Assuming the premise of non-ownership to be true, the conclusion does not follow as a matter of necessity. In order to ascertain the legal import of the word "seller," which is defined in the statute quoted above in terms of "the person who sells," reference to the general law of sales is helpful, although, of course, not controlling. The provisions of the Sales Act clearly indicate that the word "seller" as used therein denotes either ownership of the goods sold, or the existence of power or authority to make a sale of goods owned by someone else. Civ. Code, secs. 1733, 1743, 1796; First State Bank of Shannon v. Harter, 301 Ill.App. 234, 22 N.E.2d 393. Hence, lack of ownership would not, ipso facto, preclude one from being a "seller."

[9] Turning to the facts of the present case, it appears that about a month before the sale to Carter, the Sterling truck and Fruehauf trailer had been repossessed by Seaboard as mortgagee pursuant to the terms of Houston's chattel mortgage. As required therein, Seaboard gave Houston five days notice of intention to sell under a power of sale conferred by the mortgage. Neither this notice nor the Houston mortgage was introduced in evidence, but in reference thereto, Brace testified, "After the five days has expired, we are at liberty to make any disposal we wish with that equipment." In this state of the evidence, we may assume for present purposes that the sale to Carter was in strict compliance with the terms of Houston's mortgage and that Seaboard had the power to make a binding sale which would validly pass title to Carter. This power, moreover, was coupled with an interest in the property itself (New York Life Ins. Co. v. Doane, 13 Cal.App.2d 233, 56 P.2d 989), measured by the amount of the unpaid debt, which amounted to $7,685.72 and was liquidated only through the sale to Carter. It may be conceded that Seaboard's interest, however substantial it may have been, was merely a lien unaffected and unenlarged by possession taken. Harper v. Gordon, 128 Cal. 489, 492, 61 P. 84; Blodgett v. Rheinschild, 56 Cal.App. 728, 737, 206 P. 674. Nevertheless, under the circumstances here shown to exist, we are persuaded that, in exercising its power of sale in respect to the Sterling and Fruehauf, Seaboard was a "seller" within the meaning of sections 2981 and 2982 of the Civil Code.

[10-13] This conclusion appears to be indicated also by the general purpose of the statute to protect purchasers of motor vehicles from imposition through the exaction of usury in the guise of unidentified and unjustified charges. There is no doubt that a conditional vendor, as usually understood, would, on resale after repossession taken, be deemed the "seller." See Stewart v. Norsigian, 64 Cal.App.2d 540, 548, 149 P.2d 46, 150 P.2d 554; Lynch v. Sable-Oberteuffer-Peterson, 122 Or. 597, 260 P. 222, 55 A.L.R. 180. No reason appears why a different rule should apply to chattel

mortgagees after repossession, for the possibilities of imposition of the type proscribed by sections 2981 and 2982 would seem to be equally great in either case. Being a remedial statute, this act should, in any event, be liberally construed so as to bring within its embrace every case clearly contemplated by its purpose, spirit, and policy. Lande v. Jurisich, 59 Cal.App. 2d 613, 616, 139 P.2d 657, and cases cited.

In respect to the finding that Seaboard was not a seller of the Weber trailer and General Motors truck, a contrary conclusion must be reached. The evidence was that Seaboard had no interest in either vehicle in the nature of a lien or otherwise. It had no right to possession, no authority or power of sale, and received no commission or other payment of any kind because of its activities in connection with the sale of either vehicle.

[14] It is urged, however, that Carter is justified in considering Seaboard the seller of the General Motors and Weber if Brace acted as an undisclosed agent for the respective owners, Moose and Northern Transportation Company, in making the sale. It is unnecessary to determine whether this contention is sound as a legal proposition where liability is sought to be predicated under Civil Code sections 2981 and 2982, for the evidence is sufficient to support the implied finding that Seaboard was not an agent in respect to either vehicle. Testimony concerning the Weber was scant. Carter stated that, "I am sure Mr. Temple told me that he had that trailer there for another party to sell." Brace, on the other hand, stated that he didn't even know who owned this trailer until the transaction was being completed, at which time he telephoned Temple to learn in whose name the check for the price should be drawn. The general manager for Northern Transportation Company testified that he dealt solely with Temple and Malone in regard to the sale of the trailer, and never discussed its sale with Brace. It is clear that the finding that Seaboard was not the seller of the Weber is fully supported by the evidence and cannot be disturbed.

[15] As to the General Motors truck, the evidence shows that Brace had appraised it for Moose at the time of the latter's purchase. Brace knew its condition and knew that Moose was willing to sell. He took Carter to the System Freight yards to see this truck, and suggested that he purchase it in preference to another truck which Carter was proposing to buy. Brace never revealed to Carter that Moose was the owner of the General Motors truck, and all negotiations leading to the sale were conducted by Brace. There was, however, no evidence that Moose had appointed Brace as his agent, and it is undisputed that neither Brace nor Seaboard ever received any compensation in connection with the sale. The price was the amount necessary to release the truck from the chattel mortgage thereon held by the Bank of America. Pursuant to instructions from Moose, and as stated on the "Statement of Loan," Brace paid this amount by check directly to the bank, which thereupon delivered the ownership certificate to Moose who in turn delivered it to Seaboard. The most that can be said for appellant's position is that on the evidence presented different inferences could be drawn. It would, for example, be clearly reasonable to conclude that Brace's activities in connection with the sale were motivated solely by a desire to acquire for Seaboard the additional financing business connected therewith, and were not the activities of an agent. The finding that Seaboard was not a seller of the General Motors truck implies a finding that it was not an agent. We are bound by that finding. However, upon a retrial the question whether Seaboard was a seller of the General Motors truck and Weber trailer will be open for determination upon such evidence as may be presented.

Although as we have seen, Civil Code sections 2981 and 2982 were fully applicable to the sale of the Sterling and Fruehauf, the question remains whether any violations of those sections were committed by Seaboard. Appellant urges that charges in excess of those permitted by subsection (c), quoted above, were required to be paid by the terms of the note and mortgage. The contention cannot be sustained. It is admitted in appellant's brief that, had all the installments been paid on time, the required charges at the stipulated rate of 1½ per cent per month on the *monthly unpaid balances* would have totaled $2,481.22. On the other hand, the maximum charges permitted by section 2982, subsection (c), would have been calculated as 1 per cent of the *initial unpaid balance of $15,658.41,* multiplied by the number of months, including any excess fraction thereof as one month, elapsing between the date of the contract (i. e., March 11, 1946) and the due date of the last installment (i. e., September 22, 1947). Since 18 months and 11 days were to elapse, the number of months is deemed to be 19. On this basis the total permissible charges would have been $2,975.10, or nearly $500 more than was actually called for by Carter's note. The error in appellant's calculations consisted in the use of 18 as the number of months, and in considering as part of the time price differential an alleged overcharge above the cash price which Carter claimed was quoted to him before the contract was written. The first calculation is contrary to the express terms of the statute, and the second was resolved, on the basis of conflicting evidence, in favor of the respondent.

[16] In the allocation to interest and principal of the various payments made by Carter, it is admitted that Seaboard made certain allocations to interest in excess of that prescribed by the terms of the note. Seaboard alleged these overcharges to be accidental and unintentional clerical errors, and on the basis of uncontradicted evidence, the trial court so found. Appellant, however, contends that the total charges, as corrected by Seaboard upon being apprised thereof, were nevertheless in excess of those permitted by section 2982, subsection (c). The argument overlooks the fact that these corrected charges were based for part of the time upon a principal balance substantially increased over the original figure by reason of the additional advances referred to previously. The trial court, on the basis of uncontradicted evidence, found the charges to be proper and in accordance with the terms of the note, which, as we have seen, was more lenient than required by law. Accordingly, no basis of liability for triple damages under subsection (c) of section 2982 was established.

It is not contended that any attempt was made in the drafting of the chattel mortgage and "Statement of Loan" to comply with the formal requisites prescribed in section 2982, subsection (a), quoted above. There was no separate, written agreement of sale. Inspection of the chattel mortgage and statement of loan discloses several obvious particulars in which the statute was not complied with, the chief ones being a failure to state the full cash price of the various pieces of equipment either separately or in toto, or the amount of the down payment credited toward the price of each; a failure to fully itemize all motor vehicle fees and sales or other taxes; the inclusion of only part of the cost of insurance purchased; an erroneous statement of the estimated time price differential as being $2,314.59 instead of the correct figure $2,481.22; and a failure to state the amount of the last installment.

[17-18] Faced with these substantial and uncontroverted violations of the statute in respect to the Sterling and Fruehauf, we must inquire into the legal consequences of such non-compliance. It is to be recalled that the statute provides express penalties solely in the event of a violation of its usury provision. Nevertheless, the contractual requirements prescribed by the statute cannot be regarded as a mere specification of formalities, purely directory in effect, but must be taken to be a mandatory regulation designed for the protection of purchasers of motor vehicles on the installment plan from excessive, usurious or other unwarranted charges by the device of insuring full disclosure by the vendor of all items of cost. The contract in question being in direct disregard of the express provisions of a statute passed for the protection of the public, is, in respect to the Sterling and Fruehauf, void, notwithstanding that the statute does not expressly declare it to be so. Civ.Code, sec. 1667; Jacks v. Taylor, 24 Cal.App. 667, 674, 142 P. 121; Smith v. Bach, 183 Cal. 259, 262, 191 P. 14; Levinson v. Boas, 150 Cal. 185, 193, 88 P. 825, 12 L.R.A.,N.S., 575, 11 Ann. Case. 661.

[19-21] Under these circumstances, it is also clear that acceptance of the benefits of the transaction for some three and one-half months, during which time there was at least partial performance by the buyer, does not constitute a waiver such as would bar Carter from now asserting the illegality of the contract. Although one may waive a law designed for his personal benefit (Leonard v. Board of Education, 36 Cal.App.2d 595, 599, 97 P.2d 1032; Walberg v. Underwood, 39 Cal.App. 748, 752, 180 P. 55), even an express waiver will not be recognized in the case of a law designed for the public benefit or founded on public policy. Civ.Code, sec. 3513; California Powder Works v. Atlantic & P. R. Co., 113 Cal. 329, 336, 45 P. 691, 36 L.R.A. 648; Panzer-Hamilton Co. v. Bray, 96 Cal.App. 460, 464, 274 P. 769. In like vein, where the complaining party to an illegal contract is within the class sought to be protected by the statute, he will not be deemed to be in pari delicto and thus be denied relief. Miller v. California Roofing Co., 55 Cal.App.2d 136, 143, 130 P.2d 740; Tatterson v. Kehrlein, 88 Cal. App. 34, 50, 263 P. 285.

[22, 23] The rule is firmly established that in the case of a contract which, like that in the present case, is illegal by reason of being malum prohibitum only and not malum in se, while courts will not enforce the contract, they will compel a restoration of money or property as justice and equity may require in order to avoid a harsh forfeiture. Smith v. Bach, 183 Cal. 259, 263, 191 P. 14; U. S. Title Guaranty Co., v. Brown, 166 App.Div. 688, 692, 152 N.Y.S. 470; Ryan v. K. V. L., Inc., 198 Wash. 459, 88 P.2d 836; Chesnutt v. Schwartz, 293 Ill.App. 414, 12 N.E.2d 912; American-La France & Foamite Industries v. Arlington Co., 169 Va. 1, 192 S.E. 758. In the present case, then, Carter is entitled to recover the amount of money which he has paid in on the Sterling truck and Fruehauf trailer. The record, however, fails to reveal in the writings, or otherwise, what proportions of the down payment or of the subsequent installments were allocated to the price of these two vehicles and to interest thereon, and on the basis of the evidence before us, a proper and intelligent computation thereof is not possible. However, plaintiff's cause of action cannot be allowed to fail because the writings did not specify the price of each vehicle. Since, on the present evidence, the impossibility of determining the amount paid on the Sterling and Fruehauf is the direct consequence of Seaboard's failure to comply with Civil Code sections 2981 and 2982, any loss resulting therefrom should fall on it. Upon a retrial, if there is competent evidence from which the court is able to determine what was paid on the Sterling and Fruehauf purchase, that sum will be the gross amount recoverable by plaintiff. This determination would require as its basis proof of the price charged for each vehicle, including a segregation of items making up certain gross amounts specified in the statement of loan, namely, $1,514.28 to H. R. Temple, $1,000 to Chas. Moose, $1,106.76 to "Tire Co.," and sundry subsequent charges for amounts paid out by Seaboard. An allocation of the installment payments would also be necessary in order to fix the total amount paid by plaintiff on the Sterling and Fruehauf purchase. There is no legal reason why the court should not receive proof for the purpose of determining whether there were several sales or an agreed price for each vehicle. If it is shown to be severable in this respect, and if upon a retrial Seaboard should be found not to be a seller of the General Motors truck, and Weber trailer, the invalidity would apply only to the sale of the Sterling and Fruehauf vehicles. If additional proof does not establish the amount that was paid on the invalid sale of the Sterling and Fruehauf, the transaction would have to be regarded as nonseverable and the recovery should equal the amount of the total payment, plus whatever sums were allocated toward principal and interest from the subsequent installments. However, in accordance with the general rule that one who makes restitution of property must also pay a reasonable amount in compensation for the use of the property (Rest., Restitution, sec. 157), plaintiff's recovery should be diminished by the rental value of the vehicles during the period of Carter's

possession. If the recovery is for the total amount paid by him he should be charged with the rental value of the four vehicles, but if for only the amount paid on the Sterling and Fruehauf, then the rental value of those vehicles alone should be charged. The recovery should be adjusted further in such amounts as, on a retrial, may be found necessary in reaching a just and equitable result. If Seaboard should be found to be a seller of the General Motors truck and Weber trailer, also, the recovery should follow the views we have expressed with respect to the basis of recovery for the sale of the Sterling truck and Fruehauf trailer. In such event the question of severability would not enter into the case. If the finding should be that Seaboard was a seller of one of these vehicles but not the other the question of severability would still be presented.

As previously stated, Spurgeon is not a party to the action, although he contributed half of the down payment and was evidently part owner. No question has been raised as to whether any recovery by Carter may properly include sums contributed by Spurgeon and paid to Seaboard, nor as to the interest of Spurgeon in any recovery. No opinion is expressed on these points.

[24] Accordingly, the judgment on the second cause of action should be reversed for a new trial in accordance with the principles herein stated.

The Third Cause of Action.

Plaintiff's third cause of action alleges that Seaboard, as a personal property broker licensed under the Personal Property Brokers Act (Deering's Gen. Laws, 1944, Act 5825 (2d), was guilty of usury in making the present loan at interest admittedly in excess of the 10 per cent per annum permitted by section 22, Article XX of the California Constitution (adopted in 1934).

[25-27] The contention is devoid of merit. At the time of the enactment of the present Personal Property Brokers Act in 1939, there were no constitutional or statutory restrictions upon the rate of interest chargeable by personal property brokers in this state, for section 22, Article XX of the Constitution expressly exempted them from the general usury laws. Wolf v. Pacific S.W. Corp., 10 Cal.2d 183, 184, 74 P.2d 263; Matulich v. Marlo Investment Co., 7 Cal.2d 374, 376, 60 P.2d 842; Perlick v. Pac. Discount Corp., 53 Cal.App.2d 136, 140, 127 P.2d 647. Appellant seeks to avoid the effect of this exemption by claiming that Seaboard failed to comply with several provisions of the Personal Property Brokers Act and thereby lost its status as a personal property broker. These alleged violations were the following: (1) an overcharge in the price of the equipment above that quoted orally by Seaboard; (2) that appellant was compelled to sign blank authorizations for advances to be made by Seaboard and added to the note; (3) interest in excess of 1½ per cent per month was charged; (4) the loan papers did not correctly set forth the amount of the principal balance; and (5) he was charged $255.29 as expenses, whereas the mortgage provided that additional charges for expenses not to exceed $250 could be made and would be deemed secured by the mortgage. The facts assumed in his first four points were resolved against his contentions upon conflicting evidence and we hold these findings to be conclusive. On the fifth point it is immaterial here whether the excess of expenses above $250 was secured, within the terms of the mortgage. In addition to the lack of factual basis, there is no provision of law that the failure of a personal property broker in making a loan, to comply with the law in matters of form, would deprive it of the status of personal property broker.

[28] Seaboard was insured against loss of the mortgaged property and therefore could legally charge interest of not to exceed 2 per cent per month upon monthly balances under section 17 of the act. Therefore, the charge of 1½ per cent per month on monthly balances was at a legal rate. Although Seaboard entered on its books an overcharge for interest, this was found by the court, on uncontradicted testimony, to have been made inadvertently and unintentionally. It was corrected when discovered and not having been made as an intentional overcharge could not have

constituted a basis for a finding of usury. Hennessy v. Personal Finance Co., 176 Misc. 201, 26 N.Y.S.2d 1012, 1018; 66 C. J. 177. The charges for interest were not in excess of those allowed by law.

A final contention to be considered is that the above mentioned alleged violations of the act should be deemed not only violations, but also evasions which would lead to the consequence that the note and mortgage were void because of violations of the act committed by Seaboard. We will endeavor to trace the course of appellant's circuitous reasoning. The second paragraph of section 21 of the Personal Property Brokers Act provides: "Any contract of loan in the making or collection of which any violation of this act shall have been committed, shall be void, and neither the licensee nor any other person shall have any right to collect or receive any principal, interest or charges whatsoever." If, therefore, appellant had succeeded in proving violations of the act, he could have successfully maintained that the note and mortgage were void, were it not for the 1945 amendment of the act which rendered the second paragraph of section 21 inapplicable to loans of $5,000 or more. This amendment, Statutes 1945, Chapter 1221, added subdivision (d) to section 4, and reads as follows: "The following provisions of this act shall not apply to any bona fide loan of a principal amount of five thousand dollars ($5,000) or more, or to a duly licensed personal property broker in connection with any such loan, provided the provisions of this paragraph are not used for the purpose of evading this act: * * * the second paragraph of Section 21."

[29] Appellant argues that the alleged violations are also evasions of the act which render operative the proviso in the amendment, thereby making the amendment inapplicable and the second paragraph of section 21 applicable to the transaction in question. This contention is untenable. None of the alleged violations or so-called evasions would have tended in any way to bring the transaction within the provisions of the amendment. It is not pointed out in what respects they had or could have had any connection with a purpose to evade the act by claiming falsely that Seaboard was making a bona fide loan of $5,000 or more. The loan on the General Motors and Weber was for a lump sum. There was no evidence of any suggestion of separate loans on the separate vehicles. The evidence furnishes no basis for an argument that several loans were lumped together into a single loan of more than $5,000, nor evidence of any intention whatever to arrange the transaction so that Seaboard could take advantage of the 1945 amendment. On the record before us, the transaction must be deemed a bona fide loan of more than $5,000 on the General Motors and Weber. The transaction was therefore excepted from the operation of the second paragraph of section 21, and even if the alleged violations of the act had been proved, the note and mortgage as to the General Motors and Weber would still have remained valid.

The judgment is affirmed as to the first and third causes of action and reversed as to the second cause of action.

WOOD, J., and VALLÉE, Justice pro tem., concur.

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32 Cal.2d 23

GREENFIELD et al. v. MATHER et al.
MATHER v. MATHER et al.

MATHER et al. v. MATHER.
S. F. 17343.

Supreme Court of California.
June 3, 1948.
Rehearing Denied July 2, 1948.

1. Appeal and error 🔑884

Statement by counsel for respondent in petition for hearing by Supreme Court that they had never examined probate file or vouchers and made no representations in regard to contents of file foreclosed them from attacking correctness of figures which record disclosed were taken from file.

2. Courts 🔑92

Statement in opinion of Supreme Court which was not within issues in case was mere "dictum."

See Words and Phrases, Permanent Edition, for all other definitions of "Dictum".

3. Judgment 🔑735

Where plea of res judicata was based on former judgment in proceeding wherein there were no pleadings or evidence on issue adjudged, decisions of Supreme Court on former appeals were conflicting, parties had taken inconsistent positions in former actions, no innocent parties were misled by former judgment relied upon, and injustice would result if plea were allowed to stand, by reason of the special circumstances doctrine of res judicata would not be applied.

4. Judgment 🔑486(1), 735

Generally a judgment rendered in an action in personam by a court having jurisdiction over subject matter and parties is not void and subject to collateral attack merely because it may erroneously determine some matter not specifically raised in the pleadings and not covered by evidence before trial court, and such judgment is res judicata.

5. Judgment 🔑540

Doctrine of res judicata should not be applied so rigidly as to defeat the ends of justice.

TRAYNOR and SPENCE, JJ., dissenting from opinion and EDMONDS, TRAYNOR and SCHAUER, JJ., dissenting from denial of rehearing.

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action of interpleader by Edna Greenfield and others, administrators with the will annexed of Louis R. Greenfield, deceased, against A. W. Mather and others to determine the right to a balance due upon an approved claim against the estate wherein defendant A. W. Mather cross-complained against defendant Dorothy Devore Mather, the other defendants and plaintiffs, and wherein defendant Dorothy Devore Mather and others cross-complained against defendant A. W. Mather. From a judgment for A. W. Mather, Dorothy Devore Mather, Carl B. Rhodes and Don Lake appeal.

Reversed.

Prior opinion, 179 P.2d 82, a rehearing of which was denied, 180 P.2d 35.

Don Lake and James R. Jaffray, both of Los Angeles, for appellants.

Marcel E. Cerf, Robinson & Leland and Henry Robinson, all of San Francisco, for respondents.

CARTER, Justice.

The appeal here involved is from a judgment in an action of interpleader commenced by the administrators of the estate of Louis R. Greenfield in the superior court of the City and County of San Francisco on April 12, 1935. At the time this action was commenced said administrators deposited with the clerk of said court the sum of $12,549.60 admittedly due on an allowed claim presented against said estate by A. W. Mather, respondent herein. The appellant and respondent herein were named as defendants in said action, and each filed an answer and cross-complaint in the court below in which they claimed ownership of the sum of money deposited by said administrators in said court. A former appeal in this action was decided by this Court on August 3, 1939. See, Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100.

[1] The record now before us discloses that: On June 16, 1933, A. W. Mather, cross-defendant and respondent herein, assigned to his then wife, Dorothy Devore Mather, cross-complainant and appellant herein, an undivided one-half interest in and to a claim against the estate of Greenfield, pending in the superior court of the City and County of San Francisco, the principal sum of which was approximately $75,000. At the date of the assignment there was admittedly unpaid on said claim the sum of $38,699. After this assignment was executed and delivered, Mrs. Mather gave notice thereof to the administrators of the Greenfield estate. Thereafter said administrators paid Mr. Mather the following amounts:

September 5, 1933	$ 7,441.00
January 1, 1934	$ 5,881.00
March 2, 1934	$ 6,327.50
July 24, 1934	$ 6,919.55

making a total paid to A. W. Mather of $26,569.05

after the execution of the assignment. Said administrators also paid to Mrs. Mather the sum of $7,441 on September 5, 1933. She has received no other payment on account of her half of said claim. In addition to the principal of $38,699 due on said claim at the time of the assignment, interest accrued thereon amounting to the sum of $7,560.65, making a total of principal and interest of $46,259.65, of which Mr. and Mrs. Mather were each entitled to one-half or $23,129.82. Mr. Mather has received $26,569.05, or $3,439.23 more than his share. Mrs. Mather has received only $7,441, or $15,688.82 less than her share. These figures are taken from the record in this case, and their correctness is not questioned by the respondent. In fact, counsel for respondent state in their petition for hearing in this Court in this case at page 52 thereof: "We have never examined the probate file, or the vouchers, and made and make no representations in regard to its contents." This statement should foreclose counsel for respondent from attacking the correctness of the above figures as the record discloses they were taken from said file.

At the trial of this action respondent A. W. Mather offered in evidence a judgment entered in an action in the superior court of Los Angeles County on March 29, 1945, which action was commenced by him against appellant in said court on August 3, 1934. This judgment purported to award one-half of the said sum of $12,549.60 on deposit in the superior court of the City and County of San Francisco to respondent and the other half to appellant. The trial court admitted the judgment in evidence, held it to be res judicata, refused to admit any evidence offered by appellant, and rendered judgment awarding respondent one-half of the above mentioned sum and the other half to appellant. This appeal followed.

To understand the background of this litigation a review of the proceedings in the Los Angeles action is necessary. The Los Angeles action was commenced by Mr. Mather on August 3, 1934. It pleaded three causes of action. The first cause of action was for rescission of a property settlement agreement entered into between himself and Mrs. Mather on June 16, 1933, upon the ground that it was induced by false representations and fraud. The second cause of action was for rescission of the same agreement upon the ground of mistake. The third cause of action was for declaratory relief, by which he sought to have the same agreement declared void upon the ground of illegality because it was entered into between a husband and wife in the Territory of Hawaii contrary to the laws of that territory. The administrators of the Greenfield estate were joined as defendants, and the complaint prayed for the issuance of an injunction restraining them from making any further payments to Mrs. Mather on account of her half interest in the claim which had been assigned to her. A restraining order was issued and served on said administrators, and they filed an answer in the nature of a disclaimer in which they admitted that they held the sum of $12,549.60 unpaid on said claim. This answer was not served on Mrs. Mather and she filed no pleading raising any issue with respect to the sum mentioned in said answer.

Mrs. Mather interposed a demurrer to the complaint filed by Mr. Mather which was sustained without leave to amend as to the third cause of action, and judgment was entered on January 4, 1935, decreeing that plaintiff take nothing by said third cause of action. The demurrer as to the first and second causes of action was overruled. The case went to trial on these causes of action on February 18, 1935, and judgment was entered as to those causes of action on March 14, 1935, denying Mr. Mather any relief. Mr. Mather appealed from the judgment of January 4, 1935, and this appeal was dismissed on the ground that said judgment was not a final judgment. See, Mather v. Mather, 5 Cal.2d 617, 618, 55 P.2d 1174. He attempted to appeal from the judgment entered March 14, 1935, on the first and second causes of action, but this appeal was dismissed on September 10, 1935, for failure to file transcript. In the opinion of this Court in Mather v. Mather, 5 Cal.2d 617, 618, 55 P.2d 1174, the statement is made that: "It is at once apparent that no final judgment was entered in the action until March 14, 1935."

Mr. Mather had filed an answer and cross-complaint in the interpleader action in San Francisco in which he raised the same issues as to the validity of the property settlement agreement as were raised by his third cause of action in the Los Angeles action. In this cross-complaint he attacked the validity of the assignment to Mrs. Mather of the half interest in the claim against the Greenfield estate and contended that such assignment was invalid and void for the same reason that the property settlement agreement was invalid. Mrs. Mather joined issue with him by answer and cross-complaint in which she denied the allegations of his cross-complaint and pleaded her right to the ownership of the half interest in the claim assigned to her.

After the dismissal of the appeals from the two Los Angeles judgments, the San Francisco action came to trial and Mrs. Mather's counsel offered in evidence a certified copy of the judgments of January 4th and March 14, 1935, in the Los Angeles action and objected to any evidence being offered by Mr. Mather in support of the allegations of his cross-complaint on the ground that the issues raised by these allegations were determined in the Los Angeles action and that the judgments of January 4th and March 14, 1935, were res judicata. The trial court sustained the objection and thereupon entered judgment in favor of Mrs. Mather awarding to her the full amount of the money deposited by the administrators of the Greenfield estate in the interpleader action as constituting the balance of her half of the claim pursuant to the assignment. On appeal to this court by Mr. Mather, this judgment was reversed upon the ground that the Los Angeles judgments were not final judgments. See, Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100.

The attorneys for Mrs. Mather then went into the superior court of Los Angeles County and moved for a new judgment in that action. The motion was heard before Judge Clarence M. Hanson who adopted the findings made by Judge Frank M. Smith on March 12, 1935, to the effect that Mrs. Mather was the *owner of an undivided half interest in the claim against the Greenfield estate and entered a judgment awarding her the full sum of $12,549.60 which had been deposited in the superior court of the City and County of San Francisco* in the interpleader action brought by the administrators of the Greenfield estate. This judgment was entered on December 12, 1939. Mr. Mather appealed from this judgment upon the ground that it was void because it was entered without notice and that the judge who heard the motion and signed the new judgment had not presided at the trial (which was held on February 18, 1935, before Judge Frank M. Smith), *and that the findings and judgment determined issues which were not before the court, namely, the right of Mrs. Mather to the $12,549.60 deposited with the superior court of the City and County of San Francisco by the administrators of the Greenfield estate in the interpleader action instituted by them.* Their argument in this respect was based upon the fact that the administrators of the Greenfield estate were dismissed as parties to the Los Angeles action by stipulation of the parties to said action on June 4, 1936, and that thereafter there could be no issue in the Los Angeles action relative to the disposition of the sum of $12,549.60 on deposit in the superior court of the City and County of San Francisco, and that any issue in regard to the disposition of this fund must be determined in the action pending in the last mentioned court. On pages 26 and 27 of appellant's opening brief in that case counsel for Mr. Mather state: "Not only are there new and additional findings, there are new and additional provisions *in the judgment,* not based upon any previous order for judgment or any previous conclusions of law. These new and additional provisions include in their operation the co-defendants, estate of Greenfield, Edna Greenfield, administratrix, Herman Wobber and Hugo D. Keil, administrators thereof. *This new portion of the judgment orders these co-defendants to pay the sum of $12,549.60 to Dorothy Devore Mather co-defendant and respondent.* (Cl.Tr. p. 160, lines 14-19.) *There was no such provision in the previous judgment entered on March 14, 1935, or in the conclusions of law filed on that date.* (Cl.Tr. pp. 151, 154.) *Consequently, the new judgment is void.* * * *

"The procurement of this new provision in the judgment is both an imposition on the co-defendants and appellants against whom it is directed, and upon the judge. It orders the doing of an act which is impossible. *The same money is now in the hands of the Court in the San Francisco action.* (See supra, p. 4.) *Furthermore, the procurement of this judgment is in direct disregard of respondents' later stipulation that the same money be deposited with the Court in the San Francisco action, and discharging the Estate of Greenfield and the administrators thereof of liability to either A. W. Mather, appellant herein, or to Dorothy Devore Mather, respondent herein and in whose favor the new judgment is rendered.* The estate and the administrators were not only discharged from liability by stipulation of this same Dorothy Devore Mather, dated June 4, 1936, but pursuant to such stipulation, an order of Court was entered to the same effect on June 5, 1936, more than three years before the entry of the judgment on December 12, 1939. (See supra, p. 5, see also, stipulation and order thereon in Greenfield v. Mather, at Cl. Tr. p. 59, lines 12–20 therein.)" [Emphasis added.]

In their reply brief filed by counsel for Mr. Mather in the District Court of Appeal, Second Appellate District, on February 3, 1942, in support of his appeal from the judgment of December 12, 1939, in the Los Angeles action, counsel state at pages 42 and 43: "But even if we were so charitably inclined as to permit respondents to call this new and different matter in the third judgment 'surplusage,' the record would not permit it, because the new judgment, in respect to the direction to pay the money to Mrs. Mather, is directly contrary to the recitals in the second judgment and in the original findings. The second judgment recites that: '* * * Messrs. Lorrin Andrews and Sidney Snyder appearing as attorneys for plaintiff and Messrs. Don Lake and James R. Jaffray for defendants Anna Inez Mather and Lessie G. Williams, the other defendants not being represented in court, *no relief being demanded against said other defendants, who were made parties for the purpose of asking for restraining delivery to defendant Anna Inez Mather of certain moneys and properties mentioned in the complaint, which restraint was effectuated by the issuance of a temporary injunction in said action;'* (Cl.Tr. p. 153, lines 16–25; Italics ours.)

"An identical recital was made in the findings of fact. (Cl.Tr. p. 133, lines 16–25.)

Consequently, the record shows *affirmatively* that all that was sought as to Estate of Greenfield was a restraint during the pendency of the action, and that this relief was accomplished by a temporary injunction, which 'was dissolved February 27, 1935' (Cl.Tr. p. 151, line 20), which dissolution was confirmed in the second judgment. (Cl.Tr. p. 154, line 11.) *On the face of the record, all the relief that was sought against the Greenfield Estate was obtained, and the Estate was in effect dismissed from the case on February 27, 1935, when the restraint was dissolved, and most certainly so when this dissolution was confirmed in the second judgment."* [Emphasis added.]

There can be no question that it was the position of counsel for Mr. Mather on the appeal from the judgment of December 12, 1939, in the Los Angeles action which terminated in the decision of Mather v. Mather, 22 Cal.2d 713, 140 P.2d 808, that the all important question as to who was entitled to the sum of $12,549.60 on deposit in the superior court of the City and County of San Francisco in the interpleader action, must be determined by a judgment in the interpleader action. However, this Court reversed the judgment of December 12, 1939, in the Los Angeles action on the ground that Mrs. Mather's counsel failed to give sufficient notice to counsel for Mr. Mather of their motion for entry of said judgment. Mather v. Mather, 22 Cal.2d 713, 140 P.2d 808. At page 718 of its opinion in said case in 22 Cal.2d at page 810 of 140 P.2d this Court states: "The judgment, being based upon a finding that Anna Inez Mather was the owner of *one-half of the claim* against the Greenfield estate, is erroneous in adjudging her to be the owner of the *whole of said claim.* Such condition of the record precludes affirmance of the judgment as a proper termination of this litigation." [Emphasis added.]

[2] It is obvious that the Court was led into a misapprehension as to the difference between *a half interest* in the claim and *half of the unpaid balance* of the claim, as the opinion states: "The judgment, being based upon a finding that Anna Inez Mather was the owner of *one-half of the claim* against the Greenfield estate, is erroneous in adjudging her to be the owner of the whole of said claim." [Emphasis added.] This misconception is apparent when we refer to the finding made by Judge Hanson on which the judgment of December 12, 1939, was based, which determines that Mrs. Mather is the owner of an undivided one-half interest in said claim. This finding is in accord with all of the pleadings and decisions in the case. The confusion arose in assuming that the $12,549.60 on deposit in the superior court of the City and County of San Francisco which was awarded to Mrs. Mather in said judgment, constituted *the whole claim,* and was undoubtedly due to the fact that no evidence was offered in the Los Angeles action relative to the payments received by Mr. and Mrs. Mather on their respective half interests in the claim which would have disclosed that Mr. Mather had already received more than his share. Of course such evidence would not have been relevant or material in the Los Angeles action because the amount to which the respective parties were entitled to receive as their respective shares of the claim was not an issue in that case. It must necessarily follow that the above quoted erroneous statement from the opinion of this Court, 22 Cal.2d 713, 140 P.2d 808, is mere dictum because it was not within the issues in that case and therefore could not have been determined either by the trial court or this Court.

After the decision of this Court in Mather v. Mather, 22 Cal.2d 713, 140 P.2d 808, reversing the judgment of December 12, 1939, Mrs. Mather's attorneys went into the superior court of Los Angeles County and after obtaining an order expunging the judgments of January 4th and March 14, 1935, they moved for a judgment on the merits based upon the findings made by Judge Frank M. Smith in support of the judgment entered by him on March 14, 1935. These motions were made before Judge Frank M. Smith, and on November 1, 1943, he signed a judgment which determined all of the issues in the Los Angeles action in favor of Mrs. Mather. This judgment was entered on November 1, 1943, and simply provided that plaintiff A. W. Mather take nothing by reason of his complaint; that the temporary injunction theretofore issued restraining the administrators of the Greenfield estate from making any further payments to Mrs. Mather on her half interest in the claim against said estate be dissolved; and that Mrs. Mather recover her costs. No mention was made therein with respect to the disposition of the $12,549.60 on deposit in the superior court of the City and County of San Francisco in the interpleader action instituted by the administrators of the Greenfield estate. Mr. Mather appealed from this judgment and it was reversed by this Court in Mather v. Mather, 25 Cal.2d 582, 154 P.2d 684. It would appear that this Court held in that decision that Mrs. Mather was entitled to *only one-half of the $12,549.60* on deposit in the superior court of the City and County of San Francisco in the interpleader action instituted by the administrators of the Greenfield estate as distinguished from *one-half* of the *whole claim* against the Greenfield estate which, as above shown, was the phraseology used in the decision in 22 Cal.2d 713, 140 P.2d 808. It is clear that the opinion filed by this Court at that time (25 Cal.2d 582, 154 P.2d 684) is based upon the misconception that there was an issue in the Los Angeles action relative to the respective interests of Mr. and Mrs. Mather in this *fund,* as the only issue in that action was whether or not the property settlement agreement, and incidentally the assignment executed by Mr. Mather pursuant to said agreement, was valid. This assignment dated June 16, 1933, transferred to Mrs. Mather an undivided one-half interest in the unpaid balance of the approved claim of Mr. Mather against the Greenfield estate. The last opinion of this Court (25 Cal.2d 582, 154 P.2d 684) is, however, in conflict with its earlier opinion (22 Cal.2d 713, 140 P.2d 808), in that in the earlier opinion the discussion concerned the respective interests of Mr. and Mrs. Mather in the *claim as a whole,* while in the last opinion it spoke of their respective rights in the *fund of $12,549.60,* which was treated as being synonymous with the *whole claim.* This conflict resulted because of the failure to distinguish the difference between the issues in the Los Angeles and San Francisco actions. In the complaint filed by Mr. Mather in the Los Angeles action, he alleged that at the time this assignment was executed there was due and unpaid on said claim the sum of $38,699 plus accrued interest, and that Mrs. Mather had been paid on account of her half interest in said claim the sum of $7,441. He alleged that the assignment was invalid and that he was entitled to the return of the sum which Mrs. Mather had been paid under it and that she should not receive any further amount by virtue of the assignment. While the administrators of the Greenfield estate were joined as defendants in that action, they were joined solely for the purpose of restraining them from making any further payments to Mrs. Mather. They filed an answer in which they simply alleged that they were holding as the unpaid balance of said claim the sum of $12,549.60 subject to the determination of the validity of the assignment which Mr. Mather had executed to Mrs. Mather for an undivided one-half interest in said claim. No evidence was offered in any of the hearings in the Los Angeles action as to what, if any, payments had been made to Mr. Mather by the administrators of the Greenfield estate, and there was no showing before the superior court of Los Angeles County at any time that Mr. Mather at the time he commenced the Los Angeles action had already received more than his share of the proceeds of said claim if his assignment to Mrs. Mather was valid. These facts were known to Mr. Mather, as he had signed vouchers for the payments which he had received from the administrators of the Greenfield estate showing that he had received between the date of the assignment on June 16, 1933, and the date of the commencement of the action on August 4, 1934, a total sum of $26,569.05, which was $3,439.23 more than his share of the unpaid balance of the claim at the time the assignment was executed. It is obvious that if the amount which the respective parties were entitled to receive from the proceeds of this claim was in issue in the Los Angeles action, Mr. Mather should have made a disclosure by either pleading or proof in that action that he had received these payments and that he was not entitled to receive any more of the proceeds of said claim if the assignment executed by him to Mrs. Mather was valid. But it is clear that the amount to which the respective parties were entitled from the proceeds of said claim was not an issue in the Los Angeles action, and the only issue in that action with respect to said claim was whether or not the assignment to Mrs. Mather was valid. That issue was first determined by Judge Frank M. Smith in the findings and judgment signed by him on March 12, 1935, and again in the judgment which he signed on November 1, 1943. Neither of these judgments, nor the findings supporting the same, made any reference to the amount to which Mrs. Mather was entitled from the proceeds, of the claim, because there was no evidence from which any determination of said amount could be made.

It is abundantly clear from the record that after the interpleader action was commenced in San Francisco on April 12, 1935, Mr. Mather took the position that the issue as to the disposition of the sum of $12,549.60 deposited in the superior court of the City and County of San Francisco by the administrators of the Greenfield estate in the interpleader action commenced by them, was to be determined by the San Francisco court and not by the Los Angeles court. Mr. Mather through his attorneys so contended in all of his briefs and petitions until this Court made the statement in its opinion in 22 Cal.2d 713, 140 P.2d 808, that Mrs. Mather was entitled to one-half and not the whole of said claim. This statement while correct on its face was based upon a misconception that the *whole claim* and the *fund* on deposit in the superior court of San Francisco in the interpleader action was one of the same thing.

After the decision of this court in Mather v. Mather, 25 Cal.2d 582, 154 P.2d 684, and on March 29, 1945, at the request of Mr. Mather's attorneys, Judge Frank M. Smith of the superior court of Los Angeles County entered a judgment in the Los Angeles action awarding to Mr. Mather an undivided one-half of the fund on deposit in the superior court of San Francisco and the other half was awarded to Mrs. Mather. No appeal was taken from this judgment and it became final. This judgment was entered pursuant to the direction of this Court in its last mentioned decision without amendment to the pleadings or the introduction of any evidence relative to the payments received by Mr. and Mrs. Mather from the administrators of the Greenfield estate on account of the claim here involved. As before stated, no evidence was ever presented in the Los Angeles action relative to the respective interests of Mr. and Mrs. Mather in the fund deposited in the superior court of the City and County of San Francisco by the administrators of the Greenfield estate in settlement of Mr. Mather's claim against said estate.

It must be remembered that in the San Francisco action Mr. Mather filed an answer and cross-complaint to the complaint in interpleader, in which cross-complaint he joined Mrs. Mather as a cross-defendant and alleged that the assignment executed by him to Mrs. Mather on June 16, 1933, of an undivided one-half interest in his claim against the Greenfield estate was invalid and void because it was executed in the Territory of Hawaii in violation of the laws of that territory, and for that reason he was entitled to the full unpaid balance of said claim. Mrs. Mather also filed an answer and cross-complaint in said action in which she joined Mr. Mather as a cross-defendant and alleged that she was the owner of the full amount deposited by the administrators of the Greenfield estate in said interpleader action by virtue of the assignment to her by Mr. Mather of an undivided one-half interest in said claim. In said cross-complaint she asked the court to determine the rights of the respective parties to said fund. It is conceded, and the record discloses, that no trial was ever had on these issues in the San Francisco action as the trial court considered the judgment of March 29, 1945, entered in the Los Angeles action to be res judicata of all issues in the San Francisco action and refused to admit any evidence as to the payments which had been made to either Mr. or Mrs. Mather by the administrators of the Greenfield estate subsequent to the date of said assignment. This evidence was, however, offered by Mrs. Mather and now appears in the record before us in the form of an offer of proof of the issues in this action.

[3] It is apparent from the foregoing that we have here a plea of res judicata, based upon a judgment rendered in an action where, in the proceedings therein, there were no pleadings or evidence on the issue claimed to be adjudicated. While in that action the issue as to the respective interests in the claim against the Greenfield estate (one-half to each) was considered, there was never involved, nor was any consideration given to the question as to what payments had been made on the respective interests in said claim by the administrators of the Greenfield estate to either of the parties. The decisions of this Court in 22 Cal.2d 713, 140 P.2d 808, 25 Cal.2d 582, 154 P.2d 684, which led to the judgment claimed to be res judicata are conflicting, and this Court was obviously misled and mistaken as to the true issues involved. Inconsistent positions have been taken by both parties in these actions, and in view of the prior positions taken by Mr. Mather, he has little if any basis for reliance on the judgment in the Los Angeles action as res judicata of the issue in this action as to the amount to which the respective parties are entitled from the fund on deposit in said court. While the litigation was pending in the Los Angeles action which led to the judgment here claimed to be res judicata, but which embraced no issue as to the rights of the respective parties in the fund, the precise question had been presented in an action pending in the Superior Court of the City and County of San Francisco and was clearly set forth in the pleadings on file therein. From the offer of proof made by Mrs. Mather in the trial court it appears that Mr. Mather has been paid more than his share of the claim against the Greenfield estate, and although Mrs. Mather has made assignments of her interest in the claim, so far as appears, Mr. Mather has not, thus indicating that no intervening innocent third parties have been misled by the Los Angeles judgment. All those circumstances together with the facts and history of the litigation heretofore set forth present a situation where the doctrine of res judicata should not be applied.

[4, 5] We are mindful of the rule that a judgment rendered in an action in personam by a court having jurisdiction over the subject matter and the parties is not void and subject to collateral attack merely because it may erroneously determine some matter not specifically raised in the pleadings, and not covered by the evidence before the trial court, and that such a judgment is res judicata. We adhere to this rule. See, Kupfer v. Brawner, 19 Cal.2d 562, 122 P.2d 268; Estate of Keet, 15 Cal. 2d 328, 100 P.2d 1045. But in rare cases a judgment may not be res judicata, when proper consideration is given to the policy underlying the doctrine, and there are rare instances in which it is not applied. In such cases it will not be applied so rigidly as to defeat the ends of justice or important considerations of policy. See, Guardianship of Di Carlo, 3 Cal.2d 225, 44 P.2d 562, 99 A.L.R. 990; 50 C.J.S., Judgments, § 592.

By reason of the special circumstances appearing in this case, as above narrated, we are constrained to hold that the doctrine of res judicata should not be applied here, and that the issue as to the respective portions of the fund on deposit in the court below to which the parties hereto are entitled should be determined without regard to the judgment in the Los Angeles action. The judgment is reversed.

GIBSON, C. J., and SHENK and SCHAUER, JJ., concur.

TRAYNOR, Justice.

I dissent.

The majority opinion purports to adhere to "the rule that a judgment rendered in an action in personam by a court having jurisdiction over the subject matter and the parties is not void and subject to collateral attack merely because it may erroneously determine some matter not specifically raised in the pleadings, and not covered by the evidence before the trial court, and that such a judgment is res judicata." It then departs from the rule by holding that the application of the doctrine of res judicata in the present case would "defeat the ends of justice or important considerations of policy"; how, any more than in hundreds of other cases where the courts have refused to reexamine final judgments to determine whether or not they were erroneous, is never specified. So cavalier a departure from res judicata throws into question the finality of any judgment and thus is bound to cause infinitely more injustice in the long run than it can conceivably avert in this case. It is an invitation to all unsuccessful litigants to relitigate their cases, for they commonly view judgments against them as erroneous and hereafter can contend with justifiable cause that their cases also present an exceptional combination of circumstances requiring a departure from the doctrine of res judicata.

The Di Carlo case, 3 Cal.2d 225, 235, 44 P.2d 562, 99 A.L.R. 990, relied upon in the majority opinion, is not authority for the reexamination of a final judgment to determine whether under the particular circumstances of the case an injustice has been done. In that case, this court held in accord with the weight of authority (see cases collected in 99 A.L.R. 996) that intermediate accounts of a guardian are not conclusive against a ward but may be reexamined by the probate court upon a subsequent or final account. It noted that a different rule applies to the intermediate accounts of executors, administrators, and testamentary trustees, by virtue of Probate Code sections 931 and 1123, and held such cases distinguishable on the ground that an intermediate account of a guardian is made while the adverse party, the ward, is under a disability and usually unable to protect himself. (See also 99 A.L.R. 996 and cases there collected.) "This distinction is sufficient to justify an exception to the normal application of the principle res judicata." Guardianship of Di Carlo, supra, 3 Cal.2d at page 235, 44 P.2d at page 567. The court did not find the circumstances of the Di Carlo case so unusual as to justify an exception to the application of the doctrine but held merely that such proceedings are not final as against a ward and therefore not within its normal application. A rule that the doctrine of res judicata does not apply to a specific type of order can hardly serve as a basis for a rule that the application of the doctrine depends on the circumstances of a case, which must be reexamined to determine whether the doctrine will serve or "defeat the ends of justice or important considerations of policy."

By what test are the trial and appellate courts of this state to determine whether the circumstances of a case are rare enough to justify a departure from the doctrine of res judicata? The dissenting opinions filed by members of this court demonstrate the difficulty of determining whether a particular judgment defeats the ends of justice or violates important principles of policy. The number of times this court has overruled earlier decisions is a reminder that principles of justice and policy are not static. No test emerges from the turbid generalities of the majority opinion; in fact it precludes any application of the doctrine of res judicata until the courts look behind each judgment to the specific circumstances of each case to determine whether those circumstances involve such considerations of policy or justice as to require a departure from the doctrine. The rule announced in the majority opinion therefore defeats the whole purpose of the doctrine of res judicata by casting the shadow of doubt on the finality of judgments.

The record in this case and the previous litigation between the parties disclose only one ground for holding that the application of the doctrine of res judicata might result in injustice, namely, that the opinion of this court in Mather v. Mather, 25 Cal.2d 582, 585, 154 P.2d 684, directing the particular judgment may have been erroneous. Heretofore it had virtually always been held that the correctness of a previous order or judgment cannot be considered until it has been decided that the doctrine of res judicata is not applicable. "An erroneous judgment is as conclusive as a correct one." Panos v. Great Western Packing Co., 21 Cal.2d 636, 640, 134 P.2d 242, 244; Lamb v. Wahlenmaier, 144 Cal. 91, 95, 77 P. 765, 103 Am.St.Rep. 66; Edmonds v. Glenn-Colusa Irr. Dist., 217 Cal. 436, 446, 19 P.2d 502.

Nor is it material that the error, if any, may be an error made by this court or some other appellate court. Philbrook v. Newman, 148 Cal. 172, 174, 82 P. 772; McPhee v. Reclamation District, 161 Cal. 566, 572, 119 P. 1077.

Consider how often the circumstances of this case have been reviewed. It is necessary, however tedious, to recount the circumstances once more to demonstrate that there are no considerations of policy or justice in this case that warrant a departure from the doctrine of res judicata.

The appeal in this case is from a judgment in an action of interpleader to determine the rights of defendants to a certain fund under a property settlement agreement executed in the Territory of Hawaii on June 16, 1933, between A. W. Mather, respondent, and Dorothy Devore Mather (also known as Anna Inez Mather), one of the appellants. Mr. Mather assigned to Mrs. Mather a half interest in a claim and in the interest thereon against the Estate of Louis R. Greenfield. The agreement recited that the claim was for $75,000. At the time of the assignment, the principal due on the claim was $38,699. During the litigation between Mr. and Mrs. Mather regarding the validity of the property settlement agreement, the administrators of the Greenfield estate deposited with the clerk of the San Francisco Superior Court the sum of $12,549.60 on the claim of Mr. Mather. The present appeal was taken by Mrs. Mather and her assignees from a judgment of that Court determining that Mr. Mather was entitled to half the fund.

The rights of the parties to the fund in question turn on previous litigation between them, including five appeals to this court. On August 3, 1934, Mr. Mather brought an action against his former wife in the Superior Court of Los Angeles County, hereinafter referred to as the Los Angeles action, to rescind the property settlement agreement, joining as defendants Lessie G. Williams, the Security-First National Bank of Los Angeles, and the administrators of the Greenfield estate. The complaint alleged that Lessie G. Williams, Mrs. Mather's mother, claimed an interest in some of the property involved in the litigation. She joined with Mrs. Mather in demurrers and in answer to the complaint. The complaint also alleged that the Security-First National Bank of Los Angeles was acting as Mrs. Mather's agent and had custody of certain money and securities involved in the litigation. The record fails to disclose any answer filed by this defendant. The complaint also alleged that the administrators of the Greenfield estate paid Mrs. Mather the sum of $7,441.00 on account of the assignment to her of a half interest in Mr. Mather's claim against the estate. Mr. Mather sought to have the administrators restrained from making further payments to Mrs. Mather under this assignment.

The administrators of the Greenfield estate answered Mr. Mather's complaint alleging "That at all times hereinafter mentioned these defendants * * * have held and now hold for the account of whom it may concern, and on account of a claim originally filed by A. W. Mather against the estate of Louis R. Greenfield, deceased, the sum of $12,549.60; that various assignments and notices of assignment have been served upon these defendants affecting the said fund, and among other claimants to said fund there are A. W. Mather, Dorothy Devore Mather, Carl B. Rhodes and Don Lake, and these defendants aver that they are holding the said sum of $12,549.60 subject to the order and direction of the above entitled court.

"Wherefore, these defendants pray that they may be hence dismissed, that they may recover their costs of suit incurred herein, and that they may be released of all further liability toward the parties in the above entitled action, and toward all claimants in and to said fund so held by these defendants."

Carl B. Rhodes and Don Lake, referred to in the answer of the administrators of the Greenfield estate, are assignees of Mrs. Mather and are parties to the present proceeding, although they were not parties to the Los Angeles action.

The complaint in the Los Angeles action recited three alleged causes of action against Mrs. Mather based respectively on fraud, on misrepresentation, and on the ground that the agreement was illegal under the laws of Hawaii. After three amendments to the third count of the complaint, a demurrer thereto was sustained without leave to amend, and on March 4, 1935, a judgment was entered that plaintiff (Mr. Mather) recover nothing on the alleged third cause of action. On February 7, 1935, Mr. Mather appealed from this judgment. Mather v. Mather, 5 Cal.2d 617, 55 P.2d 1174, L.A. No.15233. The cause then proceeded to trial on the issues joined in the alleged first and second causes of action, and on March 14, 1935, judgment was entered in favor of Mrs. Mather on these causes of action. The judgment provided that plaintiff recover nothing by reason of his complaint and dissolved a temporary injunction restraining the administrators of the Greenfield estate from making any more payments to Mrs. Mather. Notice of appeal from this judgment was filed, but on the motion of Mrs. Mather, the appeal was dismissed for failure to file a transcript within the required time. L.A. 15481; see Greenfield v. Mather, 14 Cal.2d 228, 231, 93 P.2d 100. Meanwhile, Mr. Mather's appeal from the judgment on the third cause of action was pending, and on March 17, 1936, this court dismissed that appeal on the ground that the judgment was not final and therefore not appealable. Mather v. Mather, 5 Cal. 2d 617, 55 P.2d 1174.

While these appeals were pending, the present action was commenced as an original action in interpleader by the administrators of the Greenfield estate against A. W. Mather, the respondent herein, and Mrs. Mather, Carl B. Rhodes and Don Lake as assignees of Mrs. Mather, the appellants herein. The complaint filed by the administrators set forth the litigation to date and stated that both parties to the Los Angeles action claimed the entire $12,549.60 and that the administrators were ready and willing to pay the money to whoever might be entitled thereto. On August 15, 1935 the San Francisco Superior Court, on motion of the administrators and pursuant to a stipulation of the defendants in this action, directed the administrators to deposit this money with the clerk of the court and discharged the administrators of all claims and demands of the defendants. Mr. Mather and his former wife and her assignees joined issue by cross-complaints and answers. Mrs. Mather and her assignees claimed that her right to the fund in question had been conclusively determined by the judgments in the Los Angeles action. At the trial, Mrs. Mather objected to the introduction of any evidence with respect to Mr. Mather's right to the fund. The trial court sustained this objection and entered judgment for Mrs. Mather on the ground that the judgments in the Los Angeles action were final and binding on the parties. On appeal, this court reversed the judgment of the San Francisco Superior Court on the ground that the Los Angeles judgments were not final. Greenfield v. Mather, 14 Cal.2d. 228, 93 P.2d 100.

Thereupon on December 12, 1939, Mrs. Mather had a judgment nunc pro tunc entered in the Los Angeles action purporting to cover the matters litigated in the earlier trial. This judgment stated that in the findings of fact and conclusions of law filed on March 12, 1935 it is determined that "plaintiff take nothing by reason of his complaint, and that said answering defendants have their costs against said plaintiff and that the temporary injunction theretofore allowed [against the administrator's of the Greenfield Estate] was dissolved February 27, 1935, and should be dissolved.

"It further appears by the answer of Estate of Louis R. Greenfield, deceased, Edna Greenfield, as Administratrix * * * Herman Wobler and Hugo D. Keil, as Administrators of the Estate of Louis R. Greenfield, deceased, that they are holding the sum of $12,549.60 on part of the claim of A. W. Mather against said Estate which was transferred and assigned by him to Anna Inez Mather by the name of Dorothy Devore Mather, * * * expressly subject to the order and direction of the above court in this action, and that said sum belongs to and should be paid to said defendant Anna Inez Mather."

The judgment further provided as follows:

"(1) That plaintiff take nothing by reason of his complaint * * *.

"(2) That the injunction heretofore issued in this action be and the same is hereby dismissed and dissolved as of February 27, 1935.

"(3) That the answering defendants, Anna Inez Mather and Lessie G. Williams have and recover their costs herein * * *.

"(4) That the Estate of Greenfield, Edna Greenfield, as Administratrix, and Herman Wobler and Hugo D. Keil, as Administrators, thereof, do pay to said Anna Inez Mather * * * the sum of $12,549.60, admitted in their hands subject to the order and directions of this court in this action."

On January 4, 1940, Mr. Mather gave notice of motion to set aside this judgment upon the ground that the motion for entry of judgment was made without notice to the adverse parties and that the judgment was not in accord with the order for entry of judgment or any order for judgment. Judge Hansen, who gave the order for the judgment of December 12, 1939, but who had not presided at the trial of the action, denied this motion. In a memorandum opinion, however, he made the following observations:

"An answer to the complaint was * * * filed by the administrators of the Estate of Louis R. Greenfield, they having been joined as defendants with the defendants above mentioned, wherein it was averred they held the sum of $12,549.60 for such person or persons as might be entitled thereto, depending upon the question as to who was the rightful assignee, if any, of a claim filed by the plaintiff with the said administrators, and that said administrators held said sum 'subject to the order and direction of this court.' The case having gone to trial on the issues made, the court filed its findings and conclusions of law, in which it determined all the issues against the plaintiff and found, among other things * * * that plaintiff transferred 'one-half of the title standing in his name to the approved claim against the estate of Louis R. Greenfield, deceased.' * * *.

"At the moment it seems to me that the judgment should, at most, have recited that Anna Inez Mather was entitled to one-half and not all of the $12,549.60 as it recites. I predicate this thought on the finding above referred to. However, I have not had occasion to search the file and it may be that there is an amended finding or that the recital in the judgment is sustained by some other finding. The file is large and I have no occasion at this time to consider the point for reasons presently to be stated.

"The motion of the plaintiff asks that the judgment I signed be set aside (1) because it is not in accordance with my order of December 7, 1939, granting the motion; (2) that timely notice was not given of the motion. These being the only grounds stated, I can consider none other."

Mr. Mather appealed from the judgment of December 12, 1939 primarily on the grounds (1) that the motion for judgment was made without notice; (2) that a judge who had not tried the case made new findings of fact in the recital in the judgment and that the judgment did not conform to the findings made after trial of the case; (3) that the property settlement agreement was illegal under the laws of Hawaii. The District Court of Appeal filed an opinion on April 15, 1942, to the effect that the judgment should be modified to provide that Mrs. Mather was entitled to only half the sum held by the administrators of the Greenfield estate and as modified should be affirmed. Mather v. Mather, Cal.App., 124 P.2d 625, 628, 630. Mrs. Mather petitioned for a rehearing. Mrs. Mather's petition was directed solely to the question of the modification of the judgment. She contended that certain allegations in Mr. Mather's complaint showed that she was entitled to a judgment awarding her the entire sum and that the new findings followed this complaint. Mr. Mather likewise filed a petition for rehearing seeking a reversal of the judgment and filed a separate brief in reply to Mrs. Mather's petition for a rehearing on the ground that certain misstatements were contained therein. Mr. Mather contended that the issue as to the extent of the rights of the respective parties in the fund in question was not determined in the trial and was not covered in his complaint. Objections were made to various alleged misquotations from his complaint and from the memorandum opinion of Judge Hansen. In this brief, however, there are several statements that may be interpreted as indicating that Mr. Mather was supporting the position taken by Judge

Hansen and by the District Court of Appeal with respect to the rights of the parties in the fund in question in the event the judgment should be affirmed.

The District Court of Appeal granted a rehearing and on June 17, 1942, filed an opinion holding that the judgment was void and that it was therefore not necessary to consider the other questions raised by the parties. Mather v. Mather, Cal.App., 126 P.2d 960, 962. Mrs. Mather then petitioned this court for a hearing. Her petition was granted, and on March 1, 1943, an opinion was filed by this court modifying the judgment to order the administrators to pay Mrs. Mather "one-half of the sum of $12,549.60, admittedly in their hands subject to the order and direction of the court in this action * * *." and affirming the judgment as so modified. Mather v. Mather, Cal.Sup., 134 P.2d 795, 800.

This court stated in its opinion that the trial court had found "that Anna Inez Mather had but a one-half interest in the claim against the Greenfield estate. That being so, Anna Inez Mather should be entitled to only one-half of the money in the hands of the administrators for payment of the claim, in the absence of anything in the record to the contrary. *The record does not show that the entire sum was being held for her.*" Mather v. Mather, supra, 134 P.2d at page 799; italics added. Mr. Mather filed a petition for a rehearing, but Mrs. Mather did not. Mrs. Mather opposed this petition, but the court granted it and filed a new opinion on August 27, 1943. In the final opinion on that appeal this court reversed the judgment on the grounds that it was entered without proper notice to Mr. Mather and that it was inconsistent with the findings and conclusions of law made at the trial of the action in providing that Mrs. Mather was entitled to the entire $12,549.60 in the hands of the administrators of the Greenfield estate. Mather v. Mather, 22 Cal.2d 713, 717–719, 140 P.2d 808.

Following this decision, the Los Angeles Superior Court entered a judgment substantially the same as the first purported judgments in the Los Angeles action in that it failed to provide for the disposition of the money held by the administrators of the Greenfield estate. Mr. Mather appealed to this court, contending that the validity of the property settlement agreement under the Hawaiian law had not yet been decided by this court and that judgment failed to follow the decision in Mather v. Mather, 22 Cal.2d 713, 140 P.2d 808, supra, because it did not dispose of the $12,549.60. This court in Mather v. Mather, 25 Cal.2d 582, 587, 154 P.2d 684, 686, held that the property settlement agreement was valid but that the judgment violated the directions of this court on the former appeal. Accordingly, the judgment was reversed with directions to the trial court to include "in its judgment a provision that the sum now held on account of the claim against the Greenfield estate be paid as follows: one-half to the plaintiff, A. W. Mather, and one-half to the defendant Anna Inez Mather."

The court noted that "While there appears in the record a complicated mathematical argument whereby the defendant Anna Inez Mather seeks to show that she is entitled to the *whole amount* of said claim, the point of division has already been finally decided * * *." Mather v. Mather, supra, 25 Cal.2d at page 585, 154 P.2d at page 685. The argument referred to was substantially the same one presented by Mrs. Mather in her petition for rehearing in the District Court of Appeal in the course of the third appeal from the Los Angeles action. Although she contended that Mr. Mather must have received his full share of the claim because of the small amount of money left in the hands of the administrators of the Greenfield estate, she made no reference to anything in the record that would indicate that any payment had been made to Mr. Mather in excess of the amount admittedly paid to her.

Pursuant to the directions of this court, the Los Angeles Superior Court, in March, 1945, entered a judgment determining "That the sum of $12,549.60 admittedly in the hands of the estate of Louis R. Greenfield * * * subject to the order and direction of the court in this action, be paid as follows: One-half of the said sum of $12,549.60 to plaintiff, A. W. Mather, and one-half thereof to defendant, Anna Inez Mather * * *." No appeal was taken from this judgment and it has become final. The question before this court in the present proceeding is whether this is a valid judgment binding on the parties to the present action.

On the present appeal, Mrs. Mather again claims the entire amount of the fund, this time on the basis of an offer of proof with respect to payments heretofore made on the claim against the Greenfield estate. This offer of proof was made for the first time in the San Francisco action after the March 1945 judgment of the Los Angeles court had become final, and Mr. Mather had filed a supplemental pleading in the San Francisco interpleader action seeking half the fund on the basis of the Los Angeles judgment. Mrs. Mather and her assignee claim the right to show that the Los Angeles judgment is erroneous with respect to the rights of the parties in the fund in question on the following grounds: (1) The matter was not litigated in the Los Angeles action; (2) the assignees of Mrs. Mather were not parties to the Los Angeles action; (3) the judgment in the Los Angeles action, insofar as it purports to determine the rights of Mr. and Mrs. Mather to the fund, was fraudulently obtained by Mr. Mather's concealing from the trial court and this court that he had been fully paid his half interest on the claim. In support of these contentions, Mrs. Mather offered to prove that Mr. Mather signed vouchers of the Greenfield estate acknowledging payments equal to at least half of his approved claim of $38,699.00 and the accrued interest thereon between the dates of the property settlement agreement and the filing of his complaint in the Los Angeles action in August 1934. According to this offer of proof, Mrs. Mather received only $7,441.00, and the remainder of her half of the approved claim and interest was withheld by the administrators of the estate and amounted to the entire $12,549.60. The offer of proof was rejected by the trial court and judgment was entered in accord with the final judgment in the Los Angeles action.

At the time of the appeal in Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100, supra, the Los Angeles action had not been terminated by a final judgment, and the rights of the parties were therefore not finally determined. Since that time a final judgment has been entered in that action, which was pleaded by Mr. Mather in his supplemental cross-complaint. The judgment in the Los Angeles action is therefore conclusive in the present action insofar as it meets the requirements of res adjudicata or estoppel. Bennett v. Forrest, 24 Cal.2d 485, 493, 150 P.2d 416; Williams v. Southern Pac. Co., 54 Cal.App. 571, 576, 202 P. 356; Rest., Judgments, sec. 43; 2 Freeman on Judgments, 5th ed.1925, 1519.

It is contended that the present action does not involve the same cause of action as that involved in the Los Angeles action on the ground that final determination of that action did not necessitate a determination of the respective rights of the parties in the fund. Even if it be assumed that the two cases do not involve the same cause of action, the Los Angeles judgment, as a final judgment, is effective by way of estoppel and is binding on the parties thereto and their privies with respect to the matters actually litigated. Code Civ.Proc. sec. 1908; Sutphin v. Speik, 15 Cal.2d 195, 202, 205, 99 P.2d 652, 101 P.2d 497, see Panos v. Great Western Packing Co., 21 Cal.2d 636, 637, 638, 134 P.2d 242 and cases there collected; Rest., Judgments, sec. 68; 2 Freeman, op.cit. supra, sec. 676. Whether or not consideration was given at the original trial in Los Angeles, to what was the extent of the rights of Mr. Mather and Mrs. Mather in the fund in question that question has been the main one in the litigation between the parties in the last two appeals to this court. This court has expressly held that the question was put in issue by the answer of the administrators of the Greenfield estate, and a final judgment in the Los Angeles action has been entered expressly dividing between Mr. Mather and Mrs. Mather the sum of $12,549.60 held by the administrators of the Greenfield estate subject to the orders of the Los Angeles Court.

It follows that unless the final Los Angeles judgment is void and subject to collateral attack, Mrs. Mather is bound by the determination of the Los Angeles Court that she is entitled to only half the sum of $12,549.60 that was still due on the claim against the Greenfield estate at the time the administrators filed their answer in the Los Angeles action. Mrs. Mather contends, however, that the question of the respective rights of the parties in this fund was not in issue in the Los Angeles action, on the ground that the answer of the Greenfield estate was not served on her and that there was no evidence presented at the trial of that action with respect to the extent of their rights, the sole issue at the trial having been the validity of the agreement between Mr. and Mrs. Mather under which the latter claims an interest in the fund. It was Mrs. Mather, however, who had the judgment of December 12, 1939 entered in the Los Angeles action that expressly determined that the matter was put in issue by the answer of the administrators. Moreover, before that judgment was entered she had a judgment entered in San Francisco determining that she was entitled to the whole sum on the ground that her right thereto was finally determined by the first judgments in the Los Angeles action. Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100. After this litigation and after the question was determined in the Los Angeles action and argued before this court on several appeals, a final judgment was entered pursuant to the express directions of this court, determining that the matter was in issue in the Los Angeles action and that Mrs. Mather was entitled to only half the fund in question. Regardless of whether the Los Angeles judgment and the opinions on which it is based are erroneous, they are not void and not subject to collateral attack.

Although there is language in cases such as Baar v. Smith, 201 Cal. 87, 98, 255 P.827, to the effect that a judgment that determines a matter not specifically put in issue by the pleadings or covered in the evidence at the trial is not only erroneous but void and subject to collateral attack, such cases have been distinguished on the ground that in those cases "the question of 'validity' of the judgment was being considered in connection with an appeal from the judgment. * * * None of these cases would justify a conclusion that the prior judgment must be declared void." Kupfer v. Brawner, 19 Cal.2d 562, 564, 565, 122 P.2d 268, 270, citing cases containing such dicta. A judgment is subject to collateral attack only when the court lacks jurisdiction "over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment." Code Civil Procedure § 1917. Since the judgment in the present case was in personam, no problem of the jurisdiction over a specific thing or in rem is involved in this case. An in personam judgment by a court that has jurisdiction over the subject matter and over the parties is therefore not void and subject to collateral attack merely because it may erroneously determine some matter not specifically raised in the pleadings and not covered in the evidence before the trial court. Ex parte Bennett, 44 Cal. 84, 87; Kupfer v. Brawner, 19 Cal.2d 562, 564, 122 P.2d 268; Estate of Keet, 15 Cal.2d 328, 333–335, 100 P.2d 1045.

Even if it is assumed therefore that this court erroneously determined that the answer of the administrators of the Greenfield estate put in issue the rights of the parties, that determination and the judgment based thereon is not void, "the scope of a judgment, when collaterally attacked, is not limited to the factual or legal points expressly urged by counsel or considered by the court; it extends to matters which could have been raised and considered in the particular proceedings under the particular pleadings." Estate of Keet, supra, 15 Cal.2d at page 334, 100 P.2d at page 1048. The principal issue raised by the pleadings of Mr. and Mrs. Mather was the validity of the property settlement agreement, including the provision for an equal division of the claim held by Mr. Mather against the administrators of the Greenfield estate. The complaint of Mr. Mather put in issue the right of Mrs. Mather to any interest in the claim. It cannot seriously be argued therefore that the trial court lacked jurisdiction to determine the rights of Mrs. Mather in the amount still due on the claim at the time of trial, whether or not such jurisdiction may have been erroneously exercised. The sum held by the administrators subject to the orders of the court was the amount still due on the claim and the trial court on directions from this court determined the interests of the parties in that sum.

Nothing could be gained by attempting to determine whether the error, if any, in the opinions of this court and in the judgment was attributable to Mrs. Mather, who obtained judgments in San Francisco and Los Angeles based on the theory that this issue was actually tried in Los Angeles and who contended before this court that the matter was in issue in Los Angeles, or was attributable to certain statements in a brief filed by Mr. Mather on one of the former appeals. Nor can Mrs. Mather claim that she was deprived of a hearing on this question, for the issue as to the rights of the parties in the fund was determined in the Los Angeles judgment, and the correctness of the determination has been argued at length in the former appeals and considered in the opinions of this court and of the District Court of Appeal. Whatever the cause of error, if there be any, the final judgment of the Los Angeles Superior Court conclusively determines the rights of Mr. and Mrs. Mather in the sum of $12,549.60 held by the administrators of the Greenfield estate.

The answer of the administrators referred to the fact that the administrators had received notice of assignments of part of the claim to Carl Rhodes and Don Lake. Both Rhodes and Lake are assignees of Mrs. Mather and were joined as defendants in the San Francisco interpleader action. It is contended by Mrs. Mather and her assignees that the Los Angeles judgment is not conclusive on the rights of the parties to the present action, on the ground that the assignees were not parties to the Los Angeles judgment. A final judgment, however, operates as res judicata and by way of estoppel, binding not only the actual parties to the judgment but those persons who are in privity with them. Code Civ.Proc. sec. 1908; Bernhard v. Bank of America, 19 Cal.2d 807, 811, 122 P.2d 892; Rest.Judgments, sec. 83; 1 Freeman, op. cit. supra, 959. The pleadings of Mrs. Mather and her assignees refute the assignees' claim that they are nct bound by the Los Angeles judgment to the same extent as Mrs. Mather insofar as it was concerned with the fund. It is admitted in those pleadings that the assignments were made on August 4, 1934. The Los Angeles action was commenced on August 3, 1934, and it is not contended that the assignees, one of whom has been an attorney for Mrs. Mather throughout this litigation, did not have notice of the commencement of the action. Moreover, they joined in Mrs. Mather's pleadings in which she set up the original purported judgments in that action as a basis for recovery on the former trial of the present action. The Restatement of Judgments, section 89, provides that, "A person who, after the beginning of an action succeeds to the interest of one of the parties is entitled to the benefits of the rules of res judicata with reference to the subject matter; and he is bound by such rules * * *." See also 1 Freeman, op. cit. supra, 967. This rule applies in California at least when such persons "have notice, actual or constructive, of the pendency of the action or proceeding." Code Civ.Proc., sec. 1908 (2).

It is also contended that the judgment in the Los Angeles action is not binding on the parties to the present action, because certain persons were parties to that action who are not parties to the present action. The parties referred to claimed an interest in some of the property involved in the property settlement agreement but did not claim any interest in the fund in question. Since the title to the fund could be determined without the presence of those parties, their presence in that action is not material with respect to the effect of the judgment in the Los Angeles action on the title to the fund. Code Civ.Proc., sec. 1910.

The assignees of Mrs. Mather claim also that the judgment in the present action should be reversed on the ground that it fails to determine the respective rights of Mrs. Mather and her assignees in her share of the fund. Those parties, however, requested no such determination by the trial court, but in their pleadings alleged that there was no dispute among them and no cause for settlement by the court.

It is contended finally, that the March 1945 judgment in the Los Angeles action insofar as it relates to the fund was procured by fraud on the part of Mr. Mather and his attorneys. The allegations of fraud are twofold: (1) That at the trial of the Los Angeles action Mr. Mather conspired with his attorneys to conceal payments made to him by the administrators of the Greenfield estate; (2) that Mr. Mather's briefs on previous appeals contain fraudulent misrepresentations of fact with respect to payments made on the claim by the administrators.

The trial court found that these allegations are untrue. Normally the question whether a judgment was procured by fraud may not be considered on a collateral attack on the judgment but must be determined in an independent action in equity to set aside the judgment for extrinsic fraud. Estate of McNeil, 155 Cal. 333, 345, 100 P. 1086; additional cases collected in 15 Cal.Jur. 63. The finding of the trial court, however, indicates that the court regarded Mrs. Mather's answer to the supplemental cross-complaint of Mr. Mather as an equitable defense to the judgment in the nature of an action in equity for relief therefrom. See, Rest.Judgments sec. 112 (e). For the purposes of the appeal it may be assumed that the answer of Mrs. Mather properly put in issue her right to equitable relief from the judgment for extrinsic fraud. There is no evidence in the record, however, from which we can determine the correctness of the trial court's finding with respect to the allegation that Mr. Mather was guilty of fraudulent concealment at the time of the trial in the Los Angeles action. In any event, it was unnecessary for the trial court to make the finding, for Mrs. Mather failed to show any basis for equitable relief from the judgment.

If Mr. Mather did conceal any payments made to him before the commencement of the Los Angeles action, there is no allegation or offer of proof sufficient to show that he fraudulently kept Mrs. Mather from sources of evidence that would have revealed this fact. There is nothing in Mrs. Mather's allegations or offers of proof to indicate that due diligence on her part would not have revealed evidence of such overpayment. The administrators of the Greenfield estate, who allegedly made these payments, were parties to the Los Angeles action and were parties to the present action until dismissed on the stipulation of the defendants. There is nothing in the record to indicate that they were not available at those times to testify as to any payments made on the claim. Even if Mrs. Mather may have believed such testimony unnecessary at those times, she cannot now invoke that belief to prevent the application of the doctrines of res judicata and estoppel by judgment. Ernsting v. United States, Inc., 206 Cal. 733, 737, 276 P. 103. Nor can the application of those doctrines be avoided by the claim of newly discovered evidence. Quirk v. Rooney, 130 Cal. 505, 511, 62 P. 825; cases collected, 149 A.L.R. 1195, 1198, 1201.

It is also alleged that Mr. Mather and his attorneys made statements in his briefs on appeals from the various Los Angeles judgments that clearly implied that as a matter of fact he was not paid more than his former wife was paid on this claim. Mrs. Mather has purported to quote several statements from Mr. Mather's briefs to support her claim of fraudulent misrepresentations. Many of these statements are quoted out of context. In several instances statements quoted as those of Mr. Mather are actually references made to the memorandum opinion of Judge Hansen, who granted the judgment of December 12, 1939 but expressed doubt as to the correctness of its determination with respect to the fund in question. If it is assumed, however, that Mr. Mather was in fact paid more than Mrs. Mather, and if it is also assumed that certain statements in Mr. Mather's briefs are false, those statements would not justify a reversal in this case.

It has already been observed that Mrs. Mather was not misled into believing that she had no right to the entire sum (see Rest.Judgments, sec. 121), for she at all times asserted her right thereto, and she has not shown that evidence of the alleged payments, which she now claims would substantiate her right thereto, was not available in time to prevent the alleged error. Mrs. Mather has thus failed to establish a case for equitable relief from the judgment either on the basis of fraudulent concealment at the time of trial or fraudulent misrepresentations during the course of past appeals. "Equitable relief will be given only in a limited number of situation where the judgment was rendered after proceedings in which the present complainant was deprived of an opportunity of presenting adequately his claim or defense (see secs. 119–125) [Rest.Judgments]. The distinction between the types of situations in which equitable relief will be given and those in which it will not be given, has sometimes been expressed by saying that equity will not relieve for fraud which leads to an erroneous judgment after a trial which is otherwise fair, but only where a party has been prevented from having a reasonably fair trial. The first situation has been described as resulting from intrinsic fraud or error for which no relief will be given; the second situation has been described as resulting from extrinsic fraud, error or misfortune, for which relief will be granted." Rest. Judgments, § 118, comment b; Horton v. Horton, 18 Cal.2d 579, 584, 116 P.2d 605; Neblett v. Pacific Mutual L. Ins. Co., 22 Cal.2d 393, 397, 139 P.2d 934; cases collected 23 Calif.L.Rev. 79. Even in jurisdictions that make no distinction between extrinsic and intrinsic fraud, relief from a judgment on the ground of fraud cannot be obtained without a showing of due diligence. (See cases collected, 36 Ill.L.Rev. 894, 896). In any event, the allegations "that the other party [Mr. Mather] was aware of the invalidity of his claim or defense is not of itself a sufficient basis for equitable relief against the effects of the judgment." Rest.Judgments, § 121, comment a.

This rule, soundly rooted in public policy, is designed for the benefit of honest litigants, for "the interests of the public and the litigants require that ordinarily where a final judgment has been rendered, there should be no opportunity to relitigate the same matters. Public policy requires that pressure be brought upon litigants to use great care in preparing cases for trial and in ascertaining all the facts." Rest.Judgments, sec. 126, comment a. The failure to give relief in such cases is in the interest of "honest litigants who, long after obtaining a judgment and possibly after means of disproving the charges have disappeared, might be faced with equitable proceedings alleging such fraud." Ibid., comment c.

The judgment should be affirmed.

SPENCE, J., concurs.

On Rehearing.

Rehearing denied.

EDMONDS, TRAYNOR, and SCHAUER, JJ., dissenting.

EDMONDS, Justice (dissenting).

For the reasons stated by Mr. Justice Traynor, I concur in his conclusion that the judgment in this case should have been affirmed. The rule of res judicata is designed "to prevent vexatious litigation and to require the parties to rest upon one decision in their controversy * * *." Miller & Lux, Inc. v. James, 180 Cal. 38, 44, 179 P. 174, 177. No doctrine in the law is more fundamental and it is vital to the orderly administration of justice. Heretofore, the fact that a prior decision may have been erroneous has not been a ground for allowing a retrial of the issues previously determined and fixed by a judgment. Courts should stand firm against a policy of endless litigation in which nothing is ever decided with certainty.

I, therefore, vote for a rehearing.

86 Cal.App.2d 95

MATHERLY v. ALLEN.

Civ. 16064.

District Court of Appeal, Second District, Division 3, California.

June 9, 1948.

1. Officers 🔑69

Employee of the Lomita County Fire Protection District of Los Angeles County from June, 1944, to October, 1946, who had taken and passed examination for temporary and substitute work authorized for war emergency, but who had not been examined for permanent employment and who was not on an eligible list from which such an appointment could be made, notwithstanding his period of service, did not become a "permanent employee" under county civil service. St.1913, p. 1496, § 37; St.1941, p. 3237; Health and Safety Code, §§ 14400 et seq., 14446 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Permanent Employee".

2. Officers 🔑69

Los Angeles County charter provision, under which substitute employees, who were engaged during war emergency, could be separated from temporary positions which were created as emergency positions, was designed, to maintain efficiency of service by providing a method of removing those holding temporary positions and placing in permanent positions others who were found to possess higher qualifications prescribed for holders of permanent positions.

3. Action 🔑6

Where proceedings relating to plaintiff's appointment and discharge from county employment were taken under authority conferred by charter amendment to create temporary substitute positions in civil service during wartime emergency, court would not enter a judgment declaring plaintiff to be holder of a permanent position, which would have effect of nullifying steps taken under charter and of creating positions for which charter makes no provision and which Board of Supervisors did not attempt to create. St.1941, p. 3237.

4. Officers ⚷69

Findings of fact which showed clearly temporary nature of positions to which county firemen and others similarly situated were appointed were sufficient to authorize judgment determining that such firemen and others similarly situated were not permanent employees under county civil service. St.1941, p. 3237; Health and Safety Code, §§ 14400 et seq., 14446 et seq.

◆

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge Assigned.

Action by Monroe F. Matherly, on behalf of himself and all others similarly situated, against Wayne R. Allen, County Manager of Los Angeles County, and others, for a declaration that plaintiff is a permanent employee of a county fire protection district and for other relief. From an adverse judgment, plaintiff appeals.

Affirmed.

Arthur R. Hemm and C. M. Kilpatrick, both of Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Jesse J. Frampton and Earl O. Lippold, Deputy County Counsel, all of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

Plaintiff brought this action on his own behalf and on behalf of others alleged to be similarly situated against Wayne R. Allen, county manager of Los Angeles County, and other county officers, seeking a declaration that he is a permanent employee of a county fire protection district, subject to discharge only in the manner provided by the county charter for the discharge of permanent county employees in the civil service. The judgment declared: "That plaintiff and all others similarly situated are not employees of the County of Los Angeles, but are employees holding temporary positions in one or another of the county fire protection districts in Los Angeles County; that the employment of plaintiff and all others similarly situated may be terminated at any time, and plaintiff and others similarly situated separated from such temporary positions; that plaintiff and all others similarly situated have not obtained or acquired the status of permanent employees holding permanent positions in either the service of the County of Los Angeles or in any of the county fire protection districts of the County of Los Angeles." Plaintiff appeals.

On June 29, 1944, plaintiff was employed as a fireman by the Lomita County Fire Protection District of the County of Los Angeles, a public corporation organized and existing under the provisions of Division 12, Part 3, Chapter 2, Articles 1–13, inclusive, of the Health and Safety Code. He served as a fireman in that district and in others to which he was assigned until he received notice of discharge from his employment on or about October 1, 1946. Under the authority of section 14446 et seq., Health and Safety Code, employees of the several county fire protection districts were by resolution of the Board of Supervisors, adopted February 20, 1940, brought under the civil service provisions of the county charter and the rules, regulations and procedures of the Los Angeles County Civil Service Commission. On July 3, 1944, the Board of Supervisors, as the governing board of the Lomita County Fire Protection District, adopted a resolution which specified the number of permanent positions in said district as well as in other districts, as "captains * * * firemen" etc., and also provided that the County Forester or Fire Warden was allowed additional temporary positions equal to the number of employees specified in the resolution. The resolution continued as follows: "provided, however, that persons may be appointed to any such temporary or as needed position only for the duration of the national emergency and for six months thereafter. Persons appointed to such positions shall not be deemed to be holding permanent positions, and by reason of any such employment shall not thereby acquire classified civil service status as permanent employees of the District. 16.2 Persons appointed to any such temporary or as needed positions may be separated from such temporary or as needed positions at any time. * * * 16.4 All of the temporary or as needed duration-of-national-emergency positions provided for by this section shall terminate six (6) months after the present national emergency shall have ended." Authority for the action evidenced by the quoted provision is found in the County Charter. In 1941, subdivision 10 of section 34, article 9 of the charter was amended so as to make it the duty of the civil service commission to adopt rules designed for the protection in their positions of permanent civil service employees who were absent from their positions while in the armed services of the United States. The amendment provided for reinstatement of such returned absentees to the positions, status, seniority and efficiency ratings in the positions which they held at the time of entry into the armed service, and further provided: "'All persons appointed or transferred to fill such positions and all other persons appointed or transferred to other positions by reason thereof shall be deemed to be substitute employees and, notwithstanding any other provision of this charter, such substitute employees may be separated from such positions at any time unless they held positions subject to the provisions of this article immediately prior to appointment or transfer as substitute employees, in which event, and notwithstanding any other provision of this charter, they shall be reinstated without loss of status or seniority to the permanent positions which they held immediately prior to their first appointment or transfer as such substitute employees or to positions of like seniority and status, unless in the meantime such positions shall have been abolished. The Civil Service Commission shall conduct such examinations and promulgate such eligible lists of substitute employees as shall be necessary to carry this paragraph into effect. In the absence of any such list, substitute employees may be employed in the manner authorized for temporary employees as provided in paragraph (9) of Section 34 of this Article.'" Statutes 1941, Chapter 2, Resolutions, p. 3235 at page 3237. The civil service commission adopted rules under the heading "Special Provisions during National Emergency," providing for the establishment of registers or eligible lists under simplified procedures and examinations "for the recruitment of persons for temporary service only for the duration of the war or national emergency, as follows: * * * C. A 'competitive-temporary' eligible list may be established and maintained for any class of positions as the needs of the service require. Names of persons who have qualified by an open-competitive examination shall be placed on 'competitive-temporary' eligible lists in the order of their standing in examination, and appointments shall be made from one of the three persons standing highest on such eligible lists." For the reason that it was impossible on account of conditions due to the war to fill positions in the fire protection service, and in other services, with employees who could meet the strict requirements for admission into the civil service under normal conditions, a simplified procedure was adopted for the selection of temporary employees under which applicants could take an examination at the time they filed their applications, and if they passed, be given immediate employment. This procedure pertained exclusively to temporary employment and the requirements with respect to examination and qualification for permanent employment were not changed. Plaintiff took and passed only the examination for such temporary substitute employment. Nothing in the charter or the rules of the civil service commission authorizes the appointment to a permanent position or on a permanent basis of an employee who has passed only this special simplified examination for temporary employment.

In March, 1944, bulletins were issued by the civil service commission inviting applications for employment as firemen and the preparation of a "competitive-temporary" eligible list to be used "for temporary and substitute work, some of which may last for the duration of the war or national emergency." Plaintiff filed his application June 26, 1944, and was appointed three days thereafter.

[1] Appellant contends that he is a permanent employee. He refers to the term he has served under his appointment and relies principally upon McGillicuddy v. Civil Service Commission, 133 Cal.App. 782, 24 P.2d 942, as supporting his position. A mere recitation of the facts of the McGillicuddy case distinguishes it from our case. McGillicuddy and others had been appointed to their positions from the eligible civil service list, under the old charter of San Francisco. The positions had been arbitrarily classified by the commission as temporary because it was thought they would not last for more than six months. All of the plaintiffs had served for longer periods. Under the old charter, if the positions they were holding were permanent positions they became regular employees at the expiration of six months service. Although their civil service rights were continued by the terms of the new charter they were denied permanent status by the commission. The court upheld their claim to permanent status, declaring, in accordance with the holdings in Rodgers v. Board of Public Works, 208 Cal. 291, 281 P. 64, and Powers v. Board of Public Works, 216 Cal. 546, 15 P.2d 156, that the positions were permanent for the reason that they were such as ordinarily exist with a reasonable degree of continuity and permanency; that the appointments of the plaintiffs were not "emergency appointments" such as could be made under the charter only "until regular appointments" could be made; that the commission was without authority to arbitrarily classify positions as temporary which were neither "temporary in fact nor temporary in the law of their creation"; that the appointments were regularly made from the eligible lists and that plaintiffs retained their permanent status by virtue of the provisions of the new charter. In our case plaintiff had not taken an examination such as the charter required of applicants for appointment to permanent positions; he was not on an eligible list from which such an appointment could be made; the position of temporary substitute firemen which was intended to end with the emergency which called it into existence was temporary in fact, and also temporary in law, inasmuch as the charter and the resolution of the Board of Supervisors, which constituted the only authorization for plaintiff's appointment, created only temporary positions. The other cases upon which appellant relies were decided on facts essentially the same as those in the McGillicuddy case, and are equally inapplicable.

Appellant quotes the following from section 37 of the charter: "All persons in the county or township service holding positions in the classified service as established by this article, at the time it takes effect, whether holding by election or by appointment, and who shall have been in such service for the six months next preceding, shall hold their positions until discharged, reduced, promoted, or transferred in accordance with the provisions of this Article." St. 1913, p. 1496. The provision has no application. Plaintiff was not holding a position as fireman at the time of the adoption of the charter. He also says that under the charter provision is made that: "* * * any person who shall have been in service for six months shall hold his position until discharged, reduced, promoted or transferred in accordance with the provisions of Article IX of the Charter." We find no such provision in the charter.

[2] Appellant argues further that it was not proved that he was appointed pursuant to the resolution of the board of supervisors creating temporary positions. The record is to the contrary. The commission proceeded as directed by the resolution, appellant passed an examination and was appointed from one of the eligible lists thus created. He argues also that the only purpose of the charter amendment was to provide a scheme under which service men could return to their old positions and he claims that he could not be removed except to make way for a former employee who decided to reenter his permanent position. This argument is a mere assertion of appellant, unsupported by the record. It is clear that the charter provision under which substitute employees may be separated from temporary positions which are created as

emergency positions, was designed also to maintain the efficiency of the service by the method of removing those holding temporary positions and placing in permanent positions others who are found to possess the higher qualifications prescribed for the holders of such positions.

[3] All of the proceedings under review were had and taken under the authority conferred by the 1941 Charter amendment to create temporary substitute positions in the civil service. A judgment which declared plaintiff to be the holder of a permanent position would nullify every step that has been taken under the charter as amended and would, in effect, create positions for which the charter makes no provision, and which the Board of Supervisors has not attempted to create.

[4] Appellant's claim that the findings are insufficient to support the judgment is untenable. Facts were found which show clearly the temporary nature of the positions to which he and others similarly situated were appointed.

The judgment is affirmed.

WOOD, J., and McCOMB, Justice Assigned, concur.

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86 Cal.App.2d 64

NEBLETT v. SUPERIOR COURT FOR LOS ANGELES COUNTY et al.

Civ. 16496.

District Court of Appeal, Second District, Division 2, California.

June 8, 1948.

1. Certiorari 🔑42(7, 8), 49

Demurrer to petition for certiorari admits facts alleged, and, where petition sets forth proceedings in court below whose action is under review, demurrer makes petition the return upon which review should be heard and petitioner need not file certified copy of proceedings.

2. Judgment 🔑191

Minute order directing that findings and judgment be drawn does not constitute decision of court and is entirely immaterial.

3. Judgment 🔑200

Findings of fact and conclusions of law signed by trial judge constitute court's decision, and such decision supersedes any prior minute order directed to be entered by trial court.

4. Divorce 🔑228, 269(1)

Minute order directing defendant to pay attorney's fees of plaintiff was not court's decision and was superseded by findings of fact, conclusions of law, and interlocutory judgment, and hence judgment finding defendant guilty of contempt for noncompliance with minute order would be annulled because predicated upon violation of a nonexistent order.

5. Certiorari 🔑37

Judge of superior court whose order it is sought to review by writ of certiorari or writ of review is not proper party to proceedings.

Original proceeding by William H. Neblett against the Superior Court of California for Los Angeles County, and the Honorable William B. McKesson, Judge thereof, for a writ of certiorari.

Writ granted as to the court; petition as to judge dismissed.

Grivi & Norris, by Henry Grivi, all of Los Angeles, for petitioner.

Harold W. Kennedy, Co. Counsel, and James A. Cobey, Deputy Co. Counsel, both of Los Angeles, for respondents.

McCOMB, Justice.

This is an original proceeding for a writ of certiorari seeking the annulment of an order of the superior court of March 19, 1948, finding petitioner guilty of contempt of court and sentencing him to three days in jail.

The undisputed facts disclosed by the petition for writ of certiorari are these:

On December 9, 1943, Ruby E. Neblett, wife of petitioner, filed suit for divorce against him. The trial of the action was commenced May 15, 1947, and completed on May 23, 1947. On the latter date the case was taken under submission by the trial judge. On *May 29, 1947*, the trial judge directed that there be entered, and there was entered, a minute order, (1) granting plaintiff an interlocutory decree of divorce; (2) ordering defendant to pay plaintiff's attorney $1,500 as attorney's fees at the rate of $100 per month, commencing June 1, 1947; and (3) directing "counsel for plaintiff and cross-defendant to prepare and submit findings and judgment." On August 21, 1947, the trial judge signed and filed findings of fact, conclusions of law, and a judgment granting plaintiff an interlocutory decree of divorce.

Petitioner herein did not make any payments on the attorney's fees mentioned in the minute order. On October 24, 1947, an order to show cause was issued, directing petitioner to appear and show cause why he should not be punished for contempt for failure to comply with the provisions of the *minute order of May 29, 1947*, relating to attorney's fees. On March 19, 1948, the trial judge found petitioner guilty of contempt of court for failure to comply with the *minute order of May 29, 1947*, in that he had not paid on account of the attorney's fees mentioned in such minute order the sums due on the first of June, July and August, 1947. Accordingly, petitioner was sentenced to three days in jail.

Respondents have filed a demurrer to the petition on the grounds, (a) that no proper return has been made to the writ of review, and (b) the petition fails to state a cause of action showing that respondents had exceeded the jurisdiction vested in them by law.

Questions

First: *Was there a proper return to the writ of review issued by this court?*

[1] This question must be answered in the affirmative and is governed by this rule: A demurrer to a petition for certiorari admits the facts alleged in the petition, and where the petition sets forth the proceedings in the court below whose action is under review, the demurrer makes the petition the return upon which the review should be heard, and petitioner is not required to file a certified copy of the proceedings. (Estrin v. Superior Court, 14 Cal.2d 670, 671, 96 P.2d 340, et seq.)

In the present case respondent filed a demurrer to the petition thereby admitting the facts which are well pleaded in the petition, and it was unnecessary for petitioner to file any further or additional record in this court.

Second: *Did the trial court exceed its jurisdiction?*

This question must likewise be answered in the affirmative and is governed by these rules:

[2] (1) A minute order directing that findings and judgment be drawn does not constitute the decision of the court and is entirely immaterial. (Canadian etc. Co. v. Clarita etc. Co., 140 Cal. 672, 677, 74 P. 301.)

[3] (2) Findings of fact and conclusions of law signed by the trial judge constitute the court's decision and such decision supersedes any prior minute order directed to be entered by the trial court. (McConville v. Superior Court, 78 Cal.App. 203, 208, 248 P. 553; Fuhrman, v. Superior Court, 2 Cal.2d 250, 253, 39 P.2d 802.)

[4] Applying the foregoing rules to the facts of the instant case the *minute order of May 29, 1947*, was not the decision of the court and was superseded by the findings of fact, conclusions of law, and interlocutory judgment signed and filed August 21, 1947. It thus follows that the trial court in finding petitioner guilty of contempt of court for failure to comply with the provisions of the *minute order of May 29, 1947*, predicated its judgment upon petitioner's violation of an order which had been superseded and was nonexistent. (See rules (1) and (2), supra.) Hence petitioner was not adjudged guilty of violating any valid order of the superior court and the judgment finding him guilty of contempt must be annulled.

Third: *Was respondent judge a proper party to the present proceedings in certiorari?*

[5] This question must be answered in the negative. The rule is settled in California that a judge of the superior court

whose order it is sought to review by a writ of certiorari or a writ of review is not a proper party to the proceeding. (Benjamin Franklin B. & I. Corp. v. Schmidt, 132 Cal.App. 39, 40, 22 P.2d 26.)

For the foregoing reasons (1) the demurrer to the petition is overruled; (2) the order of the superior court of March 19, 1948, finding petitioner guilty of contempt of court for failure to comply with the minute order of May 29, 1947, and sentencing him to three days in jail is annulled; and (3) the petition for a writ of certiorari as to respondent Judge William S. McKesson is dismissed.

MOORE, P. J., and WILSON, J., concur.

86 Cal.App.2d 133

MUMMA v. MUMMA.

Civ. 16214.

District Court of Appeal, Second District, Division 2, California.

June 10, 1948.

As Amended on Denial of Rehearing June 29, 1948.

Hearing Denied Aug. 5, 1948.

1. Divorce 🔑329

A stranger to a foreign divorce decree can impeach it collaterally for fraud only when it injuriously affects him.

2. Divorce 🔑329

One who subsequently marries one of the parties to a foreign divorce has no such interest as will enable him to attack decree collaterally for fraud.

3. Divorce 🔑327, 329

A foreign divorce decree is subject to collateral attack on ground that it was procured upon a fraudulent domicile; that laws of state granting decree were not complied with; or that spouse, who was domiciled in foreign state which was not matrimonial domicile, and who procured divorce, was wrongdoer, whereas other spouse, a citizen of state of forum, who was neither personally served nor appeared in foreign action, was innocent party.

4. Divorce 🔑326

A foreign divorce decree, regular on its face, is presumed to be valid, and burden is upon party attacking it to overcome such presumption.

5. Judgment 🔑489

In absence of some ground of estoppel, parties and their privies can collaterally impeach a judgment void on its face for lack of jurisdiction.

6. Judgment 🔑494

Strangers to record may attack a void judgment only when, if judgment were given full effect, some right in them would be affected by its enforcement.

7. Judgment 🔑818(6)

Person against whom a judgment of a court of record of another state is attempted to be used in California may show by evidence other than record of judgment, and even by evidence opposed to recitals contained in such record, that court purporting to give judgment was without jurisdiction either of the cause, or of the parties.

8. Divorce 🔑329

Where Nevada decree by which husband divorced first wife was valid on its face, first wife was only one who could complain of husband's alleged fraud in procurement thereof.

9. Divorce 🔑330

Where Nevada decree by which husband divorced first wife was valid on its face, second wife, a stranger to decree who had no rights which were affected by it and who had herself obtained an interlocutory decree of divorce from husband in which validity of her marriage was adjudicated, could not collaterally attack Nevada decree.

10. Divorce 🔑329

Where a spouse domiciled in California can show that foreign divorce decree was obtained on false testimony amounting to fraud on foreign court, decree will not be recognized.

11. Judgment 🔑443(1)

Equity will annul a judgment for fraud only where fraud is extrinsic or collateral to matter tried by court and will not grant relief for fraud involved in merits of action or in any matter on which decree was rendered.

12. Judgment ⟹460(4)

In action to annul a judgment for fraud, a pleading based upon intrinsic fraud does not state a cause of action.

13. Divorce ⟹165(3)

The alleged fraud of husband in falsely representing to second wife that there was no impediment to their marriage, based upon the alleged invalid Nevada divorce from first wife, which fraud second wife allegedly was deceived into perpetrating on court in her divorce action wherein she alleged that parties were married, was "intrinsic" and not "extrinsic fraud" and hence could not form the basis of a suit to set aside interlocutory decree.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud" and "Intrinsic Fraud".

◆

Appeal from Superior Court, Los Angeles County; A. W. Ashburn, Judge.

Action by Margaret Evelyn Mumma against Ellis Hain Mumma to recover damages for fraud and to set aside the interlocutory decree of divorce obtained by plaintiff against defendant. From a judgment for defendant after a demurrer to complaint was sustained without leave amend, plaintiff appeals.

Affirmed.

Maurice Rose, of Los Angeles, for appellant.

Louis Miller, of Los Angeles, for respondent.

WILSON, Justice.

This is an action to recover damages for fraud and to set aside the interlocutory decree of divorce obtained by plaintiff against defendant. A demurrer to the complaint was sustained without leave to amend. Judgment for defendant was entered from which plaintiff appeals.

The pleaded facts in plaintiff's first cause of action are: That in reliance on the fraudulent representations of defendant to plaintiff that there was no existing legal impediment to his entering into a valid marriage with her, plaintiff, on August 22, 1934, in the city of Los Angeles, entered into a ceremonial form of marriage with him, and in the belief that she was his lawful wife lived with him in Los Angeles for a period of over eleven years until about October, 1945, gave him her cash earnings in itemized amounts and the benefit of her work, labor and services of specified values, and helped him to accumulate large sums which defendant kept in his own name; that prior to 1934, in Harrisburg, Pennsylvania, defendant had lawfully married one Rebecca Olewine; that he subsequently deserted her and, although neither defendant nor his wife has ever been a resident of Nevada, instituted an action for divorce in that state; that in his action for divorce he filed an affidavit falsely alleging that the last known address of his wife was 4710 Baum Boulevard, Pittsburgh, Pennsylvania, but that she had removed from that address and that her then residence was in Pittsburgh at some address unknown to him; that defendant well knew that at all times during the pendency of the action his wife resided on Briggs Street in Harrisburg, Pennsylvania; that upon such false affidavit defendant procured an order for the service of process upon his wife by publication of summons in a Reno newspaper; that defendant, by means of the fraud perpetrated upon his wife and upon the court, procured a divorce upon the default and without the knowledge of his wife; that defendant's wife is still living and upon her discovery of the decree of divorce in Nevada denied its validity and insists upon the subsisting validity of her marriage to defendant.

Plaintiff brought an action for divorce against defendant in the superior court of Los Angeles County on October 26, 1945, and an interlocutory decree was made and entered April 1, 1946, in favor of plaintiff. In her second cause af action in the instant case plaintiff seeks to have this decree vacated upon the ground that at the time she brought her action for divorce she was still deceived as to the validity of her marriage to defendant and unwittingly asked for its dissolution; that by defendant's deception she was made his innocent tool to impose upon the court his fraudulent representation that plaintiff's marriage to him was valid and the subject of dissolution; that it was not until on or about March 14, 1947, that plaintiff discovered the facts relative to the validity of her marriage to defendant.

Plaintiff's first cause of action is for damages for fraud and is based upon defendant's alleged fraudulent representation that there was no legal impediment to his entering into a valid marriage with her. This cause of action depends upon her ability to attack collaterally the decree of divorce granted to defendant by the Nevada court against his first wife. This plaintiff seeks to do upon the ground that because of defendant's fraud upon the Nevada court it had no jurisdiction of the defendant in that action or of the matrimonial res.

[1, 2] It has been held that a stranger to a foreign divorce decree can impeach it collaterally for fraud only when it injuriously affects him. Within this rule it has also been held that one who subsequently marries one of the divorced parties has no such interest as will enable him to attack the decree. Margulies v. Margulies, 109 N.J.Eq. 391, 157 A. 676, 677; Kinnier v. Kinnier, 45 N.Y. 535, 6 Am.Rep. 132; Hall v. Hall, 139 App.Div. 120, 123 N.Y.S. 1056, 1061; 19 C.J. page 378; 27 C.J.S., Divorce, § 336.

[3, 4] The jurisdictional grounds upon which a foreign divorce decree is subject to collateral attack in this state are recited in Cardinale v. Cardinale, 8 Cal.2d 762, 766, 68 P.2d 351, 353, in which the court states: "* * * a foreign divorce decree is subject to collateral attack upon three recognized jurisdictional grounds, i. e., (1) that it was procured upon a fraudulent domicile or residence; (2) that the laws of the state granting the decree were not complied with, and (3) that the spouse who was domiciled in the foreign state, which was not the matrimonial domicile, and who procured the divorce, was the wrongdoer, whereas the other spouse, a citizen of this state, who was neither personally served nor appeared in the foreign action, was the innocent party. If any one of these jurisdictional defects is established as a matter of fact, the foreign decree will not be recognized as valid in this state. However, the foreign decree, regular on its face, is entitled to a presumption of validity, and the burden is upon the party attacking it. Delanoy v. Delanoy, 216 Cal. 27, 13 P.2d 719, 86 A.L.R. 1321." See also Plante v. Plante, 54 Cal.App.2d 318, 324, 128 P.2d 787.

[5, 6] In the absence of some ground of estoppel parties and their privies may collaterally impeach a judgment void on its face for lack of jurisdiction, but strangers to the record may attack a void judgment only when, if the judgment were given full effect, some right in them would be affected by its enforcement. Mitchell v. Automobile Owners Indemnity Underwriters, 19 Cal.2d 1, 7, 118 P.2d 815, 137 A.L.R. 923.

[7] It is always open to the person against whom a judgment of a court of record of another state is attempted to be used in this state to show by evidence other than the record of the judgment, and even by evidence opposed to recitals contained in such record, that the court purporting to give the judgment was without jurisdiction either of the cause or of the parties. Matter of Estate of Hancock, 156 Cal. 804, 807, 106 P. 58, 134 Am.St.Rep. 177.

In re Estate of Pusey, 180 Cal. 368, 181 P. 648, cited by appellant, is not applicable to the facts in the present case. That case involved a will contest. The probate of the will of a testatrix was contested by one claiming to be her surviving husband upon the ground that the instrument was executed prior to their marriage and was thereby revoked. The contest was opposed by the proponents of the will who asserted that there was no valid marriage between the testatrix and the contestant because he had never been validly divorced from his former wife. It was contended that the divorce decree in question was void for want of jurisdiction over the defendant because the affidavit for the publication of summons was insufficient. In re Estate of Davis, 38 Cal.App.2d 579, 101 P.2d 761, 102 P.2d 545, is likewise inapplicable. That action was to determine heirship and the heir, being in privity with the ancestor, was held to be bound by an estoppel which was binding upon the ancestor. 38 Cal.App.2d at page 586, 102 P.2d 545.

Neither In re Cohen, 107 Cal.App. 288, 290 P. 512, nor Kegley v. Kegley, 16 Cal. App.2d 216, 60 P.2d 482, cited by appellant, is applicable. The former is a criminal case in which the judgment of the justice's court is attached by the defendant upon a writ of habeas corpus on the ground of lack of jurisdiction. The latter case is one in which a "mail order" divorce is attacked by one of the parties, this state being the matrimonial domicile.

[8-10] In the present case the Nevada decree is valid upon its face. Plaintiff alleges that it is void because it was procured by fraud. The only one who can complain of the defendant's alleged fraud is the one who was injured thereby, his first wife, and she has not seen fit to do so. Plaintiff is a stranger to that decree; she had no rights which were affected by it and she has herself obtained an interlocutory decree of divorce from defendant in which the validity of her marriage was adjudicated. It is true that a foreign judgment may be attacked upon the ground that the foreign court had no jurisdiction and if a spouse domiciled in this state can show that the foreign decree was obtained on false testimony amounting to fraud on the foreign court, the decree will not be recognized. Delanoy v. Delanoy, 216 Cal. 27, 34, 37, 13 P.2d 719, 86 A.L.R. 1321. This case does not fall within any of the jurisdictional grounds upon which a foreign divorce decree is subject to collateral attack as set forth in the Cardinale case. Other than upon those grounds we know of no cases holding that a foreign decree, valid on its face, may be collaterally attacked for fraud by a stranger to the decree who had no rights which were prejudiced at the time the decree was made.

Thus, even without considering the fact that plaintiff obtained an interlocutory judgment of divorce against defendant which adjudicated the validity of the marriage, plaintiff, being a stranger to the Nevada decree, and having no pre-existing rights which would be prejudiced, cannot collaterally attack the judgment which was rendered against a nonresident.

Plaintiff's second cause of action is to vacate the interlocutory decree rendered by the Superior Court of the County of Los Angeles, in her divorce action against defendant, upon the ground that there was no valid marriage between the parties to be dissolved. This cause of action, also, is based upon the allegation that since defendant's divorce from his first wife was obtained through fraud, the judgment was void and therefore there was no valid marriage between plaintiff and defendant.

[11, 12] A court of equity will set aside or annul a judgment for fraud only where the fraud is extrinsic or collateral to the matter tried by the court, and will not grant relief for graud involved in the merits of the action or in any matter on which the decree was rendered. A pleading based on such intrinsic matter does not state a cause of action. Eisenmayer v. Thompson, 186 Cal. 538, 542, 199 P. 798.

[13] There is no merit in plaintiff's contention that in the divorce action of plaintiff against defendant the matter of their marriage was adjudicated only in theory. The validity of the marriage was one of the issues raised by the complaint and decided by the court. The fraud, if any, which plaintiff alleges she was deceived by defendant into perpetrating upon the court was not collateral to the proceedings but related to the question of the validity of the marriage which was an issue in those proceedings. If there was fraud it was intrinsic and not extrinsic and comes squarely within the rule of United States v. Throckmorton, 98 U.S. 61, 25 L.Ed. 93, and Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

85 Cal.App.2d 609

In re ROBERTS' ESTATE.

HEARST et al. v. STATE.

Civ. 7414.

District Court of Appeal, Third District, California.

May 24, 1948.

Hearing Denied July 22, 1948.

1. Escheat ⚿4

Under section of the Probate Code providing that, "if the decedent leaves no one to take his estate or any portion thereof under the laws of the state, the same escheats to the state as of the date of the death of the decedent," if the decedent leaves no one to take any part of his estate the whole escheats, and, if there is someone to take a portion but no one to take the remaining portion, such remaining portion escheats to the state. Probate Code, § 231.

2. Escheat ⚿4

Husband and wife ⚿274(1)

Under the Probate Code, if there is no one to succeed to surviving spouse's one-half of the community property, such half goes to the "next of kin" of the decedent, which means the blood relatives nearest decedent, and, where no such persons existed, such one-half of the community property escheated to the state. Probate Code, §§ 228, 230, 231.

See Words and Phrases, Permanent Edition, for all other definitions of "Next of Kin".

Appeal from Superior Court, Napa County; Mervin C. Lernhart, Judge.

Proceeding in the matter of the estate of William Roberts also known as and sometimes called Wm. Roberts, also known as and sometimes called William A. Roberts, deceased, on petition of Dorothy H. Hearst, administratrix, for final decree of distribution to which Lucy E. Dykes and others and the State of California were made parties. From final decree of distribution rendered in favor of Lucy E. Dykes, Pine L. Eisfeller, and Dorothy H. Hearst, the State of California appeals.

Decree reversed with directions to enter a new decree in conformity with opinion.

Fred N. Howser, Atty. Gen., and E. G. Benard and Wm. J. Power, Deputy Attys. Gen., for appellant.

Palmer & York, of St. Helena, for respondents.

ADAMS, Presiding Justice.

This is an appeal taken by the State of California from a final decree of distribution which distributed all of the residue of the estate of William Roberts, deceased, to a sister and two nieces of decedent's predeceased wife. There is no dispute about the facts. William Roberts died intestate, in January, 1945, leaving neither spouse nor issue. His estate consisted of property which had been the community property of his previously deceased wife and himself, and had come to decedent by virtue of such character, on the death of his wife, Hattie E. Roberts. The latter left surviving her neither parents nor issue, but was survived by a sister, Lucy E. Dykes, and the two daughters of a predeceased sister, to wit, Dorothy H. Hearst and Pine L. Eisfeller, all of whom survived William Roberts.

Dorothy H. Hearst was appointed and qualified as administratrix of William Roberts' estate, and after due proceeding had she filed her first and final account, and a petition for final distribution in which it was prayed that the residue of the estate be distributed as follows: One-fourth to Lucy E. Dykes, one-eighth each to Dorothy H. Hearst and Pine L. Eisfeller, and the remaining one-half to the State of California, "since said decedent had no known heirs at law, devisees or legatees entitled to the same."

On hearing of the account and petition for distribution the trial court declined to distribute any portion of the estate to the state of California, and rendered a decision in which it said:

"The statute relative to the escheat of estates provides, 'If the decedent leaves *no one* to take his estate *or any portion thereof* under the laws of this state the same escheats to the state.' (Probate Code 230, C.C.P. Sec. 1269 et seq.) Even though there is no one to take the entire estate under Section 228 Probate Code, if there are heirs to take at all there is someone to take a portion thereof, and hence the case does not come within the language of the escheat statute which must be strictly construed as a result of escheats not being favored by the law. Escheats do not take place if there are any relatives who are entitled to inherit. In this case, one half of the estate goes to the relatives of the predeceased wife by reason of Section 228 of the Probate Code, and the other half goes to the same persons by reason of the provisions of Section 230 Probate Code, as 'next of kin' of the deceased. In construing a somewhat similar statute in the case of In re Ziesenitz's Estate, 128 Misc. 100, 218 N.Y.S. 233, the brothers of a predeceased husband were held to be 'next of kin' of the decedent, whose property came to her from her predeceased husband, thus holding 'next of kin' need not necessarily be blood relations of the deceased, but also may include relations by affinity." (Italics by that court.)

The court thereupon entered a decree distributing one-half of the estate to Lucy E. Dykes, and one-fourth each to Dorothy H. Hearst and Pine L. Eisfeller. Thereafter the state of California, through the Attorney General, made a motion to vacate said decree, and upon denial of said motion filed this appeal from the decree of distribution and from the order denying the motion to vacate.

Section 228 of the Probate Code (based upon subdivision 8 of section 1386 of the Civil Code) provides:

"If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of the community character on the death of such spouse, * * * such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse and to their descendants by right of representation."

Section 230 of said Probate Code, first enacted in 1931, provides:

"If there is no one to succeed to any portion of the property in any of the contingencies provided for in the last two sections, according to the provisions of those sections, such portion goes to the next of kin of the *decedent in the manner hereinabove provided* for succession by next of kin." (Italics added.)

Section 231 of said code provides that "If the decedent leaves no one to take his estate or any portion thereof, under the laws of this state, the same escheats to the state as of the date of the death of the decedent."

The "last two sections" referred to in section 230 are sections 228 and 229. Section 229 has no application here. The "manner hereinabove provided for succession by next of kin" is provided in section 226, which recites that where a decedent leaves neither issue, spouse, parent, brother, sister, nor descendant of a deceased brother or sister, the estate goes to the next of kin.

[1] From the opinion of the probate judge it is apparent that he based his conclusion on two propositions, the first that because there were persons, respondents, entitled to take a *portion* of decedent's estate under section 228, section 231 became inapplicable as to the remaining portion, and the state could take nothing by escheat; and, the second, that respondents are to be considered as "kin" of decedent as that word is used in section 230, and therefore they take the whole to the exclusion of the state. We think that neither proposition is tenable. We construe section 231 as meaning that if the decedent leaves no one to take any part of his estate the whole escheats; or, if there is someone to take a portion, but no one to take the remaining, such remaining portion escheats to the state. If the reasoning of the trial court

be sound it could as well be said that if an estate consisted of both community property and separate property, and there was someone to take the community property or a part thereof under section 228, the whole should be dealt with as community property and follow the order of succession therein provided for; that the separate property would follow the community property—obviously an unsound conclusion.

As for the argument that the sister and nieces of Mrs. Roberts are entitled to take the half which would go to decedent's kin if there were such, *as next of kin* of William Roberts, by virtue of section 230, the exact question presented apparently has not been decided by the appellate courts of this state. Let us therefore examine the language of section 230. It provides that if there is no one to succeed to any portion of the property of an estate under sections 228 and 229, such portion goes to the next of kin of the decedent in the manner hereinabove provided for succession by next of kin.

In this case, under section 228, a portion of decedent's estate, to wit, one-half thereof, concededly goes to respondents. As for the other half, since William Roberts left no parent or parents, brothers or sisters, or descendants of brothers or sisters, section 228 makes no provision. We must therefore look to section 230. As stated by Mr. Perry Evans in an article appearing in 19 Cal.L.Rev., at page 615:

"Subdivision 8 of section 1386 of the Civil Code, now appearing as sections 228 and 229 of the Probate Code * * * provided for succession down to the descendants of the brothers and sisters of a predeceased spouse and the descendants of the brothers and sisters of the decedent. If there were no such relatives to take under these sections, would the general rule as to succession by next of kin apply, or would the property for which these special provisions were made, or the one-half of it, escheat to the state?

"To remove any doubt there might have been on this point section 230 was added, * * *."

Section 226 of the Probate Code provides that "If the decedent leaves neither issue, spouse, parent, brothers, sister, nor descendant of a deceased brother or sister, the estate goes to the *next of kin* in equal degree, excepting that, when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote."

What, then, is meant by next of kin? In 16 Am.Jur. 821, it is said:

"The common-law manner of speech was that real property descended to the heirs by right of blood and personal property was distributed to the next of kin—kin meaning those related by blood, and next of kin meaning those nearest in degree of blood relationship—and there has been a persistency to this day to distinguish in this manner between 'heirs' and 'next of kin,' even in statutes providing that either expression shall mean those who take under the statute."

Numerous cases supporting the rule that "next of kin" means only blood relatives, are cited in 28 Words and Phrases, Perm. Ed., 632, and Cumulative Pocket Part. Also see 51 C.J.S., Kin & Kindred, page 452.

In Re Stoler, 293 Pa. 433, 143 A. 121, 124, 59 A.L.R. 1402, it is said: "Observation, we believe, will demonstrate that in current conversation, as well as in literature, and law, the words 'kin' and 'kinship' are generally used to denote only persons related by blood, and a relationship by blood." Also see Helms v. Elliott, 89 Tenn. 446, 14 S.W. 930, 931, 10 L.R.A. 535, 536 (defining "next of kin" as "next or nearest in blood"); Fargo v. Miller, 150 Mass. 225, 22 N.E. 1003, 5 L.R.A. 690 (defining "next of kin" as used in a will); State v. Bielman, 86 Wash. 460, 150 P. 1194, 1195 (construing "kin" in a statute defining incest); Swasey v. Jaques, 144 Mass. 135, 10 N.E. 758, 762, 59 Am.Rep. 65 (construing "next of kin" as used in a will); Leonard v. Haworth, 171 Mass. 496, 51 N.E. 7, 9 (defining "nearest of kin" as used in a will); State v. Tucker, 17 Ind. 715, 93 N.E. 3, 4, 31 L.R.A.,N.S., 772, Ann.Cas.1913A, 100 (construing statute defining incest); Boyd v. Perkins, 130 Ky. 77, 113 S.W. 95, 96 (defining "kin" as excluding a nephew by marriage); Supreme Council, etc. v. Bennett, 47 N.J.Eq. 39, 19 A. 785, 787; Murdock v. Ward, 67 N.Y. 387; Keteltas v. Keteltas, 72 N.Y. 312, 315, 28 Am.Rep. 155; Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170, 175; Ritter v. Ritter, 62 Ohio App. 488, 24 N.E.2d 603, 606.

That "kin" means only those related by blood has been recognized in this state in such cases as Estate of Stewart, 30 Cal. App.2d 594, 86 P.2d 1071, where adopted children of decedent's predeceased cousin claimed the right to succeed to his estate as next of kin, under section 226. It was held that they were not entitled to succeed since there were not blood relatives; and that the estate should go to the state of California under section 231 of Probate Code. Similar cases are cited in that opinion. The court said, in 30 Cal.App.2d pages 597, 598, 86 P.2d page 1072:

"The position of respondents seems to be that because their right to succeed is not opposed by any heirs of the blood, and only by the State of California, by reason of the Statute of Escheat, that therefore, rather than have the estate escheat to the State of California, the court should distribute the estate to respondents. 'It is, they state, a presumption of law that every intestate has left someone on earth entitled to claim as his heir, however remote.' As an abstract statement the foregoing quotation is doubtless correct, but this quotation must certainly be restricted to those entitled to succeed by reason of a blood relationship. It is an elementary principle that the right to succession is entirely statutory, and consequently, we hold that the entire matter here has been fully dealt with by the legislature under the provisions of the Probate Code, § 257, quoted above. Had the legislature intended to enlarge the right of succession of an adopted child to inherit *through*, and not *from* the adopted parent, it would have so provided. As the law now stands, the sole right of an adopted child to succeed is restricted to the estate of the one who has adopted him. Were we to hold otherwise, we would be attempting to legislate by judicial opinion. If the matter presents the inequities and hardships suggested by respondents, relief must be sought through legislative channels and not through the judiciary."

Estate of Brady, 171 Cal. 1, 151 P. 275, was similar in its facts to the case before us. There a decree of distribution distributing one-half of the estate, which was community property, to the state and the other one-half to relatives of the predeceased wife of decedent, under the provisions of subdivision 8 of section 1386 of the Civil Code, was affirmed. Though the question raised here was not raised in that case, it is significant that it was apparently conceded that distribution of one-half to the state was proper—which was the position taken by respondents herein until the lower court suggested a different view of the law.

[2] Respondents now argue, however, that if there is no one to succeed to the decedent's portion of the property in any of the contingencies provided for in sections 228 and 229 they are to be considered as "next of kin" of William Roberts because they are entitled to a *portion* by virtue of section 228. But as we read section 230 it means that if there is no one of those designated by section 228 to succeed to the surviving spouse's one-half of the community property, such half shall go to the next of kin of the decedent "in the manner hereinabove provided for succession by next of kin." This necessarily means those entitled to succeed by reason of the sections other than section 228, not only because the words next of kin apply to blood kin, but because the words of section 230 exclude persons who would be entitled to take under section 228 if they existed. Therefore, as applied to the situation existing here, it being assumed that there is not in existence any one of the persons designated in section 228 as entitled to take what may be designated as the husband's half of the community property, and no next of kin of decedent to take under section 230, said one-half shall escheat to the state under section 231.

In Estate of Paterson, 34 Cal.App.2d 305, 312, 93 P.2d 825, 829, in which it was held that in this state, because of the provisions of section 256 of the Probate Code, illegitimate children have inheritable blood, the court said, regarding the words "next of kin," that they mean "those upon whom, under the circumstances defined *in section 226* of the Probate Code, the law has conferred the right to inherit the property of one who dies intestate." (Italics added.)

Under section 226 no right to so inherit is conferred upon relatives of a predeceased spouse of a decedent. And under section 228 the most that can be said of respondents is that they succeed to the community property only to the extent of one-half thereof. Their argument is that because they are entitled to take one-half of the community estate under section 228, they must be considered heirs at law of decedent; that being heirs at law as to one-half they must be considered as kin of decedent. But section 230, while apparently intended to extend the right to take one-half to those bearing more distant relationship to the decedent than those mentioned in section 228, does not go to the extent claimed by respondents. It does not provide that if, on the death of the surviving spouse, he left no kin whatsoever, then the kin of his predeceased wife should take his one-half. Had the legislature intended the section to have that effect no reason appears why it should not have said so by adding "or, if the decedent left no kin whatsoever, then to the next of kin of the predeceased spouse," or similar words; or why it should have used the words "in the manner hereinabove provided for succession by next of kin"—which obviously refers to section 226, as stated in Estate of Paterson, supra.

Our statutes, Probate Code, sections 228, 230 and 231, are apparently intended to provide, as regards community property, that, under section 228, on the death of a decedent leaving neither spouse nor issue, the whole of such community property shall go to the children of the deceased spouse and their descendants by right of representation; but that in the event there are not in existence any such persons, then the community estate is to be dealt with by halves and the decedent's half shall go to the parent or parents of decedent, if there be such, and, if not, to the brothers and sisters of decedent and their descendants. Section 228 goes no further. But section 230 was obviously intended to extend to a decedent's more distant kin the right to take at least one-half in the absence of anyone to succeed thereto under section 228, which is all that need be decided in this case; and section 231 was intended to provide that in the event decedent left no one to take such one-half, such portion, at least, should escheat to the state.

The trial court cited and relied upon In re Ziesenitz's Estate, 128 Misc. 100, 218 N.Y.S. 233, as do respondents. There it was held that where a decedent's property came to her from her husband who predeceased her, the deceased husband's brothers were "next of kin" within the Decedent Estate Law, Consol. Laws, c. 13. But the applicable section of such law specifically provided:

"16. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, and no child or children of the husband or wife of the deceased, then the whole surplus shall be distributed equally to and among the *next of kin of the husband or wife of the deceased,* as the case may be, *and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in this article* * * *." Section 98, subd. 16, as amended by Laws 1913, c. 489, § 2. (Italics added.)

That case, therefore, cannot be considered as supporting respondents' present theory. On the contrary it supports an inference that in the absence of the specific provisions of the New York statute, the next of kin of a predeceased spouse would not have been deemed next of kin of decedent.

The decree of the probate court is reversed with directions to enter a new decree in conformity with the views herein expressed.

THOMPSON, J., and SCHOTTKY, Justice pro tem., concur.

86 Cal.App.2d 92

GUY F. ATKINSON CO. v. OFFNER.

Civ. 16545.

District Court of Appeal, Second District, Division 2, California.

June 9, 1948.

1. Municipal corporations ⚷335(3)

Under charter provision prohibiting withdrawal of bids and making them subject to acceptance by city for a period of three months, Los Angeles board of public works, no third party's vested rights having intervened, had power to vacate its rejection of bids for erection of filter, drier, and fertilizer storage system and within time specified award contract to lowest and best bidder. St.1925, p. 1028, § 2; St. 1947, p. 3542, § 386(c, d).

2. Municipal corporations ⚷328, 370

City of Los Angeles had power to contract for erection of filter, drier, and fertilizer storage system of the Hyperion activated sludge plant, and, having made such contract, city was bound to the same extent and effect as a private individual and progress payments should be made in conformance therewith. St.1925, p. 1028, § 2; p. 1059, § 84.

◆

Original proceeding by Guy F. Atkinson Company against Milton Offner, as chief accounting employee and secretary of the Board of Public Works of the City of Los Angeles, for a writ of mandate to compel respondent to execute a warrant for money allegedly due under a contract with the city.

Peremptory writ issued.

Lawler, Felix & Hall and Marcus Mattson, all of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., and Leon T. David, Asst. City Atty., both of Los Angeles, for respondent.

MOORE, Presiding Justice.

Petitioner seeks a writ of mandate to compel respondents to execute a warrant for the payment of certain moneys claimed to be due under its contract with the city of Los Angeles. Respondents are the chief accounting employee and secretary of the Board of Public Works of the city of Los Angeles, Dan O. Hoye, city controller, and the city of Los Angeles.

Prior to February 11, 1948, the Board of Public Works caused notice to be published inviting proposals for work and services to be performed for the city of Los Angeles for the erection of the filter, drier and fertilizer storage system of the Hyperion Activated Sludge Plant. Petitioner and others submitted bids, all of which were rejected by the board on March 3, 1948. On April 7, 1948, the board by resolution annulled its action of March 3, 1948, and found that petitioner was "the lowest and best, regular, responsible bidder" and awarded the contract to it. Thereafter petitioner and the Board of Public Works entered into a written contract pursuant to which work was commenced, and the board on May 4, 1948, approved petitioner's claim and demand duly filed with the city clerk for its initial progress payment. Section 84 of the city charter, St.1925, p. 1059, provides that no money shall be drawn from any fund under control of the Department of Public Works except upon warrant authenticated by the signature of the chief accounting employee. Respondent Offner having refused to sign the warrant presented to him, petitioner by this action seeks to compel him to do so.

The only grounds presented by respondent Offner for his refusal to sign the warrant are (1) that the Board of Public Works lacked power and jurisdiction to rescind its rejection of all prior bids and then proceed to award the contract to petitioner; and (2) that should respondent by signature authorize the initial progress payment he would become liable on his official bond for such illegal payment.

[1, 2] Such argument is specious. After providing by section 2 of its charter, St. 1925, p. 1028, that the city has power to construct local improvements and to control the disposal of sewage, the organic law proceeds by section 386(c), St.1947, p. 3542, to provide: "The right to reject any and all proposals shall, in every case, be reserved, as shall the right to waive any informality in the bid when to do so would be to the advantage of the city or its taxpayers."

Section 386(d) provides that "after bids have been opened and declared * * * no bid shall be withdrawn, but the same shall be subject to acceptance by the City for a period of three months." Such language not only places a limitation on the bidder but confers upon the city the power to revoke its rejection of a bid and to accept it within the time specified. The wisdom of such provisions is demonstrated by the present controversy. Without them the city, after its first pronouncement, would be unable to give any reconsideration to such proposals. Neither any provision of the charter nor any considerations of policy requires so drastic a curtailment of the powers of the Board of Public Works as respondents propose. The city was empowered to enter into the contract the aim of which was to construct a public improvement indispensable to the general welfare. Having made the contract it is bound to the same extent and effect as a private individual. Brown v. Sebastopol, 153 Cal. 704, 709, 96 P. 363, 19 L.R.A.,N.S., 178. Its prior rejection of petitioner's bid did not divest the board of its power to reconsider and rescind its rejection. McConoughey v. Jackson, 101 Cal. 265, 269, 35 P. 863, 40 Am.St.Rep. 53. Such power is vested in the Board of Public Works by virtue of the sections of the city charter above quoted. No third party's vested rights having intervened prior to the order rescinding the rejection of the bid, the board was authorized to reconsider and award the contract to petitioner. Doland v. Clark, 143 Cal. 176, 178, 76 P. 958; Ross v. Stackhouse, 114 Ind. 200, 16 N.E. 501. By reason of its compliance with all the requirements as to form and procedure the consummating contract with petitioner is a valid obligation of the municipality and the progress payments as provided thereby should be paid in conformance therewith.

The principles announced in Niles v. Hancock, 140 Cal. 157, 161, 73 P. 840, and Standard Box Company v. Mutual Biscuit Company, 10 Cal.App. 746, 103 P. 938, have no application. In each of them it was held that there was no valid contract because there had been no acceptance of the offer under consideration. In the case at bar the subsequent written contract signed by both parties is ample proof of their agreement. Section 1587(2), Civil Code, is likewise inapplicable since it provides: "A proposal is revoked: * * * 2. by the lapse of time prescribed in such proposal for its acceptance." The acceptance of the instant bid was within the three-month period prescribed by the city charter, section 386(c).

Let the peremptory writ issue.

McCOMB and WILSON, JJ., concur.

86 Cal.App.2d 114

In re DARGO.

Cr. 4221.

District Court of Appeal, Second District, Division 3, California.

June 9, 1948.

1. Infants 🔑16

A proceeding under Juvenile Court Law to have a minor declared a ward of juvenile court is not a "criminal proceeding" in which minor is charged with or convicted of public offense, but is more in nature of guardianship whereby minor is relieved of stigma of criminal conviction by placing him upon probation with individuals or institutions having facilities to give him correctional care, supervision and training. Welfare and Institutions Code, § 720.

See Words and Phrases, Permanent Edition, for all other definitions of "Criminal Proceeding".

2. Infants 🔑18

The provision of Youth Authority Act limiting jurisdiction of juvenile court to recommit to Youth Authority a minor charged with or convicted of public offense and committed to Authority and returned by Authority to juvenile court as an improper person or as incorrigible or incapable of reformation did not limit jurisdiction of juvenile court to redeclare minor a ward of court and to recommit minor to Authority after minor had been home on parole approximately two weeks before committing assault with deadly weapon. Welfare and Institutions Code, §§ 700(b), 720, 736, 740, 1731, 1737.1.

3. Infants ⚿16

Where minor was declared in violation of his parole and was redeclared a ward of juvenile court, juvenile court properly ordered minor recommitted to Youth Authority. Welfare and Institutions Code, §§ 700(m), 740.

◆

Appeal from Superior Court, Los Angeles County; Wilbur C. Curtis, Judge.

Proceeding in the matter of Fridolin J. Dargo, a person under the age of 21 years. From an order of the juvenile court redeclaring the minor a ward of the court and recommitting the minor to the Youth Authority for further institutional training, the mother of the minor and the minor appeal.

Order affirmed.

R. C. W. Friday, of Los Angeles, for appellants Farris.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for the People.

SHINN, Acting Presiding Justice.

The mother of Fridolin J. Dargo, a minor, and the minor, appeal from an order of the juvenile court redeclaring the minor a ward of the juvenile court under section 700, subdivision (m) of the Juvenile Court Law, Welfare and Institutions Code, and recommitting the minor to the Youth Authority for further institutional training.

A petition to have the minor declared a ward of the juvenile court under section 700, subdivision (m), of the Juvenile Court Law, was filed by an officer of the Los Angeles Police Department on December 1, 1947. The petition bears No. 112703, under which number previous petitions to have the minor declared a ward of the juvenile court had been filed. (See, In Re Dargo, Cal.App., 183 P.2d 282, for further light upon the activities of the minor.) The petition alleged that the minor was 15 years of age; that he was a person defined in subdivision (m) of Section 700 of the Juvenile Court Law; that on November 25, 1947, he committed an assault upon Dewey Bunch with a deadly weapon or instrument by striking Bunch on the head with a heavy wrench.

The matter came on for hearing before a referee of the juvenile court on December 22, 1947, after due notice to the mother and stepfather of the minor, who were present at the hearing. The allegations of the petition were denied by the minor, represented by counsel, and he declined to put on any witnesses or to testify on his own behalf. Police Officers Lewis and Suit testified. Dewey Bunch testified concerning the details of the assault upon him and identified the minor as the person who struck him with the wrench. The wrench which was found near the scene of the attack was produced. Based upon the testimony of these witnesses, the referee found that the allegations contained in the petition were true; that the assault was unprovoked; that the minor was of the age of 16 years on May 13, 1947; that he was a fit and proper person to come within the provisions of section 700, subdivisions (b) and (m) of the Juvenile Court Law; that the minor had been before the juvenile court on a number of occasions in the past, had been declared a ward of the juvenile court under section 700, subdivision (b) and (m), and had been committed to the Youth Authority and placed by it in the Fricot Ranch Camp for Boys and in the Nelles School for Boys at Whittier, from which school he had been released in November, 1947; that the minor had been home on parole approximately two weeks before the present offense was committed, during which time he had made a satisfactory record. The referee recommended that the minor be "re-declared a ward of the Juvenile Court under subdivision (m), section 700 of the Juvenile Court Law; that he be declared in violation of his parole and that he be released to the Youth Authority for further institutional training." These findings and recommendations of the referee were adopted and approved on December 24, 1947, by a judge of the superior court sitting as a judge of the juvenile court, and an order made in accordance therewith.

Although the minor was represented by counsel at the hearing before the court he offered no evidence. He requested a rehearing and it was granted, presumably to allow him another opportunity to testify or to produce other evidence. At this hearing, which was on January 26, 1948, before another judge, the evidence previously given concerning the commission of the offense was repeated and the minor, testifying on his own behalf, denied that he had committed the assault. The allegations of the petition were found by the court to be sustained and the order appealed from was made.

It is contended on appeal that by virtue of the provisions of section 1737.1 of the Youth Authority Act, Welfare and Institutions Code, the juvenile court was without authority to recommit the minor to the Youth Authority for further custodial care.

Section 1731.1 provides: "Whenever any person *who has been charged with or convicted of a public offense and committed to the Authority appears to the Authority,* either at the time of his presentation or after having become an inmate of any institution or facility subject to the jurisdiction of the Authority, *to be an improper person to be retained* in any such institution or facility, *or to be so incorrigible or so incapable of* reformation under the discipline of the Authority *as to render his retention detrimental to the interest of the Authority and the other persons committed thereto, the Authority may return him to the committing court.* In the case of a person convicted of a public offense, said court may then commit him to a State prison or sentence him to a county jail as provided by law for punishment of the offense of which he was convicted. In the case of a person who has been committed to the Authority by a juvenile court, the juvenile court *to which he is returned* may make such further order or commitment with reference to such person as may be authorized by the juvenile court law, except that said court may not recommit such person to the Youth Authority." (Italics added.)

[1, 2] From a mere reading of the foregoing language it is apparent that the limitation imposed upon the jurisdiction of the juvenile court to recommit a minor to the Youth Authority applies only where (a) the minor has been charged with or convicted of a public offense and committed to the Authority, and (b) the Authority has returned the minor to the juvenile court after it has concluded that the minor is an improper person to be retained in any of its institutions or facilities, or is so incorrigible or incapable of reformation that his retention would be detrimental to the agency or other persons committed to it. None of these facts appear in the instant case. A proceeding under section 720 of the Juvenile Court Law to have a minor declared a ward of the juvenile court is not a "criminal" proceeding. It is not a proceeding in which a minor is "charged with" or "convicted of" a public offense. It is a proceeding "more in the character of a guardianship whereby the minor is relieved of the stigma of a criminal conviction by placing him upon probation with individuals or in institutions having the facilities to give him corrective care, supervision and training." In re Dargo, supra, Cal.App., 183 P.2d 282, 283. See, also, in re Daedler, 194 Cal. 320, 332, 228 P. 467; In re Jones, 34 Cal.App.2d 77, 82, 93 P.2d 185; In re Brodie, 33 Cal.App. 751, 752, 166 P. 605; Welf. & Inst.Code, secs. 736, 1731. Nor was the order recommitting Fridolin to the Youth Authority made following his return by the Youth Authority to the juvenile court as an improper subject for further care by it. The provisions of section 1737.1 are, therefore, inapplicable to the facts disclosed in the instant record.

[3] Since the proceedings by which the minor was declared in violation of his parole and redeclared a ward of the juvenile court were in all respects regular and in conformity with the provisions of the Juvenile Court Law, the juvenile court properly ordered the minor recommitted to the Youth Authority under section 740 of the Juvenile Court Law.

The rights of the minor were given thorough consideration by two judges of the court. The record furnishes no reasonable basis for assailing the validity of the order and the appeal is ill-advised.

The order is affirmed.

WOOD, J., and McCOMB, J. assigned, concur.

86 Cal.App.2d 107

PEOPLE v. RANER et al.

District Court of Appeal, Second District,
Division 3, California.
June 9, 1948.

1. Criminal law 🔑980(2)

A hearing for determination of degree of an offense is not a "trial" in the technical sense, and is not governed by same strict rules of procedure as a trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

2. Robbery 🔑24(1)

Evidence sufficiently supported finding that defendants were armed at time of commission of robbery, so as to support conviction of robbery of the first degree. Pen. Code, § 211a.

3. Robbery 🔑11

An unloaded gun is a "dangerous weapon" within meaning of statute defining robbery perpetrated by a person being armed with a dangerous or deadly weapon as robbery in the first degree. Pen.Code, § 211a.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous Weapon".

4. Criminal law 🔑304(2)

It is common knowledge that, in committing robbery, pistols are frequently used as bludgeons.

5. Criminal law 🔑1208(9)

The definition of "deadly weapon" contained in indeterminate sentence statute defines the phrase only for purpose of that statute and has no bearing upon meaning of same words when used in other provisions of the Penal Code. Pen.Code, §§ 211a, 1203, 3024.

See Words and Phrases, Permanent Edition, for all other definitions of "Deadly Weapon".

6. Criminal law 🔑982
Robbery 🔑11

Proof that defendants were armed with sawed-off .22-caliber rifle established as matter of law that defendants were armed with a "dangerous weapon" which would support conviction of robbery of first degree, but did not establish that they were armed with a "deadly weapon" within statute depriving court of power to grant probation to defendant convicted of robbery who at time of perpetration of crime was armed with a deadly weapon. Pen. Code, §§ 211a, 1203.

Appeals from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Robert Raner and Ralph McRoberts were convicted of robbery in the first degree, and they appeal.

Reversed with directions.

William B. Neeley, Public Defender, of Los Angeles, for appellant Robert Raner.

Robert H. Green, of Los Angeles, for appellant Ralph McRoberts.

Fred N. Howser, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

SHINN, Acting Presiding Justice.

By information, the defendants were charged with the crime of robbery while armed with a deadly weapon, to wit, a sawed-off .22 caliber rifle. Defendants pleaded guilty to the charge of robbery but denied having been armed, and waived a jury trial on that issue. By leave of court, an application for probation was filed by each defendant. At the close of the hearing which was had on the applications for probation and for the purpose of fixing the degree of the crime, the trial judge found that defendants had been "armed with a deadly weapon to wit an unloaded pistol at the time of the commission of the offense." Thereupon, pursuant to section 211a of the Penal Code, which provides that "all robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree," the trial judge determined the offense to be robbery of the first degree.

It is affirmatively shown by the minutes of the court that probation was denied solely on the ground that section 1203 of the Penal Code deprived the court of power to grant probation under the circumstances. Section 1203 provides that "probation shall not be granted to any defendant who shall have been convicted of robbery * * * and who at the time of the perpetration of said crime * * * was armed with a deadly weapon * * * nor to a defendant who used or attempted to use a deadly weapon in connection with the perpetration of the crime of which he was convicted * * *." In ruling on the applications for probation, the trial judge made the following statement: "This case appears to be one in which the past record and characteristics of the defendants would recommend the granting of probation, and were it not for the fact that the law in Penal Code Section 1203 prevents me from granting the application, I would do so. As far as the evidence shows the weapon used by the defendants in perpetrating the robbery was an unloaded .22 rifle, pointed at the victim and not used in any other manner; it was, in my opinion, none the less a deadly weapon within the meaning of Section 1203 of the Penal Code." The applications were accordingly denied, and both defendants were sentenced to the State Prison for the term prescribed by law. Each defendant appeals from the judgment of conviction.

[1] Appellants' initial contention is that the degree of the crime was determined erroneously since there was no evidence to support the finding that they were armed at the time of the commission of the offense. This argument must be considered with reference to the rule that a hearing for the determination of the degree of an offense is not a trial in the technical sense, and is not governed by the same strict rules of procedure as a trial. People v. Gilbert, 22 Cal.2d 522, 528, 140 P.2d 9; People v. Williams, 14 Cal.2d 532, 536, 95 P.2d 456; People v. Rhodes, 137 Cal.App. 385, 391-392, 30 P.2d 1026; People v. Hall, 105 Cal. App. 359, 362, 287 P. 533.

[2] It is true that the reporter's transcript, which was certified by the reporter to comprise "a full, true and correct transcript of the testimony offered or taken, evidence offered or received," etc., and was so stipulated by counsel, fails to include any testimony taken on this or any other issue. On the other hand, the statement of the trial judge quoted above, indicates that his finding was based upon evidence of some nature. Furthermore, during the hearing, counsel for defendant Raner stated that: "This particular robbery was accomplished by means of pointing at the victim this .22 rifle, which the defendants maintain strenuously was not loaded. * * * In this particular instance it was used merely to cow the victim by pointing it at him, and no other use was even attempted to be made of it. It is true that the weapon itself was not found or secured until some days later, after the robbery, and the fact that it was unloaded on the particular occasion involved was dependent upon the statement or testimony of the two defendants themselves. * * *" These statements appear to have been accepted by counsel for defendant McRoberts as the basis for his argument also. A careful reading of the transcript as a whole clearly reveals that in argument both counsel either expressly or impliedly conceded that defendants were armed with an unloaded gun, and their remarks were addressed chiefly to the proposition that under the circumstances such an unloaded gun was not a "deadly weapon" within the meaning of the above-quoted provisions of the Penal Code. On the present record, even assuming that there was no other evidence before the court, we think there was a sufficient admission of the fact that defendants were

armed to support the court's determination of the degree of the crime. In re Huson, 126 Cal.App. 571, 574, 14 P.2d 845; People v. Brown, 140 Cal.App. 616, 620, 36 P.2d 194; People v. Costa, 108 Cal.App. 90, 93, 290 P. 891; People v. Hammond, 26 Cal. App.2d 145, 150, 78 P.2d 1172; cf. People v. Paraskevopolis, 42 Cal.App. 325, 330, 183 P. 585.

The chief contention urged by appellants is that the court erred as a matter of law in finding that the defendants were armed with a "deadly" weapon within the meaning of sections 211a and 1203 of the Penal Code. It is argued that under the undisputed facts, the court could have properly found the unloaded rifle to be at most a "dangerous" weapon; and that, although such a finding would support a conviction under section 211a for first degree robbery, it would not under the provisions of section 1203 deprive the trial court of the power to grant probation in the exercise of its legal discretion. We think the point is well taken.

[3, 4] Section 211a, it will be noted, refers in the disjunctive to "dangerous" *or* "deadly" weapons. Where used under circumstances similar to those in the present case, it has been repeatedly and uniformly held that an unloaded gun is a "dangerous" weapon within the meaning of this section. People v. Egan, 77 Cal.App. 279, 284, 246 P. 337; People v. Shaffer, 81 Cal.App. 752, 755, 254 P. 666; People v. Freeman, 86 Cal.App. 374, 377, 260 P. 826; People v. Coleman, 53 Cal.App.2d 18, 28, 127 P.2d 309. See also, People v. Seawright, 72 Cal.App. 414, 418, 237 P. 796; People v. Hall, 87 Cal.App. 634, 636, 262 P. 50; People v. Seaman, 101 Cal.App. 302, 304, 281 P. 660; People v. Raleigh, 128 Cal.App. 105, 16 P. 2d 752. As was said in People v. Egan, supra: "It is a matter of common knowledge that in committing robbery pistols are frequently used as bludgeons rather than as firearms. The fact, therefore, that a person perpetrating such crime is armed with a pistol is enough to justify the conclusion that the pistol used by him is a 'dangerous' weapon within the meaning of said section 211a of the Penal Code, even though it be not loaded." 77 Cal.App. at page 284, 246 P. at page 339.

The finding of the trial court that the unloaded gun on the present facts was a "deadly" weapon, however, appears to be unique and unsupported by any authority of which we are aware. A holding that that finding is correct would eliminate all distinctions in meaning between the words "dangerous" and "deadly" as found in section 211a. That such a distinction exists, however, has long been established. "In State v. Lynch, 88 Me. 195, 33 A. 978, it was said that 'deadly' and 'dangerous' are not equivalents; that a dangerous weapon may possibly not be deadly, but that a deadly weapon, one which is capable of causing death, must be dangerous * * *." People v. Seawright, supra, at page 419 of 72 Cal.App., at page 798 of 237 P. The distinction was also recognized in People v. Coleman supra, at page 28 of 53 Cal.App. 2d, at page 315 of 127 P.2d where the following statement was made: "The evidence in the present case is amply sufficient to uphold a conviction of robbery. Proof that a defendant was armed is required only to fix the degree of the crime. To fix it as of the first degree, it is not necessary that the weapon should be a deadly weapon, if, in fact, it is a 'dangerous' weapon. Pen.Code, § 211a. Robbery committed with an unloaded pistol may be robbery of the first degree. The pistol need not be used or intended to be used as a firearm. If it is capable of use as a club or as an instrument to produce bodily harm it may be classified as a 'dangerous' weapon."

[5] We are fully aware of the definition of the words "deadly weapon" which appears in section 3024 (formerly section 1168, subd. 2) of the Penal Code. Regardless of whether or not the sawed-off .22 rifle used in the present case is within the scope of this definition, a question as to which we here express no opinion, the applicability of the definition is restricted in terms to said section 3024 and has no bearing upon the meaning of the same words when used in other provisions of the Penal Code. People v. Petters, 29 Cal.App.2d 48, 50, 84 P.2d 54; People v. O'Neal, 2

Cal.App.2d 551, 558, 38 P.2d 430; People v. Caberera, 104 Cal.App. 414, 416, 286 P. 176.

"The question as to whether a given instrument is a dangerous or a deadly weapon depends for its solution primarily upon the attendant circumstances, as well as upon the use which has been made, or is proposed to be made, of the particular instrument. * * * It is manifest that a heavy club or a piece of gas pipe in the hands of a child of tender years, and proposed by it to be used as against a large and powerful man of mature years, could scarcely be considered either as a deadly or a dangerous weapon; but, reversing the situation as to parties, it is clear that the weapon might be not only dangerous, but deadly. Notwithstanding the fact that ordinarily and in and of itself the instrumentality may be in fact comparatively harmless, if, considering the attendant circumstances, together with the present ability of its possessor, the instrument is capable of being used in a deadly or dangerous manner, for the purpose of the particular occasion only, the character of the instrument may be established." People v. Freeman, supra, at pages 375, 376 of 86 Cal.App., at page 827 of 260 P. Thus, in appropriate circumstances, almost any instrument or object may become a deadly weapon. See State v. Huntley, 91 N.C. 617, 620. It would seem clear, for example, that one who actually uses, or attempts to use, an *unloaded gun* as a bludgeon or club ordinarily is guilty of assault with a deadly weapon. See People v. Pickens, 61 Cal.App. 405, 214 P. 1027, and People v. Maggio, 140 Cal.App. 246, 252, 253, 35 P.2d 369, wherein it does not appear whether or not guns so used were loaded. On the other hand, where there is no threat or attempt to use an unloaded gun as a bludgeon, and in fact it is used solely as a firearm pointed at another in a threatening manner, the crime of assault with a deadly weapon (Penal Code, sec. 245) is not committed. People v. Sylva, 143 Cal. 62, 76 P. 814; cf. People v. Bennett, 37 Cal.App. 324, 326, 173 P. 1004 and People v. Montgomery, 15 Cal.App. 315, 316, 114 P. 792.

The distinction recognized in the cited cases between unloaded guns when used or threatened to be used as bludgeons, and when not so used, is the distinction between unloaded guns as deadly weapons and as merely dangerous weapons. It is a fundamental distinction which should be recognized in the absence of a controlling statutory definition of the word "deadly."

[6] The precise point before us has not been decided in any case we have discovered. Our views, however, will be found consistent with the discussions of the meaning of the words dangerous and deadly in the numerous California cases. We reach the conclusion, therefore, that for the purposes of sections 211a and 1203, under the undisputed facts in the present case, the defendants were armed with a dangerous weapon but not with a deadly weapon. The trial court's determination that the offense was robbery in the first degree was therefore correct (Pen.Code, sec. 211a), although based upon the erroneous premise that defendants were armed with a deadly weapon. Defendants were in no way prejudiced by this error (Pen.Code, sec. 1258), and we do not understand either of them to seriously argue that it is ground for reversal of the judgment. On the other hand. the court's conclusion that under section 1203 it was powerless to grant probation was not only erroneous, since the prohibitory provisions of that section are applicable only where the defendant was armed with a deadly weapon, but was also prejudicial in that it deprived defendants of the substantial right conferred by statute, to have their applications for probation considered and determined by the court in the exercise of its legal discretion. People v. Jones, 87 Cal.App. 482, 498, 262 P. 361; People v. Miller, 112 Cal.App. 535, 539, 297 P. 40.

As we find no error affecting the judgments of conviction, a new trial is unwarranted, but since the judgments pronounced were based upon and were in conformance with the erroneous denial of the applications for probation, they should be reversed for further proceedings on the conviction.

The judgments are reversed, with directions to the trial court to arraign the defendants again for judgment, and thereupon to hear and determine defendants' respective applications for probation, and thereafter to proceed with the matter in accordance with the views herein expressed.

WOOD, J., and McCOMB, J., Assigned, concur.

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86 Cal.App.2d 124

RALSTON et al. v. DEMIRJIAN et ux.

Civ. 3726.

District Court of Appeal, Fourth District, California.

June 9, 1948.

Rehearing Denied July 1, 1948.

Hearing Denied Aug. 5, 1948.

1. Brokers 🔑86(5)

Evidence established that brokers procured a purchaser who was ready, willing, and able to purchase a vineyard on owners' terms, rendering owners liable for commission in accordance with contract for sale of the vineyard.

2. Brokers 🔑86(5)

Execution of a contract of sale of vineyard by owners was conclusive proof that owners were satisfied as to the qualification of purchaser procured by brokers, and of purchaser's ability to perform the contract, thus rendering owners liable for payment of brokers' commission.

3. Vendor and purchaser 🔑22

Much less certainty of description of realty is required in the case of a contract to sell realty than is required in the case of a deed.

4. Brokers 🔑58

Written agreement describing realty to be purchased as a 20 acre vineyard located on the "southwest corner of Dinuba Avenue and Highway 99, in the County of Fresno" and providing that vendors would take out only two acres from corner of vineyard for a gas station and other business and that boundary line of twenty acres should start 50 feet from farthest building on the highway side, was sufficiently definite to identify realty to be sold, so as to render owners liable for brokers' commission.

5. Brokers 🔑86(7)

Evidence was insufficient to establish that brokers were guilty of fraud, overreaching and bad faith toward owners of vineyards so as to bar brokers' right of recovery from owners for procuring purchasers for the vineyard.

6. Brokers 🔑49(1)

Where brokers procured a purchaser ready, willing and able to purchase vineyard described in brokers' contract of employment by owners of vineyard, and according to terms thereof, and purchaser executed a valid, binding and enforceable agreement to purchase on owners' terms, brokers were entitled to recover commissions from owners.

◆

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Freeman B. Ralston and others against Armen Demirjian and Shaka Demirjian, husband and wife, to recover for a commission growing out of a contract for sale of realty which defendants had listed for sale with plaintiffs as real estate brokers. From a judgment for plaintiffs, defendants appeal.

Judgment affirmed.

Harry Sarkisian, of Fresno, for defendants and appellants.

Ralph Robinson, of Fresno, for plaintiffs and respondents.

MUSSELL, Justice pro tem.

This is an appeal from a judgment recovered against defendants for a commission growing out of a contract for the sale of real property.

Defendants were the owners of the real property involved, and listed it for sale with plaintiff real estate brokers at the price of $22,000.00.

The written agreement which forms the basis of this action was entered into on October 28, 1946. Receipt of the sum of $1000.00 from Yervant Nikasarian, the purchaser, was recited therein, and the property was described as a 20-acre vineyard located on the southwest corner of Dinuba Avenue and Highway 99, in the County of Fresno. The agreement contained the following provision: "The seller will take out only two acres from the corner for the gas station and other business. The boundary line of the 20 acres shall start 50 feet from the farthest Bldg. on the 99 Highway side." The instrument was signed by the real estate agent, by the purchaser, Yervant Nikasarian, who agreed to purchase the property on the terms and conditions contained in the contract, and by defendants, who agreed to sell the property described in the agreement on the terms and conditions therein stated, and to pay the agent the sum of $1100.00 as commission.

The contract also contained a marginal recital as follows: "The total acreage being 22 ac. the seller will retain only 2 ac. on the corner, leaving 20 ac. for the buyer."

On October 30, 1946, the purchaser and plaintiff M. Manashian opened an escrow with the title company. The purchaser deposited the $1000.00 theretofore paid and escrow instructions were drawn.

Defendants refused to sign the escrow instructions because of the uncertainty in the description of the two acres reserved to them and insisted that a survey be made to ascertain and describe the boundaries. Upon completion of the survey it was found that the entire ranch contained only 19¾ acres; that the boundary did not start at Dinuba Avenue and Highway 99 but commenced at the center line of the Fowler Switch Canal where it intersects the State Highway, and that 1¾ acres of the property was located across Dinuba Avenue. There was no planting of vines on this portion. In the discussion which followed the buyer insisted on obtaining twenty acres of vineyard and the sellers were equally insistent that two acres be taken out for the business property. The parties could not agree, the buyer withdrew his offer on November 21, 1946, and the present action was filed December 16, 1946.

[1, 2] (1) Defendants first contend that the broker did not procure a buyer who was ready, willing and able to buy on the owners' terms. The trial court found against their contention in this respect and there is no evidence in the record to support a contrary finding. The buyer paid the original deposit and was never called upon to make payment of the balance. He testified that he had the purchase money available on the day the contract was signed and for sometime thereafter. Furthermore, the execution of a contract of sale by the owner of real property is conclusive proof that he was satisfied as to the qualifications of the purchaser and of his ability to perform the contract, thus rendering the owner liable for the payment of the broker's commission. McNamara v. Steckman, 202 Cal. 569, 572, 262 P. 297; Deeble v. Stearns, Cal.App., 186 P.2d 173.

(2) The broker obtained from the buyer a valid, binding and enforceable agreement to buy on the owners' terms. Defendants argue that it is impossible to identify the property to be sold and for that reason the contract is not valid, binding and enforceable. There is no testimony in the record indicating that there was any difficulty in locating the boundary lines of the entire property or of the two acres to be excluded from the sale, according to the express terms of the written agreement entered into between the parties.

[3] The rules governing the sufficiency of the description of property in executory contracts to sell or exchange real property are well settled. Much less certainty and particularity of description is required in the case of a contract than is required in the case of a deed (Wright v. L. W. Wilson Co. Inc., 212 Cal. 569, 573, 299 P. 521) as was said in Johnson v. Schimpf, 197 Cal. 43, at page 48, 239 P. 401, at page 403 where the rule is stated as follows:

"It is now the general and well-established rule that less strictness in the description of property is demanded in a contract than in a deed of conveyance. In the construction of executory contracts of sale of real estate, courts have been most liberal, and have sought, as far as consistent with established rules, to give effect to the intention of the parties in applying descriptions of property. The usual rigid construction given to deeds has not been adhered to in the character of contracts under consideration here. The description may be supplemented by extrinsic evidence showing its application to particular property to the exclusion of all other property. Parol evidence is ordinarily admissible to show what property the parties intended to convey, and it will be deemed that a contract adequately describes the property if it refers to something which is certain or provides a means of ascertaining and identifying the property which is the subject-matter of the contract."

[4] It does not appear that there was any uncertainty in the minds of any of the parties in the present action as to the location of the real property as described in the written contract. It was the fact that the property described therein, after excluding two acres, did not constitute twenty acres which caused the disagreement of the parties and the resulting court action. In this connection it should be noted that defendants first repudiated the contract. It does not appear that defendants ever submitted escrow instructions to the buyer or demanded the performance of the contract of sale.

[5] (3)) It is finally urged that the broker was guilty of fraud, overreaching and bad faith toward his principal, barring his right of recovery.

The agreement upon which this action was brought was reduced to writing, read to defendants and was signed by them. No complaint was made at the time by them or later in the trial court that the plaintiffs were guilty of fraud in procuring their signatures.

No facts were alleged nor proved at the trial which would support a finding favorable to appellants as to their last point presented.

[6] The plaintiffs procured a buyer ready, willing and able to buy the property described in their contract of employment and according to the terms thereof. The buyer executed a valid, binding and enforceable agreement to buy on the owners' terms. Nothing further remained to be done by plaintiffs. Under such circumstances plaintiffs are entitled to recover the commission. Deeble v. Stearns, supra.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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86 Cal.App.2d 213

BITTMAN et al. v. COURINGTON et al.

Civ. 16207.

District Court of Appeal, Second District, Division 1, California.

June 15, 1948.

1. Appeal and error 🔑930(1)

On appeal, evidence would be viewed in light most favorable to prevailing party.

2. Landlord and tenant 🔑18(1)

In forcible entry and detainer action by plaintiffs who had been taken into defendant's home as boarders, paying guests, or, at most, joint occupants, plaintiffs had burden of proving that original agreement had been modified so as to constitute plaintiffs tenants entitled to exclusive possession as against defendant as landlord.

3. Forcible entry and detainer 🔑12(2)

Where plaintiffs, under agreement, became boarders or paying guests, or, at most, joint occupants with defendant of defendant's home, defendant's temporary absence unaccompanied by an intention to abandon did not end defendant's possession, so that forcible entry by defendant when plaintiffs changed the locks was not an attempt to regain possession but was an act in defense of defendant's actual possession, precluding recovery by plaintiffs in forcible entry.

4. Forcible entry and detainer 🔑29(1)

A plaintiff in forcible entry and detainer need only show, in addition to the forcible entry, that he was peaceably in the actual possession, or at the time of forcible detainer was an occupant entitled to possession.

5. Forcible entry and detainer ⚷12(2)

Where, under agreement, plaintiffs were entitled only to joint possession or occupancy with defendant, plaintiffs could not recover for forcible detainer when defendant, as a result of changing of locks by plaintiffs, was required to break door window to gain entry, but did not oust plaintiffs from possession under the agreement.

6. Forcible entry and detainer ⚷34

In forcible entry and detainer action, whether original agreement under which plaintiffs were entitled to joint possession or occupancy with defendant of defendant's home had been modified so as to entitle plaintiffs to exclusive possession as against defendant as landlord was for jury under plaintiffs' assertion of the affirmative and defendant's denial.

7. Forcible entry and detainer ⚷43(5)

Error could not be predicated upon court's failure to separately instruct on forcible entry and forcible detainer, where appellants did not include in record on appeal the instructions, if any, offered by appellants and refused by trial court.

8. Forcible entry and detainer ⚷43(7)
Trial ⚷296(2)

In forcible entry and detainer action, instructions that plaintiffs must show that defendant had no right to enter and reside upon premises, and that plaintiffs' possession was exclusive of any "right of possession" by defendant, and that plaintiffs were tenants with an exclusive "right of possession", allegedly erroneous because referring to "right of possession" rather than "actual possession", was not misleading in view of other instructions given and, in any event, did not result in a miscarriage of justice. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Forcible entry and detainer action by Alice Bittman and John Baroero against Mildred Courington and C. G. Courington. From an adverse judgment, plaintiffs appeal.

Judgment affirmed.

O. B. DeCamp, of Santa Monica, for appellants.

H. Thomas Hodges, of Los Angeles, for respondents.

WHITE, Justice.

This is an appeal by plaintiffs from an adverse judgment entered upon the verdict of a jury in an action for damages for forcible entry and forcible detainer.

[1] Viewing the evidence, as we must on appeal, in the light most favorable to the prevailing party, it appears that in March, 1946, defendant Mildred Courington (then Mildred Smith) purchased a house at 1318 9th Street, Santa Monica. She moved into the premises on June 21, 1946. The plaintiffs, Mrs. Bittman and Mr. Baroero, moved in with Mrs. Courington on June 24, 1946, under an agreement, as testified to by Mrs. Courington, that each of the plaintiffs would pay her $30 per month for a room; that all three would share the actual work of taking care of the house, Mr. Baroero to take care of the lawn, and that the three would share equally in the cost of food. Mrs. Courington was to pay the utilities. Defendant Mildred Courington was married to defendant C. G. Courington on October 19, 1946. Her husband maintained an apartment in Los Angeles which he shared with another man. After her marriage she did not join her husband immediately, but in January, 1947, and for several months thereafter she stayed with her husband at his apartment the greater portion of the time, returning at frequent intervals to her Santa Monica residence. When she joined her husband she took with her only items of immediate necessity, and left the remainder of her property, including books, clothing, bedding, and her dog, at the Santa Monica home. She continued to receive mail at the Santa Monica address and to pay the utility bills.

On May 10, 1947, Mr. and Mrs. Courington entered the premises for the purpose of residing there, moved in their personal belongings, and thereafter continued to reside there with plaintiffs. Plaintiffs objected to their entry. On May 16, Mrs. Courington, returning to the house at night, found that the locks had been changed, whereupon she broke a window of the rear door and entered the premises.

[2] The contention that the evidence is insufficient to support the verdict cannot be sustained. The evidence, viewed most favorably to defendants, warranted the triers of fact in concluding that Mrs. Courington never abandoned her actual possession of the premises. Her temporary absence, unaccompanied by an intention to abandon, did not put an end to her possession. 22 Am.Jur. 924; Moon v. Rollins, 36 Cal. 333, 95 Am.Dec. 181. The plaintiffs could not sustain their burden of proof unless they proved to the satisfaction of the jury that the original agreement, whereby plaintiffs became boarders or "paying guests" (or, at most, became joint occupants with the owner, Mrs. Courington), had been modified so as to constitute them tenants entitled to exclusive possession as against Mrs. Courington as a landlord. This they failed to do.

[3-5] It is asserted that the court erred in instructing the jury "that the plaintiffs, in order to recover, must show by a preponderance of the evidence that the defendant, Mildred Courington, had no right to enter upon and reside in the premises, and that the possession of the premises by the plaintiffs was exclusive of any right of possession by the defendant, Mildred Courington"; also, that it was error to instruct the jury that the plaintiffs must show "that they were tenants of the property with an exclusive right of possession." Appellants' contention in this regard is that a plaintiff is required only to show, in addition to the forcible entry, that he was peaceably in the actual possession, or at the time of the forcible detainer was an occupant entitled to possession. Conceding the abstract correctness of the rules relied upon by appellants, nevertheless the instructions here were properly directed to the basic issue tendered by the pleadings and evidence, to-wit, whether the original agreement had been modified so as to put the plaintiffs in sole possession and Mrs. Courington out of possession. As hereinabove noted, under the original agreement, plaintiffs were not in exclusive possession, but held either as licensees, lodgers or guests of an owner who was in possession, or at most were joint occupiers of the property with the owner. Under the facts, Mrs. Courington was at least in joint possession with the plaintiffs. Their action for forcible entry must therefore fail, as Mrs. Courington's entry on May 10 was not under the circumstances here present an attempt to regain possession, but an act in pursuance of her actual possession, and the alleged forcible reentry of May 16 was an act in defense of her actual possession. Likewise, since Mrs. Courington did not oust plaintiffs, forcibly or otherwise, from whatever possession they had under the original agreement, plaintiffs could not recover for a forcible detainer. The most they were entitled to was the joint possession or occupancy they had theretofore enjoyed. Noble v. Manatt, 42 Cal.App. 496, 183 P. 823.

[6] It is asserted that the court improperly defined "consideration" in its instructions to the jury. The error did not affect the substantial rights of plaintiffs. The issue as to whether the original agreement had been modified was met by a flat assertion on the one side and a flat denial on the other, the determination of which was within the province of the jury.

[7, 8] Finally, appellants contend that the court "should have given the jury separate instructions on forcible entry and separate instructions on forcible detainer," but they have not included in the record on appeal the instructions, if any, offered by them and refused by the trial court. Moreover, a reading of the instructions discloses that the jury was adequately instructed on the elements of both causes of action. The asserted errors in referring to "right of possession", rather than "actual possession," could not, in view of other instructions given, have misled the jury, and in no event could it be held that the claimed errors prejudiced the substantial rights of the plaintiffs or resulted in a miscarriage of justice. Const.Cal., art. VI, sec. 4½.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

86 Cal.App.2d 74

McCLURE v. CERATI.

Civ. 7459.

Sac. 5889.

District Court of Appeal, Third District, California.

June 8, 1948.

1. Reformation of Instruments 🔑43

In suit to reform contract of employment to conform to oral agreement on ground of mutual mistake, where plaintiff alleged that contract was drafted and prepared by both parties and that plaintiff signed and executed it, he would be presumed to have read and understood its provisions. Civ.Code, § 3399.

2. Contracts 🔑245(2)

A written contract in absence of fraud supersedes all previous negotiations or stipulations. Civ.Code, § 1625.

3. Frauds, statute of 🔑44(3), 131(1)

Alleged oral agreement as to terms of employment in absolute conflict with written contract and not to be performed within one year from the making thereof was void for failure to comply with the statute of frauds. Civ.Code, § 1624, subd. 1; Code Civ.Proc. § 1973, subd. 1.

4. Appeal and error 🔑917(1)

Where plaintiff refused to amend within ten days granted and appealed from judgment sustaining general and special demurrers to his complaint, District Court of Appeal would resolve all doubts as to sufficiency of pleading against him and assume that he stated his case as fully as facts would warrant.

5. Pleading 🔑8(2)

In suit to reform written contract of employment attached to the complaint and unambiguous on its face to conform to radically differing oral agreement on ground of mutual mistake, complaint stating merely that omission of alleged agreement caused parties to believe written contract was unambiguous and failing to state how oral agreement, highly unreasonable toward one party, came to be omitted alleging neither fraud, oversight, or error of scrivener was insufficient as alleging mere conclusions. Civ.Code, § 3399.

6. Reformation of Instruments 🔑39

In suit for reformation of a contract for mutual mistake, in absence of a clear recitation of facts showing how, when and why the mistake occurred, pleading is inadequate as against demurrer. Civ.Code, § 3399.

7. Reformation of Instruments 🔑36(2, 3)

Complaint in action for reformation of contract should allege what real agreement was, what agreement as reduced to writing was, and where writing fails to embody real agreement, and should show facts as to how mistake was made, whose mistake it was, and what brought it about so that mutuality may appear.

8. Reformation of Instruments 🔑36(3)

When a plaintiff in a suit to reform a contract for mutual mistake affirmatively alleges facts from which it appears that he was guilty of gross negligence or failure to perform a legal duty with relation thereto, complaint is inadequate to entitle him to equitable reilef. Civ.Code, §§ 1577, 3399.

9. Contracts 🔑98
Reformation of Instruments 🔑7

A void agreement has no standing in law and can neither be reformed nor enforced.

10. Reformation of Instruments 🔑36(3)

Complaint alleging mistake by plaintiff due to defendant's assurance that written contract conformed in every respect to terms of oral agreement and that written contract was illegal, void, false and erroneous was insufficient to state cause for reformation. Civ.Code, § 3399.

11. Reformation of Instruments 🔑36(3)

In suit for reformation, pleading must allege that complainant relied upon asserted misrepresentations or fraudulent statements which induced a change of plaintiff's situation to his detriment to state a cause which will afford equitable relief as against a demurrer.

12. Estoppel 🔑112

In suit to reform written contract of employment on ground of mutual mistake wherein plaintiff claimed defendant by reason of friendship was estopped from denying that written contract was in conflict with alleged terms of oral agreement, complaint alleging that defendant assured plaintiff that written contract contained oral agreements but affirmatively showing that plaintiff could not have been ignorant of written provisions because he joined in preparation of the document and signed it, was insufficient. Civ.Code, § 3399.

◆

Appeal from Superoir Court, Yolo County; C. C. McDonald, Judge.

Suit by Roy A. McClure against C. M. Cerati for reformation of a written contract of employment. From the judgment, plaintiff appeals.

Judgment affirmed.

John L. Brannely and E. R. Vaughn, both of Sacramento, for appellant.

Downey, Brand, Seymour & Rohwer, of Sacramento, for respondent.

THOMPSON, Justice.

A general and special demurrer to plaintiff's second amended complaint was sustained with leave to amend the pleading within ten days. The plaintiff elected to stand on his pleading and failed to amend it. Judgment of dismissal of the action was accordingly rendered. From that judgment the plaintiff has appealed.

This is a suit for reformation, under Section 3399 of the Civil Code, of a written contract of employment, to include therein an alleged oral agreement previously made in the negotiations therefor to pay plaintiff, in addition to his stipulated salary of $6,000 a year, a further sum of $6,000 and 25% of the net profits of the business, in the event that plaintiff should be discharged before the expiration of the agreed one-year term of employment. The plaintiff was discharged prior to the expiration of the one-year term. The complaint also asks for an accounting to determine plaintiff's share of the net income and for judgment for $796.80, the unpaid portion of the specified yearly salary, plus the additional sum of $6,000 and 25% of the net income pursuant to the terms of the alleged *oral* agreement. A general and special demurrer to the complaint was sustained. The plaintiff having failed to amend his complaint within the time allowed, upon motion of the defendant a judgment of dismissal of the action was rendered.

The complaint for reformation does not allege fraud. But it does attempt to allege, pursuant to Section 3399 of the Civil Code, that, on account of mutual mistake of the parties, or by the mistake of plaintiff which the defendant then knew, or should have suspected, the written instrument does not "truly express the intention of the parties." The complaint affirmatively alleges that *"plaintiff and defendant* drafted and prepared" the written agreement, which they "signed and executed" on June 4, 1945. The written contract is attached to the complaint, marked "Exhibit A" and made a part thereof. It reads as follows:

"Exhibit A"
"Butane Engineering Co.
A. M. Cerati
Davis Highway Phone 2-0716
Agreement Between
C. M. Cerati—Employer
and
R. A. McClure—Employee

"Employer agrees to hire employee for a period of one year beginning July 1, 1945 for the sum of six thousand dollars payable at the rate of five hundred dollars per month. Employer agrees, also, to pay employee twenty-five percent of the net profits of the Butane Engineering Co. for the calendar year above stated; provided employee is still on the job by and end of such calendar year. The profits to be confined to the operations of the Butane Engineering Co. and not to include profits of the sale of capital assets nor profits of C. M. Cerati personally, if any. Such profits to be determined in the same general manner as heretofore by C. M. Cerati, as evidenced by company prepared statement or income tax records, and he to be the sole judge in determining such profits.

"Employee agrees to faithfully, loyally and efficiently work exclusively for the Butane Engineering Co. and, in case he should quit, he shall be entitled to a wage of five hundred dollars per month plus one fourth of the earned salary from July 1, 1945 to the date of his resignation. He would forfeit the balance of the six thousand dollars annual wage also he would forfeit the twenty-five percent of the profits for the year.

"If the employer should, during the year above referred to, discharge the employee, then he shall pay the full six thousand dollars in full settlement of what is due to the employee; and in case of such discharge, with or without cause, prior to the end of such year, the employee shall have no right to any share in the accrued profits.

"(signed) C. M. Cerati
"C. M. Cerati—Employer
"(signed) Roy A. McClure
"R. A. McClure—Employee
"June 4, 1945"

The complaint is couched in three counts. The first cause alleges that the defendant was engaged in merchandising liquid petroleum products in Yolo County, under the fictitious name of Butane Engineering Company; that, on June 4, 1945, the parties negotiated for plaintiff's employment in said business for one year commencing July 1, 1945, upon specified terms and at a stipulated salary; that as a result of said conversations and negotiations it was *orally agreed* defendant would pay plaintiff a salary of $6,000, at the rate of $500 per month for the year's employment, and, in the event the plaintiff was discharged during that year, defendant would pay to him the additional sum of $6,000; that "plaintiff would not have entered into said contract of employment if the defendant had not agreed to pay plaintiff said sum of $6,000.00 in addition to plaintiff's salary." It is further alleged that "*plaintiff and defendant inserted in said written agreement*" (italics added), the last paragraph of the previously quoted contract; "that said paragraph is ambiguous" because it cannot be ascertained therefrom whether the reference to payment of the "full six thousand dollars" in the event of a discharge of plaintiff included not only the specified salary of $6,000, but also the alleged additional similiar sum mentioned in the oral agreement. It is alleged that the "ambiguous paragraph" of the written contract "was caused through the *mutual mistake* of plaintiff and defendant, in believing that said contract contained unambiguous provisions" covering the requirement to pay both sums of $6,000, in the event of the discharge of plaintiff. It is alleged that the term of employment "was orally modified" to commence July 26, 1945, instead of July 1st of that year; that plaintiff began working on July 26th, and faithfully performed all of his duties until June 8, 1946, at which time he was discharged, when, for the first time, he learned that defendant construed the contract to authorize him to discharge plaintiff without cause, and without paying him the full *additional sum* of $6,000, besides his stipulated salary. Finally, it is alleged plaintiff was paid his entire salary of $500 per month for the time which he served, except the sum of $796, which last mentioned sum was tendered to him by check as full compensation, but which was refused for the reason that plaintiff claimed there was due him, under the oral agreement, the additional sum of $6,000 and 25% of the net profits of the business for that year.

The first count contains no other allegation of facts asserted to have resulted in the mistake contained in the written contract. The first count is based solely on the theory of a *mutual mistake,* and not upon an alleged mistake of plaintiff which was known to or suspected by the defendant. In paragraph V of that cause, plaintiff alleges that the omission in the written contract of the oral agreement occurred "through the mutual mistake of plaintiff and defendant."

The second cause refers to and incorporates therein all of the material allegations of the first cause of action. The second count further alleges that the acceptance of the written contract "was due to defendant's assurance to plaintiff that said written contract conformed in every respect to the terms, conditions and provisions of said oral agreement"; that defendant knew or suspected, or had reason to know or suspect that when said written contract was signed "plaintiff was of the belief that the terms and conditions of said written contract were the same as those of said oral agreement and was without knowledge of the ambiguity in said written contract"; that the "said written contract is illegal, void, false and erroneous." No other facts or reason for such alleged mistake, knowledge on the part of defendant or illegality of contract are alleged.

The third cause of action is apparently based on an asserted estoppel precluding the defendant from denying that the alleged oral agreement is in conflict with the provisions of the written contract. The only alleged grounds for estoppel are, in effect, that defendant and plaintiff were close friends and that defendant knew plaintiff had been employed by the B. F. Goodrich Company for several years at a salary of about $6,000 per year, with which company he had acquired "valuable rights" on account of his long service; that the defendant nevertheless persuaded plaintiff to resign his employment with the Goodrich Company, and to accept employment with him, on or about May 10, 1945, after a "trial period" of two weeks' service, for a period of one year pursuant to the terms of a written contract; that the plaintiff did resign and that he fully performed all the conditions of their agreement; that the "terms, conditions and provisions [of the alleged oral agreement], and each and all of them, plaintiff was led by defendant to believe were incorporated, without ambiguity, into said subsequent written contract"; that during all of the time to June 8, 1946 "defendant's acts and conduct * * * were calculated to, and did, lead plaintiff to believe that defendant was acting under the belief that the conditions and provisions of said written contract in every way conformed to * * * the oral agreement"; that the plaintiff is informed and believes that the net profits of defendant's business during said year exceeded the sum of $60,000, 25% of which belong to plaintiff under said oral agreement; that the defendant nevertheless discharged plaintiff on June 8, 1946, without cause, and that defendant should therefore be estopped from denying that the written contract of employment is in conflict with the said alleged terms of the oral agreement.

The plaintiff seeks to reform the written contract, which is absolutely conflicting with the alleged oral agreement, on the theory that the written contract is ambiguous.

It is our opinion the written contract of employment is not ambiguous or uncertain in its terms. The first sentence of the first paragraph is a clear agreement to employ plaintiff for one year beginning July 1, 1945, at a yearly salary of $6,000, to be paid at the rate of $500 per month. The second sentence of the first paragraph provides that the plaintiff shall also receive as compensation "for the calendar year above stated," 25% of the net proceeds of the business, *"provided employee is still on the job by and end of such calendar year."* The second paragraph of the contract provides that "in case he [the employee] *should quit,* he shall be entitled to a wage of five hundred dollars per month plus one fourth of the earned salary from July 1, 1945 *to the date of his resignation."* But the second paragraph is not material in this case, because the employee did not *quit.* He was discharged. The third and last paragraph of the contract seems clear and explicit. It provides that "If the employer should, during the year above referred to, discharge the employee, then he shall pay the full six thousand dollars *in full settlement of what is due to the employee;* and in case of such discharge, *with or without cause,* prior to the end of such year, *the employee shall have no right to any share in the accrued profits."* (Italics added.)

It will be observed that the reformation sought by the complaint amounts to an entire substitution of the alleged oral agreement for the material provisions of the written contract, because the two contracts are in absolute conflict. They are irreconcilable. Clearly the last paragraph of the written contract authorizes the defendant to discharge the plaintiff at any time "with or without cause". In that event the plaintiff is entitled to "the full six thousand dollars in full settlement" of the salary due to him, and the plaintiff shall then "have no right to any share in the accrued profits."

No valid cause of action based on the oral agreement, as distinguished from the subsequent executed written contract, was alleged because the services were not to be performed within one year *from the making thereof,* and it was therefore within the statute of frauds and void. Civil Code, sec. 1624.

[1-3] Under the allegations of the complaint the plaintiff must have been presumed to have had full knowledge of the clear, expressed provisions of the written contract. He alleges it was "drafted and prepared" by both the plaintiff and the defendant. The plaintiff signed and executed the written contract. He must be presumed to have read and understood its provisions. We may assume he had a copy of the instrument. He accepted the employment, received the benefits of the contract and performed his duties in accordance with its provisions for nearly one year. He was paid or tendered the full amount of his specified salary for the full term of one year. It is alleged that the asserted oral agreement was made during "certain conversations and negotiations" for the written contract which was immediately prepared and executed by the plaintiff and defendant. The written contract, in the absence of fraud, therefore superseded all such previous negotiations or stipulations. Civil Code, sec. 1625; Alameda County Title Ins. Co. v. Panella, 218 Cal. 510, 24 P.2d 163; Estate of Gaines, 15 Cal.2d 255, 264, 100 P.2d 1055. Since the alleged oral agreement is in absolute conflict with the written contract, and it was not to be performed within one year *from the making thereof,* it came within the statute of frauds and was therefore void. Civil Code, sec. 1624, sub. 1; Code of Civil Proc., sec. 1973, subd. 1; Wickson v. Monarch Cycle Mfg. Co., 128 Cal. 156, 60 P. 764, 79 Am.St.Rep. 36; Kraft v. Rooke, 103 Cal.App. 552, 284 P. 935.

[4] Since the general and special demurrer was sustained with ten days granted plaintiff in which to amend, and he refused to amend, we must resolve all doubts as to the sufficiency of the pleading against him, and assume that he stated his case as fully and strongly as the facts would warrant. Curci v. Palo Verde Irr. Dist., 69 Cal.App.2d 583, 585, 159 P.2d 674; Royal Ins. Co. v. Mazzei, 50 Cal.App.2d 549, 555, 123 P.2d 586; Frace v. Long Beach City High School Dist., 58 Cal.App.2d 566, 568, 137 P.2d 60.

[5] The only issue in the first count of the complaint is whether there are sufficient allegations to support a cause founded on *mutual mistake* of both parties, as we have previously stated. We are of the opinion the allegations of the first count are inadequate as against the demurrer, to state a cause founded on mutual mistake. It merely states that the omission of the alleged oral agreement caused the parties to believe that the written contract was unambiguous. That is a mere conclusion. No reason for the omission of the alleged oral agreement is stated. It is not even stated that it occurred through fraud, oversight, error of the scrivener, or how or why it was omitted. In fact, those contingencies are refuted by the allegations of the complaint because it is affirmatively stated the written contract was "drafted and prepared" by both parties. Moreover, the written contract is attached to the complaint as an exhibit. It is not ambiguous. Its terms are clear and unambiguous. It says nothing regarding the payment of *an additional sum* of $6,000 in the event the plaintiff should be discharged. It would be highly unreasonable to hire an employee, with the right to discharge him with or without cause, at any time during his employment, and, in the event of his discharge for unfitness or other good cause, to become bound to pay him his entire stipulated salary, together with an additional sum of $6,000, and 25% of the net profits of the business. The written contract refutes that construction. The acceptance of the alleged oral agreement would amount to a substitution for the essential provisions of the written contract. The two instruments would be absolutely conflicting. The material allegations of the complaint are mere conclusions. There are no allegations of facts showing how or why such a glaring and improbable mistake could have occurred.

[6, 7] In a suit for reformation of a contract for mutual mistake, in the absence of a clear recitation of facts showing

how, when and why the mistake occurred, the pleading is inadequate as against a general and special demurrer. Auerbach v. Healy, 174 Cal. 60, 63, 161 P. 1157; National Bank of Calif. v. Exchange National Bank, 186 Cal. 172, 181, 199 P. 1; Wright v. Shafter, 48 Cal. 275, 276; Hochstein v. Berghauser, 123 Cal. 681, 685, 56 P. 547; Kneer v. Baruch Corp., 47 Cal. App.2d 601, 603, 118 P.2d 488; 22 Cal. Jur. 732, sec. 18; 53 C.J. 1016, sec. 175; 45 Am.Jur. 644, sec. 100; 23 R.C.L. 361, sec. 58. In the Auerbach case, supra, 174 Cal. at page 62, 161 P. at page 1158, the court said: "The rules of pleading in actions for the reformation of contracts are well established and should be familiar. The complaint should allege 'what the real agreement was, what the agreement as reduced to writing was, and where the writing fails to embody the real agreement.' * * * It is necessary to aver facts showing *how the mistake was made, whose mistake it was, and what brought it about, so that the mutuality may appear.*" (Italics added.)

In Robertson v. Melville, 60 Cal.App. 354, at page 358, 212 P. 723 at page 725, it is said that: "* * * *It is the facts, and not the pleader's conclusions, from which the chancellor is to draw the conclusion that there was a mistake in which both parties participated* * * *." (Italics added.)

In the Wright case, supra, it is said: "* * * It is well settled that a complaint claiming relief on the ground of mistake must not only distinctly aver the fact of the mistake, *but also set forth the circumstances under which it occurred* in so far as those circumstances may be necessary to present a case within the rule of equity upon which relief is granted. Tested by this rule, the complaint here is radically defective, and *the demurrer should have been sustained.*" (Italics added.)

In 22 California Jurisprudence, at page 733, which text is supported by numerous authorities, it is said: "* * * If mutual mistake is the gravamen of the action, facts should be alleged showing how it was made and what brought it about, so that its mutuality may appear."

The other texts, previously cited, adhere to the foregoing uniform rule of pleading.

[8] When a plaintiff, in a suit to reform a contract for mutual mistake, affirmatively alleges facts from which it appears that he was guilty of gross negligence or failure to perform a legal duty with relation thereto, the complaint is inadequate to entitle him to equitable relief. Section 1577 of the Civil Code provides for relief from mistake only, when the mistake is "not caused by the neglect of a legal duty on the part of the person making the mistake." See Hawkins v. Hawkins, 50 Cal. 558.

We conclude that the first cause of action, as against the general and special demurrer, fails to state facts sufficient to entitle the plaintiff to reformation of the written contract on the ground of mutual mistake, and that the court therefore properly sustained the demurrer to that count.

The second cause of action is also inadequately stated for the same reasons previously assigned with respect to the first count. The second cause refers to and adopts the material allegations of the first count, as a part thereof. The second cause is founded on the asserted omission from the written contract of the alleged oral agreement, which omission was known or suspected by the defendant. The complaint merely alleges that plaintiff's mistake in that regard "was due to defendant's assurance to plaintiff that said written contract conformed in every respect to the terms, conditions and provisions of said oral agreement." That statement was specifically demurred to for uncertainty. It is not alleged when, or how, or by means of what language or conduct of the defendant, he *assured plaintiff* that the written contract, which was prepared by both of them, contained the identical provisions of the inconsistent oral agreement. Indeed, it is not alleged when or how the oral agreement was mentioned or discussed in connection with the written contract, or what was said in that regard. The preceding quoted allegation is a pure conclusion of the pleader. There are no facts alleged in that count from which the court may determine that the defendant suspected or knew that plaintiff believed the terms of the alleged oral agreement were the same as those of the written contract, which latter contract is concise, clear and unambiguous. It is in direct conflict with the alleged oral agreement. The plaintiff, having helped to prepare the written contract and having signed it without objection, should be charged with knowledge of its contents. Hawkins v. Hawkins, supra. We perceive of no reason, and certainly none is specifically alleged, why the defendant should have known, or suspected that plaintiff believed the inconsistent provisions of the alleged oral agreement were included in the written contract.

[9] Moreover, the third paragraph of the second count of the complaint alleges that the written contract is "illegal, void, false and erroneous." In Ainsworth v. Morrill, 31 Cal.App. 509, at page 511, 160 P. 1089, at page 1090, the court said: "It is elementary that a void agreement has no standing in the law, and consequently it can neither be reformed nor enforced."

[10] The demurrer to the second count was therefore properly sustained.

The third cause is likewise inadequate. It also refers to and adopts the allegations of the former counts as a part thereof. It is based on an alleged equitable estoppel, precluding the defendant from denying that plaintiff is not entitled to his entire yearly salary of $6,000, plus an additional similar sum of $6,000 and 25% of the net profits of business for that year, or that plaintiff was properly discharged, because the defendant induced him to give up his position with the B. F. Goodrich Company at a salary of $6,000, and to accept employment with the defendant, to plaintiff's detriment. On page 11 of plaintiff's brief he thus states his position in that regard: "Where the defendant by his words or conduct represents that he proposes to stand by the oral contract, and the plaintiff, *in reliance thereon,* changes his position, the defendant will be estopped to set up the bar of the statute."

The complaint does not allege when plaintiff resigned his position with the Goodrich Company. It merely alleges that, on May 10, 1945, the parties "entered into certain conversations and negotiations that resulted in plaintiff's resignation from the B. F. Goodrich Company and the execution of a contract for the employment of plaintiff in defendant's business."

There is no allegation that plaintiff resigned his former employment or changed his position to his detriment *in reliance upon said negotiations* or what was said or done by the defendant to induce plaintiff to accept employment with the defendant. It is argued, in effect, that the change of position was induced by *fraud or deceit* on the part of the defendant. But the allegations of the cause of such change of position are mere conclusions. It is not alleged that any statements which the defendant may have made were uttered *with the intention of deceiving* plaintiff to his detriment, or that plaintiff *relied* on such statements, the nature of which is not disclosed. The third cause is defective in that regard.

[11] The rule is well established that the pleading must allege that the complainant *relied* upon asserted misrepresentations or fraudulent statements which induced a change of plaintiff's situation to his detriment, in order to state a cause of action which will afford equitable relief on that account, as against a demurrer to the pleading. Estep v. Armstrong, 69 Cal. 536, 11 P. 132; Neff v. Engler, 205 Cal. 484, 488, 271 P. 744; Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 511, 137 P. 240; Burke v. Maguire, 154 Cal. 456, 467, 98 P. 21; 12 Cal.Jur. 806, sec. 64; 3 Bancroft's Code Pleading, 2382, sec. 1463; 23 Am. Jur. 939, sec. 141; 24 Am.Jur. 79, sec. 248; 37 C.J.S., Fraud, page 384, § 86. In the Burke case, supra, in which the order sustaining a demurrer to the complaint on similar grounds was affirmed on appeal, it is said, 154 Cal. at page 467, 98 P. at page 25:

"It is not stated that plaintiffs believed the alleged false representations * * *, nor that it was in reliance thereon * * * [that the change of situation to appellant's detriment occurred].

"It is the general rule that one who claims that his conduct has been influenced to his prejudice by alleged false statements of another must allege that *he believed the false statements to be true and relied on them* in his subsequent action relating to the subject thereof. [Citing authorities.]"

In 12 California Jurisprudence, at page 806, section 64, each statement of the text being supported by California decisions, it is said: "The pleadings must, of course, show the fraudulent representations; that they were known by the defendant to be false or were made under circumstances not warranted by his knowledge; that they were actually false; that they were made with intent to deceive the plaintiff, or with intent to induce him to enter into the transaction; *that the plaintiff relied upon the representations,* believing them to be true; and that he was injured."

Tested by the foregoing rule of pleading, the third count in this case is defective in failing to allege that plaintiff relied on asserted misrepresentations of the defendant, and in other respects.

In 37 Corpus Juris Secundum, Fraud, page 383, § 85, it is said that: "It is necessary to aver that the pleader was ignorant of the falsity of the representations set out, that he believed them to be true, and that he had a right to rely thereon."

[12] The pleading in this case contains no such allegations. The gist of the alleged misrepresentation is that the defendant *assured plaintiff* that the written contract contained the oral agreements with respect to his compensation in the event of his discharge. But it affirmatively appears from the pleading that plaintiff could not have been ignorant of the provisions of the written contract because he joined in the preparation of that document and signed it. We must assume that he read and fully understood that contract. Under such circumstances he had no right to rely upon statements in direct conflict with the clear provisions of the written contract. Robbins v. Law, 48 Cal.App. 555, 562, 192 P. 118; Wright v. Redwood Theatres, Inc., 49 Cal.App.2d 403, 121 P.2d 756.

The demurrer to the third count of the complaint was therefore properly sustained. The plaintiff was given time within which to amend his pleading, but failed and refused to do so. Plaintiff filed no closing brief in this case.

The judgment of dismissal of the action, which was accordingly rendered, is affirmed.

ADAMS, P. J., and PEEK, J., concur.

86 Cal.App.2d 18

BRADLEY et ux. v. OSBORN et al.

Civ. 7446.

Sac. 5883.

District Court of Appeal, Third District, California.

June 5, 1948.

1. Fraud 🔑58(1)

In action for fraudulent misrepresentations as to defendant's ownership of furniture sold by her to plaintiffs, evidence sustained finding of defendant's fraud in falsely representing that all such furniture, with few exceptions, was hers and included in sale.

2. Evidence 🔑219(1), 269(1)
Fraud 🔑55

Surrounding circumstances may be liberally considered in determining fraud, and parties' subsequent conduct and declarations may be shown in evidence of antecedent fraud.

3. Appeal and error 🔑1011(1)

An appellate court cannot interfere with trial court's fact findings on conflicting evidence.

4. Judgment 🔑343

Denial of motion to set aside a judgment for purpose of securing testimony of absent witnesses was not error where defendant failed to show diligence, no request for continuance was made and no motion for new trial was filed for newly discovered evidence or on any other ground.

5. Fraud ⚷62
Trover and conversion ⚷61

In action for conversion of furniture sold to plaintiffs by defendant and fraudulent misrepresentations as to defendant's ownership thereof, evidence supported judgment for plaintiffs in sum of $653.53 as value of furniture taken by defendant and her tenants.

6. Appeal and error ⚷1011(1)

On appeal from judgment for plaintiffs in action for conversion of personalty and fraudulent misrepresentations as to defendant's ownership thereof, Court of Appeal need not search record to determine whether values of furniture, as found by trial court, are incorrect, though there may be conflicts in evidence regarding such values.

◆

Appeal from Superior Court, Merced County; R. R. Sischo, Judge.

Action by Albert Bradley and wife against Grace M. Osborn and another to recover damages for conversion of personal property and fraudulent misrepresentations as to named defendant's ownership thereof. From a judgment for plaintiffs and an order denying named defendant's motion to set aside the judgment, she appeals.

Affirmed.

Gilbert Moody, of Turlock, for appellant.

C. Ray Robinson, Richard A. McCormick and Margaret A. Flynn, all of Merced, for respondents.

ADAMS, Presiding Justice.

By the original complaint filed in this action, in so far as its allegations are pertinent to this appeal, plaintiffs sought to recover from defendant damages for the conversion of certain personal property of the value of $654.50 which it was alleged defendant had sold to plaintiffs. On the day of the trial the complaint was amended without objection, by adding a count which recited that defendant, having offered to sell said personal property to plaintiffs, did, with intent to deceive and defraud plaintiffs, falsely and fraudulently represent to them that she owned said property; that plaintiffs relied upon said representations and purchased the property; but that in fact defendant knew said representations were false and that the said property was owned by other persons.

The action was tried by the court sitting without a jury, and resulted in a judgment for plaintiffs in the sum of $653.53. The findings recite that on the date of the agreement entered into between the parties, defendant, with intent to deceive and defraud plaintiffs, falsely and fraudulently represented to them that the furniture was the property of defendant, that plaintiffs relied upon such representations; that in fact, as defendant well knew, said representations were false and untrue and said furniture was not the property of defendant; also that as to part of said furniture sold to plaintiffs, defendant herself took and converted same to her own use.

Judgment was entered on May 3, 1947, and on May 24th defendant filed a motion to set aside the judgment on the ground that it was taken against her through inadvertence, surprise and excusable neglect. Affidavits in support of the motion were filed, as were counter affidavits by plaintiffs, and a hearing was had. The motion was denied, and this appeal was taken from the judgment and from the order denying the said motion.

The record shows that by the agreement between plaintiffs and defendant Osborn the latter sold to plaintiffs certain real property consisting of about two acres of land and the buildings situated thereon. One of said buildings was a store with two living apartments in the rear which constituted a part thereof, and the others, situated on the rear of the lot, consisted of five units referred to in the record as "cabins." The apartments in the store building and the cabins were all furnished. Defendant executed a bill of sale which covered "personal property situated on the land of the first party * * *, described as follows, to wit: furniture in cabins, service station tanks, four in number, store furniture and fixtures, pumps and equipment."

At the time of the sale Mrs. Osborn was occupying one of the apartments in the store building, and it is admitted by plaintiffs that it was agreed that she was to retain the furniture contained therein. As for the furniture in the other apartment, defendant admits that she removed it, but she now claims that it was not included in the bill of sale and that she therefore had a right to do so. Plaintiffs contend that it was included in the sale; and Mr. Bradley testified that when he discovered that said furniture had been removed and threatened to "call the whole deal off," Mrs. Osborn promised to return such furniture but did not do so. As for the furniture in the cabins, appellant admits that she purported to sell same to plaintiffs and that she took Mr. Bradley around to see the cabins and then pointed out a few pieces that belonged to some of the tenants. But the tenants, claiming ownership thereof, removed much more of the furniture than had been pointed out by the defendant as theirs.

Appellant argues on this appeal, first that the bill of sale did not include the furniture and furnishings in the two apartments in the store building, second that she left in the cabins all the furniture and furnishings contained therein, and that if the tenants removed same after she had surrendered possession of the property to plaintiffs, she should not be held liable for same, and, third, that her motion to set aside the judgment should have been granted and she should have been given a chance to show by the tenants of the cabins that statements made by the Bradleys were untrue.

Regarding the scope of the bill of sale, it is apparent that it did not set forth all of the various items of furniture and furnishings in the store apartments and cabins. As to that extent it was insufficient to show what the parties intended should be conveyed, the trial court permitted testimony as to what furniture and furnishings were contained in the store apartments and cabins at the time the bill of sale was executed, and which articles defendant designated as belonging to her and were intended to be conveyed. Such evidence was introduced without objection on defendant's part, and Mr. Bradley enumerated the articles contained in the cabins as he remembered them.

[1, 2] The gist of appellant's first contention on appeal is that the finding of the trial court is not sustained by the evidence. However, we are of the opinion that there is sufficient testimony to show that defendant did represent to plaintiffs that all the furniture in the cabins, with a few exceptions, was hers and was included in the sale, and that in fact it did not belong to her but to the tenants who rightfully removed same when they vacated the cabins. Mr. Bradley testified that the property was advertised for sale as furnished; that furnishings in the one apartment in the store consisted of a stove, ice box, heater, table, chairs, chesterfield set, bed divan, bedroom set, springs and mattress, and that defendant when pointing them out to him said, "This is what you are buying." All of this furniture defendant admittedly removed.

As for the furnishings in the cabins, Mr. Bradley testified that defendant took him through all but one of them and said, "Here, they are furnished like this." And as to the other cabin she said it was furnished exactly like the others. He also testified that he sought to induce defendant to go through the cabins with him and inventory the furnishings, but she always "would get very sick and have to lie down." After plaintiffs took possession and some of the tenants claimed to own various articles of furniture which defendant had represented were hers, plaintiffs several times sought unsuccessfully to induce defendant to sign a release by which it could be determined what articles, if any, the tenants owned and what she had owned that she had sold to plaintiffs. She also refused to give releases to the tenants, though requested by them to do so. In short, she refused to cooperate in any way to clear up the situation as to whether she or the tenants owned the furniture that was taken away by the tenants.

From the conduct and statements of defendant both before and after the sale, the trial court, which heard the testimony of the parties and observed their conduct during the trial, was justified in drawing an inference of fraud and deceit on the part of defendant. In Walberg v. Underwood, 41 Cal.App. 679, 682, 183 P. 254, 255, the court said: "Appellant correctly states the rule that surrounding facts and circumstances may be liberally used in determining fraud, and that subsequent conduct and declarations of the parties may be shown in evidence of antecedent fraud." Also see Stewart v. Indemnity Ins. Co., 4 Cal. App.2d 385, 388, 41 P.2d 182; Snyder v. City Bond and Finance Co., 106 Cal.App. 745, 748, 749, 289 P. 859; Tench v. Mc Meekan, 17 Cal.App. 14, 20, 118 P. 476; Divani v. Donovan, 214 Cal. 447, 452, 453, 6 P.2d 247; McKeever v. Locke-Paddon Co., 58 Cal.App. 51, 57, 207 P. 1040; Carter v. Turner, 90 Cal.App. 193, 197, 265 P. 870; Jarkieh v. Badagliacco, 75 Cal.App.2d 505, 509, 510, 170 P.2d 994; Tranchina v. Arcinas, 78 Cal.App.2d 522, 524, 178 P.2d 65.

[3] And under the authority of the above cited cases, an appellate court is not at liberty to interfere with the findings of the trial court, there being conflicts in the evidence adduced.

[4] As regards the motion made by defendant to set aside the judgment, she cites no authority supporting same, but states in her brief that at the time of the trial it was not known that the tenants could definitely be located, nor what real bearing on the case their testimony would have. However, the record shows that during the trial, when defendant was testifying, she stated that she could find the tenants if they wanted her to do so. The original complaint was filed December 3, 1946, and appellant knew from same that plaintiffs were seeking to recover for furniture which it was alleged she had converted to her own use. She also knew long before the trial that the tenants were claiming to own furniture which she had purportedly sold to plaintiffs, for she testified at the trial that two or three weeks after plaintiffs took possession they spoke to her about her writing to the tenants to get a release, but that she did not do so because "I didn't feel like getting myself tangled into something like that and wouldn't do it." The trial was not had until March 17, 1947. The court filed an opinion on April 10th; findings were filed May 2nd, and the judgment was entered May 3, 1947. On May 24th the notice of motion to set aside the judgment was filed and the affidavits of the former tenants accompanying same were variously dated May 19th, 20th and 21st. Obviously it did not take long after the judgment was filed for defendant to find these parties; and there is nothing to show that had she desired to secure their testimony at the trial she could not have done so. No request for continuance of the trial for that purpose was requested, though when plaintiffs filed their amendment to the complaint their attorney offered to consent to a continuance if desired by defendant's counsel. No motion for a new trial was filed on the ground of newly discovered evidence or any other ground. Under the circumstances we cannot say that the trial court abused its discretion in denying the motion to set aside the judgment.

[5, 6] Finally, appellant urges that the evidence does not support a judgment for the amount found. But there is testimony by Mr. Bradley that the tenants took about 75% of the furnishings in the cabins, and that defendant took all of the furnishings in the one apartment included in the sale. Since the escrow indicates that plaintiffs paid $1000 for the furniture, the amount found by the court does not appear to be without support, especially since defendant herself offered no evidence as to values except that that taken from the apartment amounted to approximately $200. Also, plaintiff Albert Bradley testified to values of a list of articles in the cabins which were missing, totalling in excess of $700. These items are set forth in respondents' brief, and are not disputed in appellant's closing brief. It is not the duty of this court to search the record to determine that the values, as found by the trial court, are incorrect, even though there may be inconsistencies and conflicts in the evidence regarding same.

The judgment and order are both affirmed.

PEEK and THOMPSON JJ., concur.

85 Cal.App.2d 765

PEOPLE v. NEAL.

Cr. 4197.

District Court of Appeal, Second District,
Division 3, California.
May 28, 1948.

As Modified June 11, 1948.

1. Infants 🔑20

Evidence supported conviction of committing lewd or lascivious acts with body of 11 year old girl. Pen.Code, § 288.

2. Criminal law 🔑706, 1171(1)

In prosecution for commission of lewd acts with body of minor girl, deputy district attorney was guilty of prejudicial misconduct in asking defendant's character witnesses whether they "knew" that defendant had pleaded guilty of rape and contributing to minor's delinquency and including in questions details as to department of certain court wherein defendant pleaded guilty of rape, withdrawal of such plea, his plea of guilty of contributing to delinquency, sentence imposed, and terms of probation. Pen.Code, § 288.

3. Criminal law 🔑1171(1)

Error in asking character witnesses of defendant if they "knew" that he had been convicted instead of asking if they had heard reports that he had been convicted was not rendered harmless because witnesses answered in the negative where prosecutor's question was tantamount to a declaration that it was an established fact that defendant had been convicted.

4. Criminal law 🔑379

Defendant's general reputation, testified to by character witnesses, is estimation in which defendant is held in community as to traits of character testified to, not merely what witnesses think of him.

5. Witnesses 🔑274(1)

Cross-examination of defendant's character witnesses should have been restricted to questions testing sufficiency of foundation for their direct testimony as to defendant's general reputation in community for truth and morality and not extended to include inquiries as to what witnesses thought such reputation would be or what they might think of defendant if they had additional information stated by deputy district attorney.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Homer Ellsworth Neal was convicted of committing lewd or lascivious acts with the body of a child under 14 years old, and he appeals.

Reversed and remanded for a new trial.

Gladys Towles Root, of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondent.

WOOD, Justice.

Defendant was convicted in a jury trial of violation of section 288 of the Penal Code, and he appeals from the judgment.

[1] Appellant's contention that the evidence was insufficient to support the judgment is not sustainable. The alleged victim, a girl 11 years of age, testified that on April 27, 1947, about 11:00 a. m., she went with defendant, at his invitation, into an underground pumping station to see the pumps; that while they were in the station he carried her, with his arm around her waist, to a place "to stand on" where she could see the pumps; that he ran his hands up and down her legs and under her pants; that when they were about to leave he told her not to tell her mother about anything that happened; that he gave her fifty cents; and that when she arrived home she told her mother what had happened. Her mother testified that on the day mentioned the girl went away from home about 11:00 a. m. and returned about 1:00 p. m.; and that when she returned she told the witness "about something happening to her." A deputy sheriff testified that, in a conversation with defendant the next day, the defendant said that he and the girl had gone down into the pumping station, and that he had showed her around; that the only time he had his hands on her was when he picked her up to place her on a

pump and that when he was lifting her he had one hand under her buttocks and the other hand over her breast; and that he had given her twenty-five cents.

Defendant testified that he permitted the girl to go into the station because he was trying to build up the good will of the children in the neighborhood and in a nearby school so that they would not throw any more refuse against the door of the station; that he had taken groups of children in there; that after he permitted children to see the station he had very little trouble "with stuff being put on the door or any bottles broken and thrown in"; that he did not touch the girl except when he picked her up, at her request, and put her on top of a covered pump, about 32 inches above the floor, where she could see the stopping and starting of the three automatic pumps; that he picked her up "kind of on her arm and just set her over"; and that he gave her twenty-five cents. Eighteen persons, called as character witnesses by defendant, testified in substance that defendant's reputation for truth, morality, and chastity was good. These witnesses included two ministers, the president of the Lakewood Public Utility District where the defendant was employed, the general manager, the attorney, a director, and an employee of the district, the editor of the community newspaper, an engineer, an employee of a city college, and eight neighbors. The evidence was legally sufficient to support the judgment.

[2] Appellant's further contention that the deputy district attorney was guilty of prejudicial misconduct is sustained. After the first character witness (one of the ministers) had testified that defendant's reputation, in the respects above mentioned, was good, the prosecutor asked him: "Did you know that on October 18, 1939, Mr. Neal pleaded guilty to one count of rape?" Defendant objected to the question, and the prosecutor withdrew it, and then asked the witness as follows: "Did you know that on October 18, 1939, Mr. Neal pleaded guilty to one count of rape in Department A of the Superior Court of Long Beach; on November 6, 1939, the plea of guilty to that count was withdrawn; on December 14, 1939, Mr. Neal pleaded guilty to two counts of contributing to the delinquency of a minor, a misdemeanor; and on March 11, 1940, he was sentenced to one year in the County Jail concurrently on each of those counts; sentence suspended and placed on probation for two years; sentenced to the City Jail of Long Beach 24 hours out of each week for period of eight months?" Then counsel for defendant said: "I object to that and make a motion to strike on the grounds it is incompetent, irrelevant and immaterial and not proper cross-examination." Then the following occurred:

"The Court: I think it is cross-examination in regard to his opinion, isn't it?

"Mr. Boland [counsel for defendant]: No, your Honor.

"The Court: You may answer the question whether you knew that or not.

"The Witness: I have no knowledge concerning these things.

"Q. By Mr. Tobey [prosecutor]: Had you known that would that make any difference in your opinion that his reputation for chastity and morality is good? A. I don't know anything about those things. The question is—I don't know, are you presenting those as established facts?

"Q. I have here the records of the Superior Court, Superior Court information No. 77479, and I would like to introduce this in evidence as People's Exhibit A.

"Mr. Boland: I object to that, if your Honor please, on the ground that it is merely a record of a conviction of a misdemeanor, which is not proper in this case to bring before the Court.

"The Court: Objection sustained. I don't think it is admissible.

"Mr. Tobey: It is not offered for the proof of any previous charge, nor is it offered in any respect other than to establish reputation as to chastity and morality.

"The Court: Read the last question. (Question read by the reporter.)

"The Court: You may answer that.

"The Witness: I think not in view of the contacts that I have had with him."

After the general manager of the utility district had testified that the reputation of the defendant, in the respects above mentioned, was good, the prosecutor asked him: "Did you know that on December 14, 1939, Mr. Neal pleaded guilty to two counts of contributing to the delinquency of a minor?" The witness answered, "No." Then counsel for defendant said: "I object to that and make a motion to strike that as not proper cross-examination. The time covered by the direct examination was within the last two years." The court said: "When was this period?" Counsel for defendant said, "1939." The court said: "Objection sustained. The answer may be stricken."

After the director of the district had testified that the reputation of the defendant was good, the prosecutor asked him: "Did you know of his plea of guilty to a charge of contributing on December 14, 1939?" Then the following occurred:

"Mr. Boland [counsel for defendant]: If your Honor please, I object on the ground that the direct examination was confined to a period of since 1940.

"The Court: Objection sustained.

"Mr. Boland: And I will ask the Court to instruct the jury to disregard the question.

"The Court: The jury is instructed to disregard that particular question.

"Q. By Mr. Tobey [prosecutor]: Did you know that on March 11, 1940, Mr. Neal was sentenced to one year in the County Jail on two counts of contributing?

"Mr. Boland: If your Honor please, I object to the introduction of any of that line of testimony on the ground it is incompetent, irrelevant and immaterial and not proper cross-examination.

"The Court: Objection sustained."

After the employee of the city college had testified that the reputation of defendant was good, the prosecutor asked her: "Did you know of his having been sentenced to the City Jail of Long Beach on March 11, 1940?" Defendant's counsel objected to the question upon the ground that it was not proper cross-examination, and that it was incompetent, irrelevant and immaterial. The objection was sustained.

It was prejudicial misconduct on the part of the prosecutor to ask a character witness if he knew that defendant had pleaded guilty to a charge of rape or to charges of contributing to the delinquency of a minor, or that he had been sentenced to the county jail or to a city jail, and to include in the question the alleged details as to the certain department of a certain court where the defendant allegedly pleaded guilty to rape, and to include the alleged details as to the withdrawal of that plea on a certain day and pleading guilty to contributing to delinquency on another certain day, and to include the alleged details as to the sentence and the terms of probation. See People v. McDaniel, 59 Cal.App.2d 672, 675-677, 140 P.2d 88. The court erred prejudicially in overruling the objection to that question, and in directing the witness to answer it. The asking of that question was designed to advise the jury indirectly, under the guise of cross-examination, concerning a matter which the prosecutor could not have presented directly, namely, that it was a fact that defendant had been convicted previously. That the question had the effect, which it was calculated it would have upon hearers, is indicated by the question which the witness thereupon asked the prosecutor, namely, "* * * are you presenting those as established facts?" It was also prejudicial misconduct for the prosecutor, in response to that question by the witness or for any reason at all, to announce that he had with him the records of the superior court, an information bearing a particular number, and that he would like to introduce that record in evidence.

The prejudicial misconduct of the prosecutor which occurred during the cross-examination of the first character witness was aggravated by his repeating parts of that prior question while cross-examining three other character witnesses. As above shown, he asked subsequent questions as follows: (1) He asked one of the other witnesses if he knew that defendant had pleaded guilty to contributing to the delinquency of a minor; (2) he asked another if he knew that defendant had pleaded guilty to contributing, and had been sentenced to the county jail; and (3) he asked another if she knew that he had been sentenced to the city jail of Long Beach. In addition to emphasizing the prior misconduct of the prosecutor, those subsequent questions, by reason of the variations therein as to the location of the jail to which defendant was sentenced, tended to create the impression that he had been sentenced to two different jails because he had been convicted in two different prior cases.

[3] Respondent asserts that the error, if any, in asking the character witnesses if they knew that he had been convicted, instead of asking if they had heard reports that he had been convicted, was harmless error for the reason that the witnesses answered in the negative. The alleged point of that assertion seems to be that since they answered they did not know of the conviction there was no implication that defendant had been convicted. The question of the prosecutor, which included many alleged details concerning a conviction, and his offer of the record in evidence, were tantamount to a declaration by the prosecutor that it was an established fact that defendant had been convicted. The negative answers of the witnesses did not render the errors harmless. Respondent asserts also that those questions were asked in good faith. After the court had sustained the defendant's objection to the question as to whether a witness knew of the prior conviction, the prosecutor asked three similar questions, and objections thereto were sustained. In view of the repeated asking of such question under those circumstances, it cannot be concluded that the prosecutor asked the questions in good faith.

[4, 5] It has been said, in referring to cases of this kind, that "No charge can be more easily made, and none more difficult to disprove." See People v. Adams, 14 Cal.2d 154, 164, 93 P.2d 146, 152. It was also said in that case, at pages 167, 168 of 14 Cal.2d, at page 153 of 93 P.2d, that ordinarily upon a charge of this nature the only defense available to the accused is his own denial together with evidence of former good reputation, and that by reason of the ease with which convictions may be secured "in cases of the instant kind that courts are at pains to insist upon fair trails in all respects being accorded to the accused." The evidence herein consisted principally of the uncorroborated statements of the alleged victim and the denial by the defendant. The testimony of the character witnesses on direct examination was limited to defendant's general reputation in the community for truth and morality. That general reputation was, of course, the estimation in which the defendant was held in the community as to those traits of character, and was not merely what the character witnesses thought of him. See People v. Long, 63 Cal.App.2d 679, 684, 147 P.2d 659. The cross-examination should have been restricted to questions which would test the sufficiency of the foundation for the direct testimony, and should not have been extended to include inquiries as to what the witnesses might think defendant's general reputation in the communty would be, or what the witnesses individually might think of him, if they had additional information. The misconduct of the district attorney in the present case was a flagrant abuse of such limited privilege of cross-examination of the character witnesses. Unless such misconduct in the cross-examination of character witnesses is discontinued it may become necessary to place further limitations upon cross-examination of such witnesses.

The judgment is reversed and the cause is remanded for a new trial.

SHINN, Acting P. J., and McCOMB, J. (assigned), concur.

86 Cal.App.2d 49

In re SLACK'S ESTATE.

KUCHEL v. SLACK et al.

Civ. 13707.

District Court of Appeal, First District,
Division 1, California.
June 8, 1948.

1. Taxation ⚿895(7)

The statutory provision, limiting amount deductible as federal estate tax from appraised value of decedent's property for state inheritance tax purposes to amount computed by appraiser on application of federal tax exemptions and rates at time of decedent's death, permits deduction of less than amount due or paid federal government, if appraiser's valuation of taxable estate is less than valuation accepted by federal government, particularly in view of preceding provisions. Revenue and Taxation Code, §§ 13981, 13982, 13989.

2. Taxation ⚿895(7)

The word "paid" in statutory provision, limiting deductions from appraised value of decedent's property for inheritance tax purposes to obligations of decedent or his estate and amounts paid by estate or transferee, does not mean physical payment of money, but amount finally fixed and enforcible. Revenue and Taxation Code, § 13982.

See Words and Phrases, Permanent Edition, for all other definitions of "Paid".

3. Taxation ⚿895(7)

A state inheritance tax appraiser's determination of amount of federal estate taxes against decedent's estate on basis of valuation thereof as of date of his death does not determine that such taxes are due within statutory provision for deduction of amount due or paid federal government as estate tax from appraised value of decedent's property for state inheritance tax purposes, in view of federal statutes declaring federal estate tax due and payable 15 months after decedent's death and permitting executor to value estate for estate tax purposes as of one year after decedent's death. Revenue and Taxation Code, § 13989; 26 U.S.C.A.Int.Rev. Code, §§ 811(j), 822(a) (1).

4. Taxation ⚿895(6)

Debts owed by decedent at date of his death, within statutory provision for deduction of such debts in computing inheritance tax, are debts actually existing, and statute does not artificially create debts not in fact existing. Revenue and Taxation Code, § 13983.

5. Taxation ⚿895(6, 7)

The only deductions allowable under statute from appraised value of decedent's property for inheritance tax purposes are obligations of decedent or his estate, which have been paid or on which liability has attached, so that they are actually due. Revenue and Taxation Code, §§ 13981–13983, 13989.

6. Taxation ⚿895(7)

Under statutory provision for deduction of any amount due or paid federal government as estate tax from appraised value of decedent's property for state inheritance tax purposes, federal estate taxes need not be actually paid, but must be due in sense that they will be paid without change in amount, to be deductible. Revenue and Taxation Code, § 13989.

7. Statutes ⚿219

The state controller's policy of allowing amount of inheritance tax appraiser's estimate of federal estate tax, rather than amount actually paid federal government, as deduction from appraised value of decedent's property for state inheritance tax purposes, is not persuasive confirmation of correctness of such allowance as contemporaneous administrative construction of statute, in view of controller's rule that in case of difference between such amounts, deduction allowed is smaller amount. Revenue and Taxation Code, § 13989; Administrative Code, § 835; 26 U.S.C.A.Int.Rev. Code, § 811(j).

8. Evidence ⚿47

The District Court of Appeal takes judicial knowledge of state controller's inheritance tax rules and regulations incorporated in administrative code. Pol.Code, § 725.3; Code Civ.Proc. § 1875, subd. 3; Administrative Code, § 835.

9. **Statutes** ⚷219

The state controller's interpretation of statutory provisions for deduction of federal estate taxes in computing state inheritance taxes by his rule that, in case of difference between amount of federal tax, as computed by state inheritance tax appraiser, and amount actually paid federal government, smaller amount shall be deducted, is entitled to great weight in determining meaning of such provisions, and controller's failures to act according to such rule cannot be considered administrative interpretations to be given weight by Court. Revenue and Taxation Code, §§ 13981–13983, 13989; Administrative Code, § 835.

10. **Taxation** 895(6)

The statutory requirement that nothing which does not actually reduce amount of inheritance shall be allowed as deduction from appraised value of decedent's property in computing inheritance tax was not met by actual reduction of net inheritance by shrinkage of values of securities of estate during year following decedent's death, as the item claimed as deduction, not general reduction in value of estate, must reduce inheritance. Revenue and Taxation Code, § 13981.

11. **Taxation** ⚷895(4)

The value of securities of decedent's estate is their value at time of his death, and any subsequent appreciation or depreciation in value thereof is immaterial in computing value of estate for inheritance tax purposes. Revenue and Taxation Code, § 13981.

12. **Taxation** ⚷887, 895(1, 9)

While state's right to inheritance tax accrues at time of decedent's death, amount of tax may be determined thereafter and, when so determined, relates back to time of death.

13. **Taxation** ⚷856

An inheritance tax is not a "property tax," but essentially a tax on statutory privilege of testamentary transfer or succession, and the state, in extending such privilege, may place such limitations thereon as it deems proper in way of burdens on its exercise.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Tax".

14. **Taxation** ⚷895(6)

In case of doubtful validity of claims deductible from appraised value of decedent's estate for inheritance tax purposes, question of deduction thereof may be postponed until doubt is resolved.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of Charles W. Slack, deceased. From an order fixing an inheritance tax in the amount determined by an appraiser after deducting the amount of a federal estate tax as computed by him, instead of a smaller amount actually paid by Edith Slack and another, as executrices of deceased's will, from the appraised net taxable value of the estate, Thomas H. Kuchel, as state Controller, appeals.

Reversed.

James W. Hickey, of Sacramento, and Richard C. O'Connor, and Raymond G. LaNoue, Deputy, both of San Francisco, for appellant.

Slack, Zook & Edwards, of San Francisco, for respondents.

BRAY, Justice.

Appeal by the State Controller (upon an agreed statement) from an order of the superior court fixing inheritance tax.

Charles W. Slack died December 20, 1945. The inheritance tax appraiser appointed by the Probate Court appraised the net taxable value of his estate as of the date of death at $882,789.87. Applying the federal estate tax rates and exemptions to this valuation, the appraiser computed a federal estate tax of $223,718.30. This amount he allowed as a deduction, thus reaching a final valuation subject to inheritance tax of $659,071.57. Applying the rates of the state inheritance tax to this figure, he fixed the inheritance tax to be paid by the beneficiaries under the decedent's will at $38,421.06.

During probate, certain securities of the estate declined in value and the executors took advantage of that provision of the Internal Revenue Code (26 U.S.C.A.Int.Rev.Code, § 811(j) which permits the executor, at his option, to value the estate for estate tax purposes as of one year after decedent's death, instead of at the date of death. Based on such valuation the federal estate taxes actually paid amounted to $207,096.87, instead of $223,718.30 as computed by the appraiser, valuing the estate as of the date of death. Appellant, the State Controller, filed objection to the appraiser's report on the ground that the deduction for federal estate tax should have been only the amount actually paid, rather than the amount computed by the appraiser; he contended that deducting only the estate tax actually paid, the correct amount of inheritance tax would be $39,916.98, or $1,495.92 more than that fixed by the appraiser. The trial court overruled the objection of the Controller, approved and confirmed the figures as determined by the appraiser, and fixed the inheritance tax at the lower figure.

There is no dispute as to the correctness of the various computations. The parties are concerned with the principle rather than the amount involved. The only issue is whether the federal estate tax deduction shall be that actually paid, which is based upon the valuation of the estate as of one year after death, or that based upon the valuation of the estate at the date of death.

This case is one of first impression, as neither counsel nor we have been able to find any case in any jurisdiction directly in point.

Section 13989, Revenue and Taxation Code, provides: "Any *amount due or paid* the Government of the United States as a Federal inheritance or estate tax in the estate of any decedent is deductible from the appraised value of property included in any transfer subject to this part made by the decedent. The amount deductible is *limited* to an amount computed by the inheritance tax appraiser upon an application of the Federal inheritance or estate tax exemptions and rates (commencing at the primary rates) in force at the date of decedent's death to that portion of the decedent's property the transfer of which is subject both to the tax imposed by this part, and to any Federal estate tax law, and upon his own valuation of that portion." (Emphasis added.)

Respondents rely upon the concluding clause of that section, and contend that the appraiser's valuation of the estate as of the date of death is wholly controlling for the purpose of fixing the estate tax deduction. Appellant contends that the entire section must be considered as a whole and in connection with the following sections: Section 13981, which provides: "This article is a limitation on deductions allowable. It is not intended by this article to allow as a deduction *anything that does not actually reduce the amount of an inheritance or transfer*"; and section 13982, which provides: "In determining the market value of property included in any transfer subject to this part, the deductions specified in this article, and no others, are allowed against the appraised value of the property, if the deductions: (a) Are obligations of the decedent or his estate, except as otherwise indicated in this article; and (b) Are paid by the estate or the transferee." (Emphasis added.)

[1, 2] The first sentence of Section 13989 provides that the deduction which is allowable is "Any amount due or paid the Government" as an estate tax. The second sentence limits the deduction to an estate tax using rates and tax in force at the date of decedent's death, computed by the inheritance tax appraiser upon his valuation of the portion of the estate subject to both federal estate and state inheritance taxes. This sentence is a limitation upon and not an enlargement of the first sentence. In other words, the amount deductible by virtue of the first sentence can never be greater than the amount "due or paid," but by virtue of the second sentence may be less, if the valuation placed upon the taxable estate by the appraiser is less than the valuation accepted by the federal government. It protects the state against a federal appraisement which is

higher than the state appraisement. Particularly is this so when this section is read in conjunction with sections 13981 and 13982. The former section provides that the article is a limitation on deductions allowable and that "anything that does not actually reduce the amount of an inheritance" shall not be allowed. The latter section imposes two conditions which must appear before any item can be allowed as a deduction: (1) it must be an obligation of the estate, and (2) it must be paid. It is obvious that the amount of the inheritance is not reduced by an estimate made by the appraiser, and which amount is not due and will not be paid the government. While section 13982 uses the words "Are paid," it is obvious, in considering that section with the other sections and the subject matter, that the money in payment of the obligation does not have to be physically paid. The word "paid" in this sense means the amount finally fixed and which is enforceable.

[3] Section 13989 uses the language "due or paid." Respondents argue that the determination by the inheritance tax appraiser of the amount of estate taxes based on the estate valuation as of the date of death determines that such taxes are "due." However, this contention overlooks the fact that the Internal Revenue Code (26 U.S.C.A.Int.Rev.Code, § 822 (a) (1) provides that the federal estate tax "shall be due and payable fifteen months after the decedent's death." Considering this section with section 811(j), it appears that the only amount ever due is that which is fixed after the executor exercises his option as to the date on which the valuation is to be based. Thus, unless and until the executor chooses the valuation date, the estate tax could not in any sense be due, and even though the executor chooses the date of death as the valuation date, the tax is not due until fifteen months thereafter. See Walker v. Mann, Tex.Civ.App.1940, 143 S.W.2d 152, 155.

[4-6] If the language in section 13982, "paid by the estate or the transferee" is inconsistent with "Debts of a decedent owed by him at the date of his death are deductible" in section 13983, and with "Any amount due or paid" in section 13989, such fact does not help respondents. The tax which respondents desire deducted comes within neither the classification "due" nor the classification "paid." It is merely an estimated tax, the whole of which was never paid or due the federal government. "The Inheritance Tax Act * * * is quite convincing to the point that a debt of which the act takes notice is one which has actual existence, and it does not attempt to artificially create a debt where in fact none exists." Estate of Parrott, 199 Cal. 107, 112, 248 P. 248, 249. Section 13982 read with the other sections discloses the intent of the Legislature that the deductions to be allowed are only those which have been paid or in which the liability has been attached so that they are actually due. Under section 13989, to be deductible the federal estate taxes do not have to be actually paid, but must be due in the sense that they will be paid without change in amount.

[7-9] Respondents contend that from the year 1935 when the optional valuation in estate taxes was first provided, until 1947, the State Controller followed the policy of allowing as a deduction the appraiser's estimate of the estate tax, rather than the tax paid after exercise of the option. They then argue that such policy is a persuasive confirmation of the correctness of their position, as being a contemporaneous administrative construction of the code sections, citing Sutherland on Statutory Construction (3d Ed., 1943), Sec. 5107, and Coca-Cola Co. v. State Board or Equalization, 25 Cal.2d 918, 156 P.2d 1. However, such contention is unfounded. In 1941, the Controller promulgated "Rules and Regulations Relating to the Inheritance Tax Act." Rule 462 there was incorporated in the California Administrative Code, on its adoption in 1945, as section 835. (This court takes judicial knowledge of these rules and regulations. (Pol.Code, Sec. 725.3; Code CivProc., Sec. 1875, subd. 3.) This rule provides, in effect, that in case of difference between the amount computed by the state appraiser and the amount actually paid to the federal government, the deduction allowed is whichever amount is smaller. Under authorities cited by respondents, this inter-

pretation by the administrative officials is entitled to great weight in determining the meaning of the code sections involved. If it be true that the Controller has not always acted according to this rule and this construction, such failure in the face of such a rule cannot be considered an administrative interpretation that should be given weight by this court. Either we should consider the rule, or hold that because of conflict between the rule and the action of the Controller there is no contemporaneous administrative construction of any value.

[10, 11] Respondents argue that because the value of the estate diminished in the year following the death of the decedent, the requirement of section 13981 that the item allowed as a deduction must actually reduce the amount of the inheritance, was met by the fact that the net inheritance was actually reduced by the shrinkage of values. This is a strained construction of the section. It is the item claimed as a *deduction* which must reduce the inheritance, not a general reduction in value of the estate. As said in Estate of Spitly, 124 Cal.App. 642, 13 P.2d 385, 386, "The value of * * * securities * * * is their value at the time of the death of the decedent, and any subsequent appreciation or depreciation in their value is immaterial * * *."

The confusion resulting in the claim that the Controller is attempting to *increase* the inheritance tax because of a *decrease* in the value of the estate and of the inheritance, is due to the assumption that there is a change in the amount of the estate tax deductible. The estimate by the state appraiser is only an estimate. There is only one estate tax "due or paid" the government. That is the tax fixed by the government on the value of the estate on the date selected by the executor. This amount "due or paid" is not changed, although it may vary from the amount of the estimate.

While it may constitute an anomalous situation, that the value of the estate at the time of death is the value to be used for state inheritance tax purposes, while the value for federal inheritance and estate taxes may under the optional system be the value one year after death, and in such event the latter valuation is the basis for the deduction allowed in the state taxes on the former valuation, still that situation arises because there is no provision in the state inheritance tax act comparable to section 811(j) of the federal act. The state has the absolute right to deny any deduction whatever for federal estate taxes. See Estate of Watkinson, 1923, 191 Cal. 591, 217 P. 1073, and Stebbins v. Riley, 268 U.S. 137, 45 S.Ct 424, 69 L.Ed. 884, 44 A.L.R. 1454. The history of the relation between federal estate taxes and the California inheritance taxes is interesting. In the original inheritance tax act there was no provision for a deduction of federal estate taxes. In Estate of Miller, 184 Cal. 674, 195 P. 413, 414, 16 A.L.R. 694, the court in construing the inheritance tax act as it existed in 1916, held that as the tax was to be computed on the "clear market value" of the "beneficial interest," the federal estate tax should be deducted "since it is plain that what the transferee receives is only the portion of what the decedent left which remains after the federal tax is taken." 184 Cal. at page 680, 195 P. at page 415, 16 A.L.R. 694. In 1917, the inheritance tax act was amended to provide definitely that no deduction should be made for any inheritance or estate tax paid to the government of the United States. (Stats. 1917, p. 883.) The constitutionality of this amendment was upheld in Estate of Watkinson, supra, and Stebbins v. Riley, supra. In 1921, this amendment was repealed and the provisions that are now codified in section 13989 were first adopted.

[12–14] While our inheritance tax law encourages the prompt settlement of estates by allowing a percentage credit for payment of inheritance taxes within six months of the date of the death, and the federal estate tax return does not have to be filed or the tax paid until fifteen months after date of death, and while it probably takes considerable time for such return to be audited and the federal tax finally fixed, and although the state inheritance taxes are due at date of death and become delinquent two years thereafter, with attendant penalties, those facts do not change the plain meaning of the sections involved. "* * * the right of the state to the tax accrues at the time of death, but this does not mean that the tax may not be thereafter determined, and when so determined it relates back to the time of death." Estate of Parrott, supra, 199 Cal. at page 112, 248 P. at page 250. As a practical matter the executors are fully protected by paying the inheritance tax based upon the estimate of the inheritance tax appraiser, subject to later adjustment when the amount of the federal tax is determined. Although this may be a burden, "an inheritance tax is not a property tax, but is essentially a tax upon the statutory privilege of testamentary transfer or succession, and * * * the state in extending the privileges may place such limitations upon it as it deems proper in the way of burdens upon its exercise." Estate of Watkinson, supra [191 Cal. 591, 217 P. 1076]. Moreover, as said in Estate of Parrott, supra, 199 Cal. at page 112, 248 P. at page 250, in speaking of claims which are deductible, "In cases of doubtful validity the question of deduction may be postponed until the doubt is resolved. Matter of Dimon, 82 App.Div. 107, 81 N.Y.Supp. 428. The act, which is very comprehensive, expressly recognizes the impracticability of determining the indebtedness of a decedent at the time of death, and provides in numerous sections for the refund of taxes erroneously paid, as well as for the assessment of the tax in cases where deductions for debts have been erroneously made."

That it is the policy of the state that the only deductions permitted are those items which the estate has actually paid or is liable for, rather than an estimate, is shown by the California cases considering the subject. In Estate of Parrott, supra, deceased and her brother were joint makers of a promissory note and mortgage. The brother at all times was solvent. After the claim was presented and allowed against the estate for the full indebtedness, the brother paid his half of the obligation. The estate claimed a deduction from the inheritance tax appraisement of the entire amount of the note rather than the amount for which it was actually liable. The court held that although the note, as between payer and payee, possessed the potentialities of an enforceable demand against either one of the debtors, that fact affected the estate only in the proportion of its liability. The allowance of the claim in full did not change the situation that the estate actually would be required to pay half of it only, and the only deduction which could be made for inheritance tax purposes would be that amount.

The order appealed from is reversed.

PETERS, P. J., and WARD, J., concur.

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86 Cal.App.2d 43

In re TERSIP'S ESTATE.

HENSLEY v. TERSIP.

Civ. 16199.

District Court of Appeal, Second District,
Division 3, California.
June 7, 1948.

1. Marriage 🔑13, 18

Under Minnesota law, essence of the contract of marriage is the consent of the parties, and to give rise to a common law marriage there need only be an agreement in the present tense by the parties to be husband and wife, and cohabitation is unnecessary. M.S.A. § 602.02.

2. Marriage 🔑50(5)

Evidence sustained finding that a common law marriage was contracted under Minnesota law by man and woman who lived together ostensibly as husband and wife for about two years and were generally reputed to be such. M.S.A. § 602.02.

3. Executors and administrators 🔑32(1)

Alleged widow's wrongful assertion that she was deceased's surviving wife, was "constructive fraud" warranting her removal as administratrix. Probate Code, § 521.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Fraud".

4. Executors and administrators ⚷32(1), 35(3)

The word "fraud" as used in section of the Probate Code empowering court to remove a personal representative who has committed or is about to commit a "fraud" on the estate, should be given its broadest meaning. Probate Code, § 521.

5. Executors and administrators ⚷91

A court must exact of an administrator or executor the ultimate in the performance of fiduciary duties.

6. Executors and administrators ⚷35(3)

An administrator who asserts false claims against the estate, to the prejudice of others interested in the estate, is guilty of "constructive fraud" warranting his removal. Probate Code, § 521.

◆

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Proceeding in the matter of the estate of William J. Tersip, deceased, wherein Paul Hensley filed a petition for an order revoking letters of administration previously granted to Jeanne E. Tersip as administratrix of the deceased's estate, removing her as administratrix, and ordering her to produce and file any wills of the deceased. From an order in favor of the petitioner, Jeanne E. Tersip appeals.

Affirmed.

Weinstein & Bertram, of Los Angeles, for appellant.

G. V. Cutler, of Burbank, for respondent.

SHINN, Acting Presiding Justice.

This is an appeal by Evelyn Jeanne Tersip from an order revoking letters of administration theretofore granted to her as administratrix of the estate of William J. Tersip, deceased, removing her as administratrix and ordering her to produce and file any and all wills of said decedent, if any there be.

The order was made after hearing had upon a petition filed by one Paul Hensley, a nominee of a niece of decedent. The basis for the petition and the order was that appellant had been appointed pursuant to her application for letters in which she alleged herself to be the surviving wife of decedent, whereas, in fact, she was not the wife of the decedent or related to him, but was the wife of one Robert G. Roberts. The proof of the petitioner tended to establish a common law marriage between appellant and said Roberts in the state of Minnesota, contracted some time during the period from 1933 to 1935. Appellant denied the common law marriage and testified that she was married to William J. Tersip in Tiajuana, October 23, 1942. The trial court found that appellant is the common law wife of said Roberts, that she was never legally married to Tersip, and that when she filed her petition for letters of administration she knew that she was not the surviving spouse of said decedent.

The finding that appellant was not legally married to Tersip, broadly interpreted as it should be in support of the order, should be construed as a finding that there was no marriage ceremony as testified to by appellant. Her testimony was that Tersip took her to Tiajuana in October, 1942, where he introduced a man to her as a priest; there was a ceremony conducted in broken English which she did not understand; that she did not think it was in a church; that the man signed what he said was a certificate of marriage, that she signed it and that she did not know what had become of it; that both she and Tersip were Catholics and could not be married in a Catholic church, and that she thought the ceremony was performed in a residence but did not know its location. One Mikulcic, an acquaintance of decedent, testified that in the fall of 1941 he visited decedent in the La Brea Sanitarium; that Tersip told him at that time that he and appellant intended to be married in Tiajuana; that about three days after that appellant and Tersip came to his house, took him out to dinner, appellant had a ring which she showed him, and Tersip said they had been married in Tiajuana. No documentary or other evidence was produced in support of appellant's claim that she had married Tersip, nor was there evidence that any effort had been made to locate a record of the marriage in Tiajuana. Appellant's account of the marriage was extremely casual and, in view of her lack of interest to produce a record of it, was unconvincing. A statement of identity signed by Tersip for the benefit of a title company was received in evidence. It stated that he and appellant were married in Mexico City, October 15, 1942. Appellant had come to California from Minnesota in 1937, and in April, 1939, had established the Glen Braw Sanitarium in Los Angeles. Tersip was an employee in her sanitarium but had no interest in it. About January, 1941, she and Tersip opened a joint bank account in the names of William J. or Jeanne E. Tersip. In 1945, real estate was conveyed to them in joint tenancy but it had been sold prior to the death of Mr. Tersip, and reference was made in the testimony to other property which had been conveyed to them in like manner. While there was no express finding that the alleged ceremony of marriage was not performed in Tiajuana, we are obliged to imply one from the finding that appellant was not legally married to Tersip. We must therefore assume that the court did not believe the testimony of appellant and rejected as unsatisfactory the evidence respecting that marriage ceremony. On this ground alone we would be obliged to affirm the order.

There was also, in our opinion, sufficient evidence to justify the finding that appellant had contracted a common law marriage with Roberts in Minnesota, and that it had not been dissolved. She testified to the following facts: She had been married before to a man named Wirth, by whom she had three children. She first met Roberts at Breezy Point, Minnesota, in 1929. He was the superintendent of a large resort and appellant was employed by him for the season as a cook. Except for three summer months Roberts was in railroad work. Appellant saw him from time to time until 1932 when he was in a hospital with a broken leg and appellant went to see him. In the meantime she had taken up nursing. She was unemployed at the time, her three children were with her former husband, and Roberts employed her for $75 per month to keep house for him and nurse him. There was no evidence that this arrangement was continued or that she was paid for her services. Before he left the hospital Roberts was transferred to Hastings, Minnesota and at his request appellant went to Hastings and rented a house, arranged to have his furniture moved and to set up housekeeping when he should leave the hospital. Hastings was a small town where Roberts was well known, and at Roberts suggestion it was agreed that they would let the general public believe that they were married. They moved into a two-story house with one bedroom on the first floor and three on the second floor. This was the home of Roberts, appellant and her three children, for some two years. Appellant did not tell any one in Hastings that they were not married, except a priest and one friend of hers, a Mrs. Drum. The home in Hastings was rented by appellant under the name of Mrs. Fred Roberts, and she used a railroad pass issued to Mrs. Fred Roberts. She opened her sanitarium in Los Angeles under the name of Jeanne E. Roberts and when Roberts came to California in 1939 appellant, with the assistance of a doctor, gained him admittance to Rancho Los Amigos, a public institution. She was listed on the records there and known as the wife of Roberts, visited him frequently, and in corresponding with him signed herself Jeanne Roberts. In explanation of her procuring his admittance to the hospital she stated: "I know he was at a private sanitarium and it was costing me so much money I couldn't keep it up."

Witnesses in Hastings testified by deposition to the residence of appellant with Roberts for some two years, that appellant introduced Roberts as her husband and was generally known as Jeanne Roberts. She attended to Roberts' business and cashed his checks under that name. Among the witnesses were their landlord in Hastings, a tradesman and other intimate acquaintances. It was satisfactorily proved that the parties lived together ostensibly as husband and wife and were generally reputed to be such.

Common law marriages were then recognized in Minnesota. According to the decisions in that jurisdiction, the evidence was sufficient to justify an inference that appellant and Roberts had entered into an oral contract of marriage in the early stages of their cohabitation.

"When the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the party against whom the proceeding is instituted, or of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent." M.S.A. § 602.02.

[1] "The essence of the contract of marriage is the consent of the parties, as in the case of any other contract; and, whenever there is a present, perfect consent to be husband and wife, the contract of marriage is completed. The authorities are practically unanimous to this effect. * * * The whole law on the subject is that, to render competent parties husband and wife, they must and need only agree in the present tense to be such, no time being contemplated to elapse before the assumption of the status. If cohabition follows, it adds nothing in law, although it may be evidence of marriage. It is mutual, present consent, lawfully expressed, which makes the marriage." In re Hulett's Estate, 66 Minn. 327, 69 N.W. 31, 33, 34 L.R.A. 384, 61 Am.St.Rep. 419.

"It involves generally living together as husband and wife in the same habitation, so where one lives and dwells, there the other lives and dwells; but there must, generally speaking, be something more than mere living together; there must be an association consciously and openly, as husband and wife." (35 Am.Jur. p. 328.)

"Where there is no proof of any express written or oral agreement, there must be evidence of cohabitation as man and wife, or the assumption openly of marital duties and obligations, continued for such time and to such an extent as to reasonably sustain the conclusion or inference that the parties have agreed to become and be husband and wife. The cohabitation and conduct must be of some continuance and such as is usual between persons lawfully married." Ghelin v. Johnson (In re Lust's Estate), 186 Minn. 405, 243 N.W. 443. A finding that a marriage was proved under the Minnesota law by evidence not unlike that which is before us was sustained in Wilson v. Wilson, 139 Neb. 153, 296 N. W. 766.

[2] The finding that appellant was the wife of Roberts at the time of her alleged marriage to Tersip is supported by the facts proved and the law of Minnesota which governed at the time.

[3-6] We do not doubt that appellant's wrongful assertion of claims to the rights of a surviving wife, based upon her false representation of widowhood was a ground upon which the court was empowered to remove her under section 521, Probate Code, as one who had committed or was about to commit a fraud upon the estate. The word "fraud" as used in the section should be given its broadest meaning. It would apply to the conduct of appellant in the capacity of administratrix. It is not necessary that actual fraud has been, or is about to be committed. The court must exact of an administrator or executor the ultimate in the performance of fiduciary duties and should be satisfied with nothing less. An administrator who asserts false claims against the estate to the prejudice of others interested in the estate is guilty of constructive fraud. We cannot deny the power of the court to remove its representative whose self-interest stands in the way of a fair and impartial representation of the rights of all other claimants to an estate in probate. When that self-interest has once been asserted the court may properly assume that it will continue to be asserted, and may act accordingly. For this reason it may remove an administrator when it appears that constructive fraud, consisting of breaches of fiduciary duty, are about to be committed. It was to be assumed that appellant would not protect the rights of others in the estate against her own claims. Such continuing conflict of interest, especially where the claims of appellant were unfounded, rendered her unfit to serve as administratrix and the threatened breach of duty was properly forestalled by the order of removal.

Since we uphold the statutory power of the court to remove appellant, for the reasons stated, it is unnecessary to decide whether, independently of the statute, there is power to remove an executor or administrator whenever such action appears necessary for the protection of the estate or the courts. See Luckey v. Superior Court, 209 Cal. 360, 370, 287 P. 450; Koury v. Castillo, 13 N.M. 26, 79 P. 293, 294; Ross v. Pitcairn, Mo.Sup., 179 S.W.2d 35, 37; Estate of Bell, 135 Cal. 194, 196, 67 P. 123; Estate of Palm, 68 Cal.App.2d 204, 212, 156 P.2d 62.

Finally, it must be understood that we are not affirming the order as one which vacated the order of appointment. The proceeding was one for removal, and the parties have treated it as such. The question is not raised whether it could also be regarded as an attack upon the validity of the first order, and we do not consider that point.

The order is affirmed.

WOOD, J., and VALLÉE, J. pro tem, concur.

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86 Cal.App.2d 67

In re MUNSON'S ESTATE.

MUNSON v. FIRST TRUST & SAVINGS BANK OF PASADENA et al.

Civ. 16065.

District Court of Appeal, Second District,
Division 3, California.
June 8, 1948.

1. Trusts 🔑271½

A beneficiary of a testamentary trust, as well as the trustee thereof, is entitled to petition court for instructions to trustee. Probate Code, § 1120.

2. Trusts 🔑271½

Probate court had jurisdiction to determine during administration of testamentary trust whether promissory note, made by a deceased beneficiary and held as an asset of trust estate, should be charged against interest of those who succeeded to interest of deceased beneficiary. Probate Code, § 1120.

3. Trusts 🔑271½

The statute pertaining to testamentary trusts gives probate court jurisdiction over practically all controversies which might arise between trustees and those claiming to be beneficiaries. Probate Code, § 1120.

4. Trusts 🔑271½

The fact that issue as to method of charging a note executed by deceased beneficiary and held as an asset of trust estate could be tried upon termination of trust estate does not foreclose use of a petition for instructions to trustee for purpose of determining issue during administration of trust estate. Probate Code, § 1120.

5. Trusts 🔑271½

Although probate court was empowered to determine issue as to method of charging a note executed by deceased beneficiary and held as an asset of trust estate before close of trust estate, order reserving determination of such issue until close of trust was a proper disposition thereof in view of prior order so reserving the determination of issue on objections to trustee's annual account.

6. Trusts 🔑271½

Where testamentary trustee petitioned in annual account for permission to charge off as worthless a note held by trust estate and executed by deceased beneficiary, and second beneficiary objected and requested that matter be deferred until close of trust, which request was granted, order reserving determination of such issue was res judicata as to second beneficiary's subsequent petition to have issue determined before termination of trust. Probate Code, § 1120.

7. Trusts 🔑271½, 297

Statutory proceedings for settlement of testamentary trustee's account or for instructions to trustee are in rem. Probate Code, § 1120.

8. Motions 🔑61

An application in administration of testamentary trust estate to set aside a previous order which had become final is a "collateral attack," and such order, unless void on its face, may not be set aside on such attack.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

9. Appeal and error ⚷843(1)

Where particular issue was wholly academic both under circumstances existing at the time of trial and under prospective circumstances, no decision on such issue was required.

10. Limitation of actions ⚷132

Statute of limitations does not run against a claim against an estate from the time it is allowed pending open and unsettled administration. Probate Code, § 708.

11. Appeal and error ⚷843(2)

Where claim of testamentary trustee on note executed by deceased beneficiary and held as an asset of trust estate had been allowed and approved in course of administration of beneficiary's estate, question of statute of limitations on note was not of immediate importance so as to require an immediate determination of issue as to manner in which note should be charged with respect to those who succeeded interest in trust of deceased beneficiary. Probate Code, §§ 708, 1120.

12. Appeal and error ⚷854(2)

Order was affirmed where it was correct under conditions then existing irrespective of whether reason assigned by trial judge for his decision was correct.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Proceeding in the matter of the estate of Spencer M. Munson, deceased, on the petition of Harry R. Munson for instructions to the trustee of a testamentary trust created by decedent's will, opposed by First Trust & Savings Bank of Pasadena, trustee, and by John S. Munson and others. From an order denying the petition, petitioner appeals.

Affirmed.

Roland Maxwell and Paul H. Marston, both of Pasadena, for appellant.

Cruickshank, Brooke, Dunlap & Ross, of Pasadena, for contestant and respondent.

Brown, Hamill & Hunt, of Pasadena, for heirs at law and respondents.

WOOD, Justice.

Petitioner, one of the beneficiaries of a testamentary trust, appeals from an order denying his petition for instructions to the trustee.

In accordance with the terms of the will of Spencer M. Munson, the decree of distribution in his estate directed the trustee as follows: to pay to Maude McEwen, during her lifetime, the sum of $125 per month; to pay the balance of the income from the trust estate, after deducting certain expenses, in equal monthly installments to Edward H. Munson and Harry R. Munson, sons of the decedent, during the life of Maude McEwen; that in the event that either Edward H. Munson or Harry R. Munson shall die prior to the death of Maude McEwen, then the income to which such deceased son would have been entitled shall be paid to the "heirs at law of such deceased son living at the date of the death of Spencer M. Munson, according to the laws of succession in the State of California" ; that upon the death of Maude McEwen to divide the corpus of the trust estate equally between Edward H. Munson and Harry R. Munson; and that the "heirs at law of any deceased son to take their parent's share by right of representation."

Maude McEwen is still living. Edward H. Munson died subsequent to the decree of distribution, leaving two sons and two daughters surviving him who were living at the date of the death of Spencer M. Munson.

Included in the property of the trust estate is a note in the amount of $23,500 executed by Edward H. Munson. A creditor's claim for the amount of the note, which was filed by the trustee herein against the estate of Edward H. Munson, was allowed and approved. The representative of the estate of Edward H. Munson paid $169.54 to the trustee in part payment of the creditor's claim, and then advised the trustee that no further payment could be expected.

The trustee herein rendered the fifteenth annual account and requested permission therein to "charge the note off as worthless, and make no further accounting of said asset." Petitioner herein filed objections to the fifteenth annual account and alleged that the "indebtedness should continue to be carried as an asset of said trust estate until the termination of the trust, at which time the share received by the heirs of said Edward H. Munson, deceased, should be charged with the balance due upon said indebtedness." The court made an order on June 30, 1944, settling the fifteenth annual account and denying the trustee permission to charge off the balance due on the note; and ordering that the trustee "carry said note as an asset of said trust estate until the termination of the trust"; and ordering "That the question of whether said note of Edward H. Munson shall be charged against the interest of any certain beneficiary or beneficiaries of said trust be and the same hereby is reserved for determination at the time of final distribution of the trust estate."

On May 20, 1946, petitioner filed the petition now before the court by which he sought to have it determined that the balance due on the promissory note was a charge against the interests of those beneficiaries who "succeeded to said interest" of Edward H. Munson, including their interests in the corpus of the trust estate and their interests in the income during the existence of the trust estate. The trial court denied the petition "for lack of jurisdiction at this time to pass on the questions presented by said petition without prejudice to the right of the said Harry R. Munson to present said petition and to raise all questions therein contained at the time of the termination of said trust and the distribution to the beneficiaries of the property constituting said trust estate."

Apparently this proceeding for instructions is based upon section 1120 of the Probate Code. That section provides in part as follows: "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass * * * upon * * * termination of the trust. * * * The trustee may also petition such court, from time to time, for instructions as to the administration of the trust. * * *"

[1] A beneficiary of a testamentary trust is also entitled to petition the court for instructions to the trustee. Estate of Smith, 4 Cal.App.2d 548, 552, 553, 41 P.2d 565.

[2-5] Appellant contends that the court did have jurisdiction to determine, during the administration of the trust, whether the note should be charged against the interest of those who succeeded to the interest of the deceased beneficiary. This contention is sustained. In the case of Estate of Smith, supra, it was said, 4 Cal.App.2d at page 552, 41 P.2d at page 567: "We believe the language employed in the present section [1120] of the Probate Code was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust." In Estate of Loring, 29 Cal.2d 423, 175 P.2d 524, a petition by the trustees of a testamentary trust for instructions regarding distribution was heard and determined during the administration of the trust. In Estate of Howe, Cal.Sup., 189 P.2d 5, wherein the executor in a petition for instructions asked for a determination in regard to the ownership of a business, there was a discussion as to whether the probate court had power to try an issue of title upon a petition for instructions. The court said, 189 P.2d at page 6: "There is no express statutory procedure for determining an issue of title as between an executor and the estate which he is administering. The fact that such an issue may be tried upon the hearing of objections to the settlement of the executor's account does not foreclose the use of a petition for instructions for the purpose of obtaining an adjudication in regard to the ownership of property. The probate court, therefore, had jurisdiction to entertain the petition of Netz [the

executor] * * *." Even if section 1120 of the Probate Code were not broad enough to include a petition for instructions as to the issue in controversy in the present case, it would seem, under the holding in Estate of Howe, supra, that the fact that the issue here could be tried upon the termination of the trust estate would not foreclose the use of a petition for instructions for the purpose of determining the issue during the administration of the trust estate. Although a court is empowered to determine such an issue before the close of a trust estate, the order herein reserving the determination of such issue until the close of the trust was a proper disposition of the present matter in view of the prior order of June 30, 1944, so reserving the determination of the same issue.

[6-8] As above shown, the fifteenth annual account included a request by the trustee for permission to charge off the note indebtedness. The petitioner herein filed objections to that request on the ground that if said indebtedness should be charged off and eliminated from the assets, the heirs of Edward H. Munson would receive one-half of the amount that is finally distributed without any charge being made against that one-half for funds already received by Edward H. Munson. This petitioner asked in that proceeding, as above shown, that said indebtedness be carried as an asset of the estate until the termination of the trust and that at that time the share to be received by said heirs "be charged with the balance due upon said indebtedness." A hearing on said matter was had, and on June 30, 1944, the court ordered, upon stipulation of counsel for this petitioner, the trustee, and Edward J. Munson (one of the heirs of Edward H. Munson) that the question as to whether the note should be charged against the interest of the beneficiaries should be reserved for determination at the time of distribution of the trust estate. That order became final. It appears therefore that the issue now before the court is the same issue that was before the court at that time, and that this petitioner, who now asks that such issue be determined before the close of the trust, then asked that the issue be reserved for determination at the close of the trust, and that the court in the former hearing granted his request. By reason of said former order of June 30, 1944, reserving the determination of said issue until final distribution of the trust estate, respondents contend that the issue now presented is res judicata. This contention is sustained. In Security-First National Bank v. Superior Court, 1 Cal.2d 749, at page 755, 37 P.2d 69 at page 72, it was said: "A proceeding pursuant to * * * section 1120 of the Probate Code, like other successive proceedings in the probate and execution of a will or the administration of an estate, is a proceeding in rem. * * * Therefore a subsequent application in the administration of the same estate to set aside a previous order entered in the course of probate jurisdiction after the same has become final is a collateral attack, and, unless the order is void on its face, it may not on such attack be set aside." The petition in the present case does not expressly attack the prior order, but the present petition is in effect a collateral attack on that order since the prior order has not been set aside, and since it is not asserted herein that there has been any change in the conditions which existed at the time of making the prior order that would present a different factual basis for the consideration of the court. It does not appear that the condition of the trust estate, or the income from it, or the position of the beneficiaries has changed subsequent to the making of that order.

[9] Appellant asserts in effect that this petition for instructions should have been heard for the reason that at some future time there might be income, over and above the $125 per month, to be distributed to petitioner and the heirs of Edward H. Munson, deceased, and that, in such event, it would be necessary to know whether the part of such income that should be paid to those heirs should be applied on the balance due on the note. It does not appear that there was any such surplus income above that amount at the time the prior order was made, or that there has been such additional income since then, and it does not appear that there is any prospect that there will be such income at any time for distribution. When and if there is any in-

come available for distribution to petitioner and said heirs, it will then be material and necessary to determine whether the part thereof available for the heirs should be so charged. Until then the question presented by petitioner, with respect to applying the heirs' share of the income on the balance due on the note, is not a real issue, but is wholly academic and for that reason need not be decided.

[10, 11] Appellant further asserts that the petition should have been heard because the "question of the statute of limitations on the note is also of immediate importance." In his petition for instructions, the appellant alleged that the note would be barred by the statute of limitations on March 1, 1948, which date, according to appellant, is four years from the maturity date of the note. As above shown, the creditor's claim presented by the trustee was allowed. Section 708 of the Probate Code provides as follows: "* * * No claim which has been allowed is affected by the statute of limitations, pending the administration of the estate." In Estate of Schroeder, 46 Cal. 304, at pages 316 and 317, the court said: "The question then is, whether the Statute of Limitations runs against a claim from the time it is allowed, pending an open and unsettled administration. * * * We think there are several reasons why the statute does not run, pending the administration, against a claim allowed * * *. Other reasons might be adduced, but these are sufficient to show that the Statute of Limitations ceases to run during a pending administration against claims duly allowed." See also In re Arguello, 85 Cal. 151, 153, 24 P. 641; Wise v. Williams, 88 Cal. 30, 35, 25 P. 1064; Shively v. Harris, 5 Cal.App. 513, 515, 90 P. 971. Since the trustee's claim as a creditor of the estate of Edward H. Munson was allowed, the claim was not barred on March 1, 1948, and will not be affected by that statute pending the administration of the estate of said deceased beneficiary. The statute of limitations, therefore, does not present a question of immediate importance. If the balance due on the note is paid, there will be, of course, no question to consider relative to charging the interests of the successor beneficiaries. If the note is not paid and the estate of Edward H. Munson should be closed as an insolvent estate, the condition of the assets of the trust estate would thereby be substantially changed, and in that event it might become necessary to proceed within a limited time, after such change, to obtain a determination as to whether the debt of the deceased beneficiary should be charged against the interests of such successor beneficiaries.

[12] Irrespective of whether the reason assigned by the trial judge for his decision herein was correct, his decision reserving the question herein for determination at the time of final distribution of the trust estate was not erroneous under the conditions then existing.

The order is affirmed.

SHINN, Acting Presiding Justice, and McCOMB, Justice Assigned, concur.

GUERIN et al. v. BLAIR. *

Civ. 16374.

District Court of Appeal, Second District, Division 2, California.

June 3, 1948.

Rehearing Granted June 24, 1948.

1. Bailment 🔑21, 35

Where bailee contrary to terms of agreement rented tractor and power unit control to defendant, bailor was not estopped from asserting claim against defendant nor required to demand return of tractor and power unit before instituting action of claim and delivery against defendant.

2. Replevin 🔑11(3)

Where possession of personal property is obtained in good faith or otherwise from a person who has no right to transfer such property, a right of action accrues against transferee as soon as he acquires possession of property and action of claim and delivery may be filed without demand that transferee return property.

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* Subsequent opinion 196 P.2d 651.

3. Bailment ⚷35

Where bailment of tractor and power unit provided that upon default bailor on three days' notice might terminate agreement and take possession of equipment, etc., giving of such notice to one to whom bailee had wrongfully rented equipment was not essential to maintain action against such person.

4. Bailment ⚷35

In action of claim and delivery against one to whom bailor had wrongfully rented equipment, evidence that defendant had requested bailee to take possession of equipment and that he did not do so was properly excluded as immaterial.

5. Judgment ⚷707

In action of claim and delivery against one to whom bailee had wrongfully rented equipment the record of another suit between the bailor and bailee involving same property was properly excluded as immaterial.

6. Bailment ⚷35

In action of claim and delivery by bailor against third person to whom bailee had wrongfully rented tractor and power unit control, evidence sustained judgment for $5,120 damages.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Claim and delivery action by H. T. Guerin and others, partners doing business as Guerin Brothers, against John H. Blair. From a judgment for plaintiffs the defendant appeals.

Judgment affirmed.

Arthur C. Webb, of Los Angeles, and Charles Reagh, of San Francisco, for appellant.

Latham & Watkins, of Los Angeles, John G. Evans, of San Francisco, and James W. McNabb, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in a claim and delivery action, defendant appeals.

The record supports the following facts:

On January 8, 1946, plaintiffs leased a tractor and power unit control to Vergil Grove for a monthly rental of $3,750. The lease contained a provision prohibiting the subletting of the equipment, and a condition No. 13, reading:

"Should the Lessee defer any payment more than 30 days or substantially violate any provision hereof, the Lessor may, after three days' notice, terminate this agreement, take possession of the equipment without becoming liable for trespass and recover all rental due, * * *."

On January 15, 1946, in violation of the provision in the lease, Mr. Grove sublet the equipment to defendant, who took possession of it and paid Mr. Grove $800 a month rental for two months. Thereafter plaintiffs located the equipment in defendant's possession, demanded its return on September 6, 1946, and on the following day filed the present claim and delivery action. The equipment was delivered to the sheriff of Los Angeles County on September 12, 1946, and thereafter judgment was entered in favor of plaintiffs in the present action for damages in the sum of $5,120.

Questions

First: *Since plaintiffs had leased the equipment to Mr. Grove, who was rightfully in possession thereof, and who in turn, in violation of a provision in the lease, sublet it to defendant, were plaintiffs (a) estopped to assert their claim against defendant, and (b) was it a prerequisite to the accrual of plaintiffs' cause of action that they make demand upon defendant for the return of the property?*

[1, 2] This question must be answered in the negative. Where the possession of personal property is obtained in good faith or otherwise from a person who has no right to transfer such property, a right of action accrues against the transferee

as soon as he acquires possession of the property, and it is not a prerequisite to the owner's filing a claim and delivery action that he make demand for his property. (Harpending v. Meyer, 55 Cal. 555, 558 et seq.)

The foregoing rule is applicable to the present case. By the very terms of the agreement of the lease under which Mr. Grove obtained possession of the property here involved, his right to possession was a limited one and he was prohibited from subleasing the property. Therefore, when he transferred it to defendant, defendant's possession was unlawful and it was unnecessary for plaintiffs to make a demand for the return of their equipment. (First National Bank v. Thompson, 60 Cal.App. 2d 79, 82, 140 P.2d 75.)

Second: *Was it a prerequisite to plaintiffs' maintaining the present action that they give the three-day notice required by condition No. 13 in the lease between plaintiffs and Mr. Grove?*

[3] This question must also be answered in the negative. The present action is not predicated upon the lease between plaintiffs and Mr. Grove or for the breach of any condition thereof by defendant. It is based upon the fact that defendant is unlawfully in possession of property belonging to plaintiffs, hence the provision of the lease relative to notice is immaterial in this action.

Davenport v. Alexander, 53 Cal.App. 688, 200 P. 771, relied on by defendant, is not here in point for the reason that in the cited case, defendant had come into possession of the personal property *lawfully,* and hence demand for its return was a prerequisite to a claim and delivery action. In the present case, defendant came into possession of the property *unlawfully.*

Third: *Did the trial court commit prejudicial error in excluding (a) evidence that defendant had requested Mr. Grove to remove the equipment after he had had it for two months, and (b) the record of another suit in the Superior Court between plaintiffs and Mr. Grove involving the property in question in the present case?*

This question must likewise be answered in the negative.

[4] (a) Evidence that defendant had requested Mr. Grove to take possession of the equipment and that he in fact did not do so would not relieve defendant of liability for wrongfully having possession of plaintiffs' property. The proffered evidence was immaterial and therefore properly excluded.

[5] (b) It is conceded that defendant was not a party to the suit between plaintiffs and Mr. Grove. Evidence was not introduced, nor has defendant pointed out in his briefs any reason why the record in another action to which defendant was not a party would be material or binding on defendant in this case. The trial court's ruling was correct.

[6] Fourth: *Was the amount of damage awarded defendant excessive?*

This question must be answered in the negative. The finding was supported by evidence which disclosed that the reasonable rental value of the equipment was $800 per month; that defendant had possession from January 15, 1946, until September 12, 1946; that plaintiffs had received payment for rentals to March 1, 1946; thus defendant was chargeable with the reasonable rental value of the equipment from March 1, 1946, to September 12, 1946, a period of six months and twelve days. Based on these facts, the judgment in the amount of $5,120 was correct.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

86 Cal.App.2d 118

LEWY v. ATCHISON, T. & S. F. RY. CO. et al.
Civ. 3718.

District Court of Appeal, Fourth District, California.
June 9, 1948.

1. Master and servant ⚿276(2)

In action under Federal Employers' Liability Act for injuries allegedly sustained by locomotive fireman, evidence sustained implied finding of jury that fireman suffered no substantial or permanent injury due to any claimed negligence of employer. Federal Employers' Liability Act, §§ 1 et seq., 3, 45 U.S.C.A. §§ 51 et seq., 53.

2. Appeal and error ⚿1002

Where there is conflict in evidence and evidence relied upon is of substantial character, judgment will not be disturbed on appeal.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by John Lewy against the Atchison, Topeka & Santa Fe Railway Company and another, under the Federal Employers' Liability Act, § 1 et seq., 45 U.S.C.A. § 51 et seq., for injuries. The other defendant was dismissed as a party defendant. Judgment in favor of the named defendant, and the plaintiff appeals.

Affirmed.

Morris B. Chain, of Bakersfield, for appellant.

Leo E. Sievert, Robert W. Walker and J. H. Cummins, all of Los Angeles, Frederic A. Jacobus, of Berkeley, and Calvin H. Conron, Jr., of Bakersfield, for respondents.

GRIFFIN, Justice.

This action was instituted by plaintiff and appellant against defendants and respondents under the provisions of Title 45 U.S.C.A. Chap. 2, sec. 51 et seq., Federal Employers' Liability Act, for claimed injuries occurring to plaintiff while defendant company was engaged in Interstate Commerce. Damages claimed amounted to $30,500.

Defendants denied generally the allegations of the complaint, and claimed contributory negligence on the part of plaintiff by way of diminution of damages under Tit. 45 U.S.C.A. Chap. 2, sec. 53. See Myers v. Southern Pacific Co., 14 Cal.App.2d 287, 58 P.2d 387.

From May to July 14, 1946, plaintiff was engaged by defendant company as a locomotive fireman. On July 14, the day of the accident, he was firing one of three engines pulling a train of 80 freight cars in an easterly direction near Woodford, in Kern County. His engine was "spotted" for water at waterspout number 4. The engineer, according to plaintiff's testimony, set the air brake controlling the entire train and also set the independent handbrake controlling the engine and tender. It was plaintiff's duty to, and on that occasion he climbed upon the tender, reached up, and by means of a hook swung the waterspout around to the manhole and slid the sleeve extension down into it. He then stood upon a platform which was attached to and located on the sleeve extension about six or eight inches above the floor of the tender for the purpose of holding the spout in place. He reached for the valve, pulled it toward him, and turned on the water. After the water had been feeding into the tank for a short time (one or two minutes) the engine started to roll back. Lewy, according to his testimony, lost his balance on the platform, fell toward the front of and across a compound box attached to the upper portion of the tender. While in this position he claims the waterspout swung across and struck him with sufficient force to break the box free from its rivets (defendant produced evidence showing that the rivets were not loosened). The spout broke and fell over the main line. Plaintiff then testified that he returned to the cab of the engine; that the engineer had been down oiling the engine; that he noticed the hand brake was set but that the main air brakes had been released; and that the train had been moved back about two car lengths before it was brought to a stop. He then testified that both of his legs were badly bruised, his hip and back were numb, his arms bruised and that he had a sprained elbow and wrist. Plaintiff continued with his duties into Barstow. On July 16 he reported to a company doctor in Bakersfield. He was treated for a period of about two weeks and returned to work as a fireman on a helper engine. He claimed that he was unable to do his regular work due to pain in his left hip. He reported back to the doctor who treated him for about two months. After his release he went back to work as a "hostler". He laid off again because of a claimed pain in his hip. He was also examined and treated in the company hospital in Los Angeles. Thereafter, he resigned from the company and consulted his own doctor and was treated by him up to the time of the trial of this action.

Defendant Langford, the engineer, testified that he set the independent brake but the air brake was kept in running position because the rules of the company required that there must be air in the train while stopped so that in case a car broke off it would not run away; that under these circumstances it would then automatically go into emergency and stop; that he used the "independent air because you don't use the automatic air"; that it would be dangerous to leave the air set throughout the train for any length of time because it would leave the train without any automatic air brakes; and that he had previously made stops in the same manner, at the same place, without any trouble; that he did not know what made the train move on this particular occasion. Other locomotive engineers, familiar with the run, similarly testified as to the custom and rule and also that it was not necessary for plaintiff to stand on the platform, attached to the spout, after the water started running.

Defendant Langford signed a report to the company in reference to the damage to the waterspout. He accepted certain demerits for knocking it down but not for any injury to defendant Lewy. He explained that his reasons for accepting these demerits was for the sole purpose of preventing loss of his and other men's time in investigation proceedings. Defendant Langford was dismissed as a party defendant. The jury returned a verdict in favor of defendant company.

Plaintiff now argues on this appeal that the verdict of the jury on the question of the lack of negligence of the company is not warranted by the evidence; that on this question there was no conflict, and no reasonable grounds for a difference of opinion; that the "great current of the evidence" shows that plaintiff did suffer some injury and therefore he should have recovered.

From a reading of the record as to the extent and seriousness of plaintiff's claimed injuries, regardless of the merits of the first contention, it appears to us that there is considerable conflict in the evidence in this respect.

Plaintiff furnished X-ray pictures and reports pertaining to his spine and produced medical testimony showing that there was an absence of fusion of the spinous process. However, his doctor indicated that this condition was congenital and that the patient knew of this fact but that it had never bothered him; that it would be reasonable to believe that the injury described by the plaintiff could aggravate the condition; that his findings indicated that plaintiff had the "residual of an acute lumbo-sacral strain" at the junction of the lower lumbar; that plaintiff complained of tenderness over the left iliac lumbar ligament region and pain on straight leg raising; that there appeared in the X-rays evidence of "scoliosis" (curvature) of the spine, probably congenital; that the plaintiff had suffered some sprain to the ligaments or muscles in the area of the lumbo-sacral and should not do heavy lifting. On cross-examination he was asked if he was familiar with the term "railroad spine" and he described it as a "litigation type of injury" where the patient is interested in obtaining reimbursement for a claimed (feigned) injury to the lower back, which condition is difficult medically either to prove or disprove. He then testified, however, that he did not believe plaintiff to be suffering from "railroad spine".

Another doctor testified that plaintiff, in giving his case history, complained of pain in his left pelvis, and back of his left thigh, pain in the left shoulder, neck and back when pulling himself up into the engine cab, pain in his left lower forearm, wrist and fingers, left knee, and varicose veins, all of which he claimed he never had before. He then testified that he found tenderness of the left sacroiliac and of the medial portion of the left knee,varicosity of the anterior tibial surface of both legs and a slight hematoma of the left midtibia; that he was able to stoop over and draw his knees to his abdomen and that the movements were fairly good, but there was some tenderness in the left latisimus dorsi lateral to the scapula; that his reflexes were normal; that the X-rays showed no evidence of fracture, injury or disease; that bruises would not show up in the X-rays. Up to May 10, 1947, he examined him and found on that date that there was improvement, no pain in the neck, some complaint of tenderness of the left sacroiliac region and left hip and he believed he had a slight prostatitis.

Defendant, in addition to other evidence, produced medical testimony as to plaintiff's claimed injuries. A conductor on the train, who rode in the cab of the engine after the accident with plaintiff, testified that he noticed plaintiff's activities thereafter; that plaintiff did his work as usual and he saw nothing out of line at any time and that plaintiff said nothing about being hurt; that he was the one to whom plaintiff should have reported any claimed injury but that plaintiff made no such report. Defendant Langford then testified that after the accident happened plaintiff showed him his knees and legs where they had been bruised; that he asked plaintiff if he wanted to make a report of his injury and plaintiff said: "No, let's let it go"; that he did not complain about his back; that plaintiff told him the waterspout knocked him down, or "he slipped and fell * * * he didn't know how he got down"; that thereafter plaintiff went about his duties in the ordinary way except his knees were stiff where the skin was broken.

Another engineer testified that he noticed plaintiff and his activities on August 2, 1946, when plaintiff was fireman on his freight train; that plaintiff handled the taking of water and the opening and closing of switches, and during the whole trip he did not notice anything unusual with respect to his activities or conduct and plaintiff made no complaints, to his memory, about his leg or hip.

A claim adjuster saw plaintiff a few days after the injury. According to his testimony plaintiff said he fell on top of the water tank and skinned his knees and legs; that he examined them and saw superficial skin abrasions; that plaintiff stated that was the only injury he had; that he asked for leave of absence for a few days with pay; that the request was granted.

Medical testimony, produced by defendant company, showed that plaintiff was examined by its doctors; they testified that plaintiff complained of a low back injury; that as a result of the examination, as to the upper extremities, there was found "nothing unusual or abnormal about them"; that as to his back no muscle spasm nor localized tenderness was found; that the X-rays showed a normal spine, including the lumbar vertebra and lumbo-sacral and sacroiliac joints; that they disclosed no indication that any of the joints in the lower back had been injured; that plaintiff requested yard service work which request was granted; that as a result of his examination he was "unable to find anything definitely wrong with plaintiff's back"; and that he didn't think plaintiff had "any disability, organically or functional". One doctor testified that plaintiff made no complaint about pain in the back but did complain about his knees; that X-ray pictures of both knees were taken and they disclosed neither fracture nor dislocation; that he found what he described as a "plexus of small blood vessels in his leg" which he stated could not have been the result of any claimed injury; that he felt that plaintiff was fully able to return to work by August 2, 1946; that on one visit or possibly two, he saw plaintiff carrying a small child in his arms; that this would indicate to him that plaintiff had no serious back trouble or lumbo-sacral trouble as this could not be done in comfort if such trouble existed. Exhibits in evidence show that plaintiff, in requesting a leave of absence from work from July 15, 1946 to August

1, 1946, on a form provided by the company, stated as a reason for such leave "multiple contusions * * * a small abrasion of the left knee, abrasion over the right tibial tubercle". No suggestion was therein made as to any back injury. Plaintiff applied for a leave of absence from October 16, 1946, to December 3, 1946 (but did not use it). He stated in the application as the reason therefore: "Taking care of sick wife". No mention is made of his claimed injures.

[1, 2] From an examination of the entire evidence the jury might well have believed that plaintiff exaggerated the extent of and suffered no substantial or permanent injury due to any claimed negligence of the defendants. In support of the verdict and judgment we must accept this implied finding. Where there is a conflict in the evidence and the evidence relied upon is of a substantial character, the judgment will not be disturbed on appeal. Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, Justice pro tem., concur.

86 Cal.App.2d 39

BERVEN v. MILLER et al.

Civ. 16431.

District Court of Appeal, Second District, Division 2, California.

June 7, 1948.

1. Specific performance 🔑28(2), 31

Specific performance of contract for sale of land will not be decreed unless contract is complete and certain in its terms.

2. Specific performance 🔑28(2)

Agreement by landlord to give tenant in event of sale of leased property, the first chance to buy property by equalling offer made for it by another in consideration of tenant's furnishing material and making certain repairs on premises was too indefinite to be specifically enforced.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by K. J. Berven against Edwin F. Miller and others for specific performance of alleged contract for sale of realty. From judgment for defendants, the plaintiff appeals.

Affirmed.

K. J. Berven, in pro. per.

George B. Hancock and Ray R. Rogers, both of Huntington Park, for respondents Glidewell.

McCOMB, Justice.

From a judgment predicated upon the sustaining, without leave to amend, of defendants' demurrer to plaintiff's third amended complaint, plaintiff appeals.

Plaintiff filed a complaint for specific performance against defendants seeking title to certain land, alleging that Emma M. Miller delivered to plaintiff an instrument in writing for the sale of the land, which read as follows:

" 'In consideration of tenant furnishing material and doing repairs, also work necessary to decorating the premises, the landlord agrees that in event of a sale of property, the tenant shall have the first chance to buy property at the offer made for same. Tenant to occupy premises until sold' (signed) Mrs. Miller, Sept. 16, 1945."

It was further alleged that Mrs. Miller died intestate April 16, 1946; that defendants are her heirs; and that on April 10, 1946, the property involved had been sold to defendants Ralph and Vallie Glidewell.

This is the sole question presented for our determination:

Did the complaint state a cause of action?

[1] This question must be answered in the negative and is governed by this rule: Specific performance of a contract for the sale of land will not be decreed unless the contract is complete and certain in its terms. (Klein v. Markarian, 175

Cal. 37, 40, 165 P. 3; Sontag v. Wells Fargo Bank, etc., Co., 218 Cal. 371, 374, 23 P.2d 276.)

[2] It is evident from a reading of the purported agreement between the parties that it falls within the rule just stated. The document signed by Mrs. Miller was at best a mere option which plaintiff under certain conditions could accept or reject. The terms of payment, the times of payment, the property to be sold, are each so indefinite and uncertain that a court could not decree specific performance of the agreement.

The order sustaining the demurrer without leave to amend and the judgment predicated thereon were correct.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

85 Cal.App.2d 806

LANGER v. LANGER et al.

Civ. 13737.

District Court of Appeal, First District, Division 1, California.

June 3, 1948.

Rehearing Denied July 3, 1948.
Hearing Denied July 29, 1948.

1. Appeal and error ⚷995

A reviewing court may not deem as unworthy of belief evidence which a trial court, having seen the parties and observed their demeanor and manner as witnesses, has accepted.

2. Witnesses ⚷35, 48(1), 319

Persons who are able to make known their perceptions, including those convicted of crime, may be witnesses, except those specifically excluded, but credibility of any witness may be questioned. Code Civ. Proc. §§ 1847, 1879, 1880, 2051.

3. Witnesses ⚷46

A degraded character may be a competent witness, though not credible. Code Civ.Proc. §§ 1847, 1879, 2051.

4. Appeal and error ⚷1008(1)

The balancing of the scales to evaluate evidence is for trier of facts.

5. Fraudulent conveyances ⚷188
Trusts ⚷89(1)

In mother's action against son and daughter-in-law to have declared in mother's favor a resulting trust in realty, evidence sustained findings for mother as against defenses that property was placed in son's name to defraud creditors or that funds turned over to son by mother, and which property was purchased, constituted a gift.

◆

Appeal from Superior Court, City and Court of San Francisco; Alfred J. Fritz, Judge.

Action by Viola Langer against Martin P. Langer and others for a decree that legal title to certain property was held in trust for plaintiff's use and benefit by defendants. Judgment for plaintiff, and defendants appeal

Affirmed.

Leslie C. Gillen, of San Francisco, for appellants.

Morris Oppenheim, of San Francisco, for respondent.

WARD, Justice.

Plaintiff filed a quiet title action against her son which was changed by amended complaint to an action praying for a decree that the legal title to certain property was held in trust for her use and benefit. The property was purchased from E. Cittrino on March 28, 1938, title being taken in the name of defendant Martin P. Langer. The complaint alleges "That the entire consideration for the transfer of the said real property and for the execution of said grant deed to the said Martin P. Langer was paid by plaintiff; and that no part of the consideration therefor was paid by the defendant Martin P. Langer either to the said E. Cittrino or to plaintiff, or at all; and that the said defendant Martin P. Langer, by reason of the premises, took the legal title to said real property in trust for the use and benefit of plaintiff." The court found in accord with the quoted portion of the complaint. Other findings are to the same effect.

From 1923 to about 1935 the mother was engaged in buying, operating and selling small theaters. The son started as a youth to work as a motion picture operator, but eventually managed theaters. Subsequently he worked as a taxi driver.

As appears in the record, the mother made an affidavit to the Public Welfare Department for the purpose of obtaining a pension for her husband, also one, during the war, to assist her son in obtaining a release from the army. Another affidavit, presented to a draft board, stated that her son was her sole support. The mother made no income tax returns but left such matters to her son. According to her testimony, whatever money she made from regular or irregular transactions she turned over to the son except during a period when he was out of the state.

As stated, title to the property was taken in the name of Martin P. Langer. It consisted of a lot in San Francisco with a house on the street and a cottage in the rear. The son made a down payment thereon of one thousand dollars; the balance was borrowed from a building and loan association. The plaintiff mother resided in the premises at the front, where she maintained a rooming house. The defendant son, with his wife, resided in the cottage at the rear. At the time of the purchase the mother had outstanding against her one judgment. Neither plaintiff nor defendants paid rent to the other party.

The evidence is conflicting on all issues. In view of her neglect to demand an accounting, the claim that the mother made a gift to her son might be true as to part of the funds she entrusted to him. Likewise the son's neglect to demand the income or rental from the "front" dwelling indicates that the son made no claim of ownership to the premises until he gave a power of attorney to his wife who demanded that plaintiff vacate the same. The following testimony appears in the record:

"Q. That was while Martin was back in the camp? A. That is right, correct.

"Q. You didn't get out? A. I didn't get out. She told me to get out.

"Q. All right. Did you see Martin shortly after that? A. In two days later —he flew from the camp, in an emergency, and he came, and when I talked to him he told me he had nothing to say any more.

"Q. When he came to your house where were you? A. I am in my room, in my house.

"Q. What did Martin do and say; tell us what happened? A. When he came to me he told me I have got to get out. I said, 'I am going to sleep in this bed and die in this bed.' He said, 'No, we will see.' He took down my clothes and threw me in the kitchen and told me to stay in the kitchen.

"Q. He pulled you out of bed? A. He pulled me out of bed and threw me in the kitchen. Everybody knows that. * * *

"Q. At that time did you ask Martin for a deed to the property? A. He was living with me.

"Q. Did you ask him for a deed to the property? A. Yes. He said, 'It is in my name and it is my property now.' I say, 'Martin, I buy the property and you know it is not yours.' He said, 'It is in my name, and I am going to keep it.'"

It is plaintiff's contention that when a transfer of real property is made by one person, and the consideration is paid by another, a trust is presumed in favor of the person paying the consideration. Civil Code, sec. 853. Defendants primarily contend that the findings are not supported by the evidence. In addition it is suggested: 1. That whatever was paid by the mother was a gift to the son. And 2. That the mother perpetrated a fraud upon her creditors and that under such conditions an action to maintain a resulting trust may not be maintained.

[1] The merits of this appeal must be decided upon the facts. Unfortunately both sides, during the trial and on appeal, seem to feel that blackening the reputation of the other side as regards traits, habits or acts will avail in the determination of the sufficiency of evidence to support find-

ings. A reviewing court may not deem as unworthy of belief evidence which a trial court, having seen the parties and observed their demeanor and manner as witnesses, has accepted.

[2-4] All persons who are able to make known their perceptions, including those convicted of crime, may be witnesses (Code of Civil Procedure, sec. 1879), except those designated in section 1880, but the credibility of any witness may be questioned. "A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence." Code of Civil Procedure, sec. 1847. "A witness may be impeached by the party against whom he was called, by contradictory evidence or by evidence that his general reputation for truth, honesty or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he had been convicted of a felony." Code of Civil Procedure, sec. 2051. A degraded character may be a competent witness though not credible. People v. Cox, 66 Cal.App. 287, 226 P. 14; Loughran v. Loughran, 292 U.S. 216, 54 S.Ct. 684, 78 L.Ed. 1219. The trier of the facts not a reviewing court, has the privilege of balancing the scales to evaluate the evidence. The sins, or rather errors of the past may be directly related and connected, or they may be independent and irrelevant, to the issue presented.

[5] The real question is the sufficiency of the evidence to sustain the findings. The court was justified in finding that the mother did not place the deed to the property in the son's name to defraud creditors. The court asked the following question: "You didn't put the lots in your son's name just to get away from the judgment?" To which plaintiff answered: "No." It subsequently developed that the mother requested the son to deed the property to her while the judgment against her was still in existence. In fact, the record indicates that the judgment is still outstanding. It is a reasonable inference from the evidence that the money delivered by the mother to her son was used in the purchase of the property. In this connection the daughter testified that this was the fact, and the mother testified that she made the monthly payments to the building and loan company and paid for certain remodelling. There is also evidence from various witnesses that after the title had been taken in the name of the son, the son frequently stated to his mother in the presence of third parties that the property was hers, and that she could have a deed at any time. From the evidence herein this court is not in a position to say as a matter of law that the funds turned over to the son by the mother constituted a gift. So far as the contention that a gft of the money was made, this was totally inconsistent with the testimony of the mother, which the court believed. In all respects, as outlined above, the court was justified in rendering judgment for the plaintiff.

The judgment is affirmed.

We concur:

PETERS, P. J., and BRAY, J., concur.

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86 Cal.App.2d 87

In re SPIES' ESTATE.

SPIES et al. v. FIEN et al.

Civ. 15715.

District Court of Appeal, Second District, Division 2, California.

June 9, 1948.

1. Wills 🔑439

The intent of testator so far as possible should control in interpretation of his will. Probate Code, § 101.

2. Wills 🔑446

When will is open to two constructions, one of which makes it valid and the other illegal, construction sustaining will should be followed.

3. Wills 🔑448

An interpretation which will prevent intestacy is preferred over some other interpretation. Probate Code, § 102.

4. Wills 🔑440, 441

If prerequisite testamentary intent does not appear from face of instrument, reference may be had to circumstances of its execution and language will be construed in light of those circumstances.

5. Wills 🔑441

The circumstances surrounding execution by decedent a month after wife's death and a month before his own death of witnessed instrument providing for disposition of a portion of his insurance money in case of his death were sufficient to establish an intent to effect a transfer of his property at death.

6. Wills 🔑133

For purpose of satisfying requisite formalities of a holographic will, witness' signature may be disregarded as surplusage if part written by testator is complete and sufficient, although witnessing may be indicative of testator's intention.

7. Wills 🔑93

Prior declarations of intent to make a will are admissible when attempt is not to explain an ambiguity, but to show testamentary character of a letter.

8. Wills 🔑133

Where testator's wife, to whom he had left his entire estate, predeceased testator, letter written by testator a month later to secretary of fraternal lodge stating that in case of his death it was his wish to bequeath a portion of fraternal insurance to his niece was properly admitted to probate as a codicil to testator's will, although including signature of a witness.

◆

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Proceeding in the matter of the estate of Albert P. Spies, wherein Laura M. Fien and others contested the petition of Eleanor Spies and another for the allowance of an instrument written by the deceased as a will or codicil. From an order admitting the instrument to probate as a codicil, the contestants appeal.

Order affirmed.

MacFarlane, Schaefer & Haun, of Los Angeles, for petitioner.

James B. Salem, of Los Angeles, for contestants.

Bailie Turner & Lake, of Los Angeles, for legatee.

MOORE, Presiding Justice.

Albert P. Spies executed his last will and testament March 7, 1930. It left testator's entire estate to his wife. She predeceased him on December 10, 1944, and the will contained no appropriate provision for the disposal of his estate to his survivors. On January 12, 1945, he wrote, dated and signed with his own hand the following instrument:

"Jan. 12---45

Mr. James Yates
Secy 663 B of L F & E

In case of my death, before my Brotherhood Policy is assign in change of beneficiary, it is my wish, that I bequeat $2000.00 of this $4000.00 policy to Patty Lou Smith of 1047 E. Wood St. Decatur, Ill. and Apt's 419 & 421 of Glen Donald's Apt's at Los Angeles, Calif.

Albert P. Spies
Mrs. W. M. McKay
(Witness thereto)"

The addressee of the letter is Mr. James Yates, secretary of Lodge 663 of the Brotherhood of Locomotive Firemen and Enginemen. The letter was not delivered but was found in testator's effects after his death. The witness thereto, Mrs. W. M. McKay, was a neighbor and a practical nurse who attended testator in his last illness and with whom he frequently discussed his affairs. Patty Lou Smith is the daughter of a sister of decedent's wife. Eight brothers and sisters survived decedent, seven of whom are appellants herein and one is administratrix with will annexed. Mr. Spies was in poor health at the time of the demise of his wife and he became progressively worse until his death on February 8, 1945.

At a hearing and trial without a jury the superior court found that the holographic instrument of January 12, 1945, was duly executed with testamentary intent and admitted it to probate as a codicil to testator's last will and testament.

Appellants' sole contention on appeal is that the instrument, viewed either alone or in the light of the circumstances of its execution, does not evidence sufficient testamentary intent to warrant its admission to probate as a will or codicil.

[1-4] It is axiomatic that the intent of a testator so far as is possible should control in the interpretation of his will. This is accordingly the basic rule of construction to which all others must yield. Probate Code, sec. 101; Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893; Estate of Wilson, 65 Cal.App. 680, 697, 225 P. 283. When a will is open to two constructions, one of which makes it valid and the other illegal, the construction which sustains it should be followed. Estate of Ingram, 104 Cal.App. 1, 8, 285 P. 365; Estate of Spreckels, 162 Cal. 559, 569, 123 P. 371. Of two modes of interpretation the one which will prevent intestacy is preferred. Probate Code, sec. 102. If the prerequisite testamentary intent does not appear from the face of the instrument itself, reference may be made to the circumstances of its execution, and the language will be construed in the light of those circumstances. Estate of Spitzer, 196 Cal. 301, 307, 237 P. 739; Estate of Miller, 128 Cal.App. 176, 182, 17 P.2d 181; Estate of Beffa, 54 Cal.App. 186, 188, 201 P. 616. The application of the foregoing principles to the questioned instrument and its attendant circumstances demonstrates the correctness of the order of the trial court in the instant case.

[5] The opening words of the contested letter, to wit, "In case of my death," indicate clearly that the decedent intended thereby to direct the distribution of his estate in the event of his death. That phrase dramatically expresses the contingency upon which the gift is to take effect. By reason of his years and the recency of the passing of his wife he must have realized that his days were limited and his bequest to her had lapsed. In this he was correct: his decease occurred less than a month from the date of the instrument. His wife's decease was a sufficient incentive to prompt him to make an immediate disposal of his property. Not only was it natural for him to designate another legatee but his original will shows that his policy was to make disposal by will. Other evidences of a testamentary dispositive intent are apparent in the particularity of the description of the beneficiary as well as of the property involved, and by the fact that the decedent caused Mrs. McKay to sign the instrument as a witness.

These circumstances impel the deduction that the deceased intended by the writing to effect a transfer of his property at death according to his desires. Estate of Spitzer, supra, 196 Cal at page 307, 237 P. 739; Estate of Beffa, supra, 54 Cal.App. at page 189, 201 P. 616.

[6] For the purpose of satisfying the requisite formalities of a holographic will the added signature of a witness may be disregarded as surplusage if the part written by the testator is complete and sufficient (Estate of Tanner, 33 Cal.App.2d 186, 189, 91 P.2d 170; Estate of Clark, 55 Cal. App. 85, 88, 129 P.2d 969), but such witnessing may be indicative of an intention at its writing to make it dispositive in character.

[7, 8] The circumstances of the execution of the letter further indicate the presence of the necessary testamentary intent. Mrs. McKay testified that the decedent frequently prefaced his remarks with "if anything happens to me"; that he referred to Patty Lou Smith by name and said that he loved her as if she were his daughter; that he was going to change the beneficiary of his will from his wife to his niece. Such prior declarations of intent to make a will are admissible when the attempt is not to explain an ambiguity but to show the testamentary character of a letter. Estate of Spitzer, supra, 196 Cal. at page 306, 237 P. 739. Thus the trial court properly concluded that the letter was testamentary in character and that the decedent had the requisite testamentary intent when he wrote and signed it.

The cases cited by appellant are not pertinent. In both Estate of Spitzer, 196

Cal. 301, 306, 237 P. 739, and Estate of Button, 209 Cal. 325, 331, 287 P. 964, the court held that the true test of the character of an instrument purporting to bequeath property is not the testator's realization that it is a will, but whether he intended to create an effective though revocable transfer of his property to take effect only upon his decease while passing no present interest. In Estate of Kisling, 68 Cal.App.2d 163, 167, 156 P.2d 57, the court sustained a finding that the purported holographic will was not entirely written by the deceased. In Estate of Dotta, 18 Cal.App.2d 763, 765, 64 P.2d 741, the court declined to disturb a finding of the trial court as to testamentary intent, no error having been shown in the court's application of established rules of law in deriving its determination of factual issues.

The order is affirmed.

McCOMB and WILSON, JJ., concur.

* * *

85 Cal.App.2d 672

PERSSON v. JAMES GRIFFITHS & SONS, Inc.

Civ. 13647.

District Court of Appeal, First District, Division 1, California.

May 26, 1948.

Hearing Denied July 22, 1948.

1. **Appeal and error** 🔑110

Order denying motion for new trial is not appealable.

2. **Master and servant** 🔑101(9)

Federal Employers' Liability Act impresses upon employer duty to furnish employee with reasonably safe place to work. Employers' Liability Act §§ 1–10, 45 U.S.C.A. §§ 51–60.

3. **Seamen** 🔑29(2)

Jones Act, making applicable to actions by seamen certain provisions of Employers' Liability Act, creates a statutory duty of employer to furnish seamen with reasonably safe place to work. Jones Act, 46 U.S.C.A. § 688; Employers' Liability Act, §§ 1-10, 45 U.S.C.A. §§ 51–60.

4. **Seamen** 🔑29(5)

In action by seaman against ship owner under Jones Act, evidence sustained finding that proximate cause of seaman's fall from deck lumber pile was negligent failure of owner to supply adequate lighting in area in which seaman was required to work. Jones Act 46 U.S.C.A. § 688; Employers' Liability Act, §§ 1–10, 3, 45 U.S.C.A. §§ 51–60, 53.

5. **Trial** 🔑296(4)

Where doctrine of comparative negligence applies and contributory negligence is not a bar, instruction that plaintiff should be presumed to have exercised ordinary care until rebutted by other evidence, though error, is not prejudicial where jury is otherwise properly instructed.

6. **Appeal and error** 🔑1064(1)

In action by seaman under Jones Act for injuries sustained in fall aboard ship, instruction that it is presumed that plaintiff was exercising ordinary care, though error, since plaintiff and witnesses testified in detail as to circumstances surrounding the accident, was not prejudicial where evidence produced by defendant on issue of plaintiff's negligence was not strong and jury was otherwise properly instructed.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Jaan Bernard Persson against James Griffiths & Sons, Inc., a corporation, for personal injuries sustained as a seaman aboard ship under the Jones Act, 46 U.S.C.A. § 688. From the judgment, and from an order denying its motion for new trial, defendant appeals.

Appeal from order dismissed. Judgment affirmed.

Hoge, Pelton & Gunther, J. Hampton Hoge, and Leo V. Killion, all of San Francisco, for appellant.

L. Charles Gray, of San Francisco, for respondent.

PETERS, Presiding Justice.

[1] Plaintiff, while employed as a winch operator on the "Coastal Buccaneer", slipped and fell and seriously injured his hip. He brought this action under the Jones Act, 46 U.S.C.A. § 688, alleging that the employer had failed to provide him with a safe place in which to work. The cause was tried before a jury, resulting in a $15,000 verdict. From the judgment entered on the verdict, and from the order denying its motion for a new trial, the defendant appeals. The order denying the motion for a new trial is not appealable, and the appeal therefrom should be dismissed.

Defendant makes two contentions on this appeal, first, that the evidence is insufficient to sustain the judgment, and second, that prejudicial error occurred in the giving of one instruction.

[2] The Jones Act gives to an injured seaman in such cases the right to a jury trial, and makes applicable to actions by seamen certain provisions of the Employers' Liability Act. 45 U.S.C.A. §§ 51–60. Under this last-named statute there is no doubt that it is the duty of the employer to furnish the employee with a reasonably safe place in which to work. Rey v. Colonial Nav. Co., 2 Cir., 116 F.2d 580; Armit v. Loveland, 3 Cir., 115 F.2d 308; Cleveland-Cliffs Iron Co. v. Martini, 6 Cir., 96 F.2d 632; The Alpha, D.C., 44 F.Supp. 809. Defendant does not contend to the contrary. Section 53 of 45 U.S.C.A. provides that contributory negligence of the employee does not bar recovery, the section adopting the doctrine of comparative negligence.

The accident giving rise to this action occurred about 8:40 p. m. on the evening of April 26, 1946. It is admitted that plaintiff was then employed as a merchant seaman and was then performing the duties of a winch operator, and that while so working he fell from the top of a deckload of lumber to the deck an broke his hip. The ship was then docked alongside a pier in San Francisco, its San Francisco cargo had been discharged, and the ship was being prepared to put out to sea. There were three cargo hatches on the vessel extending aft from the bow, numbered 1, 2 and 3. Each hatch was surrounded by a "coaming," which, when the hatch covers were on, extended upwards from the deck something over three feet. The "foremast" was located between hatches 1 and 2, and two winches were located fore and aft of the foremast. The "mainmast" was located between hatches 2 and 3, and two winches were located fore and aft of that mast. On the "cross-tree" of each mast, some twenty to thirty feet above the deck, were two floodlights, adjustable so as to be able to throw light either fore or aft. It is also undisputed that the vessel was carrying a deckload of lumber, and that such lumber was piled to a height of three feet or more on both the port and starboard sides of hatch number 2. Piled on top of the lumber on the port side of hatch number 2 were large crates eight or nine feet square. Nothing was piled on the lumber on the starboard side. There is evidence that the lumber was piled so close to the starboard railing that there was no passageway on that side, and also evidence that the lumber was piled so close to the starboard side of number 2 hatch that there was no passageway on that side. On the starboard side the lumber was piled so as to extend to about the aft end of number 2 hatch, and so as to come to about two feet from the winch located aft of number 2 hatch. Thus there was a clear space on the deck of about two feet between the aft end of the lumber pile and the winch, and the winch was about two feet from the end of the hatch.

By about 8:00 p. m. on the night in question plaintiff, and the other men in his crew, had discharged all of the cargo from hatch number 1. They put on the hatch covers and secured the gear. They were then ordered by the Chief Mate to secure the gear on hatch number 2. This, among other things, required that a certain appliance called a "preventer guy" be attached to a cleat located on the deck. It was normally the duty of the winch operator to secure this appliance. Plaintiff testified that, although lights were trained on number 1 hatch, there was no light at all trained on number 2 hatch, particularly on the starboard side where the preventer guy was located, and that that area was quite dark; that he walked over the hatch cover on hatch number 2 and onto the lumber piled on the starboard side of the hatch; that he walked to the aft end of the pile of lumber intending to "ease myself down" to the deck with "one hand on the winch," and "one hand on the edge of the lumber"; that he reached for the winch but misjudged the distance and fell; that "I could not contact it, because I fell. If I had contacted it, I would not have fell"; that he fell because of "the darkness. I misjudged the distance on account of the darkness"; that immediately after he was picked up the lights were turned on number 2 hatch; that we then "got lit up like a Christmans tree, all the lights on the ship got turned up."

Two seamen, Lindsay and Kristiansen, who were working with plaintiff at the time of the accident, corroborated plaintiff in all essential details. Both testified by deposition. Lindsay testified that he saw plaintiff walk across the lumber and fall; that plaintiff lost his balance as he went to step off the end of the deckload and fell into the clear area between the winch and the aft end of the lumber. He was positive that the starboard side of number 2 hatch was "dark. There was no light turned on" at the time of the accident, but that immediately after the accident somebody turned the lights on. He thought there was a light illuminating the port side of hatch number 2.

Kristiansen testified that he and plaintiff started over the lumber to secure the preventer guy; that plaintiff attempted to "get down off the deckload, and he put his hand on No. 2 winch to help himself get down, I suppose, and suddenly I seen him twist his body and fall on deck." He was quite clear in his testimony that, at the time of the accident, there were no "lights on which cast light at that place where he fell or in the area of the preventer guy"; that the starboard side of number 2 hatch was "pretty dark—very dark, in my opinion." He agreed that the lights were turned on shortly after the accident.

The only testimony introduced on behalf of defendant was the deposition of W. M. Gagnier, who was the Chief Mate on the ship at the time of the accident. He testified, as did the plaintiff and his witnesses, as to the physical facts, except that he was not clear whether there was a passageway between the lumber and the railing, and between the lumber and number 2 hatch, but, even if there were such passageways by which the preventer guy could have been reached without crossing the lumber, he stated that it was "the most natural thing" for plaintiff to have crossed over the top of the lumber. He also testified that there were floodlights illuminating all three hatches, and was quite positive that a floodlight was trained on number 2 hatch before, during and after the accident. He admitted, however, that immediately after the accident he heard some of the crew discussing the poor lighting at hatch number 2, and also admitted that, when he took a statement from plaintiff before plaintiff was removed from the ship to a hospital, plaintiff told him the accident happened because the deck lights were out.

[3, 4] The contention that the evidence, as a matter of law, fails to sustain the implied finding of negligence, is without merit. As already pointed out, under the statutes here involved it is the statutory duty of the employer to furnish his seamen with a reasonably safe place in which to work. It is too apparent to require further comment that, on the evidence introduced, the jury could and did reasonably find that the proximate cause of the accident was the negligent failure of the defendant to supply adequate lighting in the area in which plaintiff was required to work. Gagnier's testimony merely created a conflict which was resolved by the jury. That determination being based on substantial evidence should and must be sustained. Crawford v. Southern Pacific Co., 3 Cal. 2d 427, 45 P.2d 183; Blythe v. City & County of San Francisco, 83 Cal.App.2d 125, 188 P.2d 40; Davidson Steamship Co. v. United States, 205 U.S. 187, 27 S.Ct. 480, 51 L.Ed. 764.

The second contention of defendant is that the court committed prejudicial error in instructing the jury that "Under the law, it is presumed that plaintiff at the time and place in question was exercising ordinary care and acting as a reasonably prudent person would act." In this connection defendant relies on three cases holding that it is prejudicial error to instruct on the presumption of due care in a case where plaintiff or his witnesses testify in detail as to the circumstances surrounding the incident involved. Kelly v. Fretz, 19 Cal.App.2d 356, 65 P.2d 914; Campbell v. City of Los Angeles, 28 Cal. App.2d 490, 82 P.2d 720; Clary v. Lindley, 30 Cal.App.2d 571, 86 P.2d 920. These three cases did hold that, under the facts there involved, the giving of the instruction was not only error, but was prejudicial error. We agree with the defendant that, in the instant case, there was no room for the presumption, and that the giving of the instruction was error. But was it prejudicial? It will be noted that the three cases relied upon were all ordinary negligence cases in which contributory negligence on the part of the respective plaintiffs would have been a complete bar to their causes of action. But in the present case, as already pointed out, the doctrine of comparative negligence applies, and contributory negligence is not a bar. It has been directly held in this state that in such a case, although it is error to give the instruction when plaintiff's evidence shows all the circumstances of his injury, such error is not prejudicial. The leading case is Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709, where the action, as in the instant case, was under the Jones Act. After first holding that it was error to give the instruction, the Supreme Court held that, in a comparative negligence case, the giving of such an instruction was not necessarily prejudicial. In this connection Mr. Justice Curtis, speaking for a unanimous court, had the following to say (at page 119 of 4 Cal.2d, at page 714 of 47 P. 2d): "Had this been a case where the contributory negligence of the plaintiff would have defeated his claim for damages, the consequences following the giving of that instruction might have been most serious, and possibly might have required a reversal of the judgment. In the present action, however, we have, as shown in the discussion herein, been much more concerned with the action of defendant's employees, and with the question of their negligence, then we have in the conduct of the plaintiff. Admitting that the plaintiff was negligent, still he is, as stated above, entitled to recover in this action. We are therefore of the opinion that the giving of this instruction worked no serious prejudice to the defendant. On the whole, the instructions, were full and fair and were just, both to the plaintiff and the defendant."

In view of the facts that in the present case there was but little evidence upon which a finding of contributory negligence could have been based, and that contributory negligence even if present would not bar a recovery, and in view of the fact that in all other respects the jury was fully, fairly and properly instructed, the rule of the Paulsen case would seem to be controlling.

[5] Even if this were an ordinary negligence case in which contributory negligence would be a complete bar, it would not necessarily follow that the error in giving the due care instruction would be prejudicial as a matter of law. Although there is language in the Kelly, Campbell and Clary cases, supra, indicating or implying that the error in giving the questioned instruction is necessarily prejudicial, the better reasoned cases, decided both before and after those three cases were decided, hold that, although it is error to give the instruction, it is not prejudicial where the jury is otherwise fully, fairly and properly instructed. Tuttle v. Crawford, 8 Cal.2d 126, 132, 63 P.2d 1128; Raggio v. Mallory, 10 Cal.2d 723, 729, 76 P.2d 660; Ellison v. Lang Transportation Co., 12 Cal.2d 355, 360, 84 P.2d 510; Speck v. Sarver, 20 Cal.2d 585, 588, 128 P.2d 16; Lewin v. Margolis, 14 Cal.App.2d 746, 748, 59 P.2d 153; Lam Ong v. Pacific Motor Trucking Corp., 16 Cal.App.2d 274, 275, 278, 60 P.2d 480; Parker v. Manchester Hotel Co., 29 Cal. App.2d 446, 457, 85 P.2d 152; Woodward v. Southern Pac. Co., 35 Cal.App.2d 130, 144, 94 P.2d 1028; Morrison v. Jose, 57 Cal.App.2d 795, 802, 135 P.2d 586; see, particularly, Beck v. Sirota, 42 Cal.App.2d 551, 562, 109 P.2d 419, where the problem is discussed at length. In several of the above-cited cases one or more of the three cases cited by defendant were questioned, explained or distinguished. Under the

rules announced in these last-cited cases whether the error in the giving of the instruction is or is not prejudicial depends upon all of the circumstances of the case, including the facts and the balance of the instructions.

In the instant case the evidence produced by defendant on the issue of plaintiff's negligence was not very strong. It consisted of evidence that there was another possible route plaintiff could have taken without crossing over the piled lumber. But defendant's testimony on this issue was by no means clear. Gagnier was not certain whether a passageway existed between the lumber and the rail and between the lumber and number 2 hatch. Moreover, even if such passageway existed, he conceded that the path taken by plaintiff was a "natural" one. Defendant also tried to defend on the ground that the area where plaintiff fell was well lighted. Gagnier so testified. Such testimony might relate to possible contributory negligence on the part of plaintiff. But plaintiff and two disinterested witnesses were most positive that the area was dark. Certainly, under the facts, the due care instruction could not have misled the jury.

That this is so is made quite clear when the balance of the instructions are considered. On the issue of the plaintiff's duty to exercise care for his own safety the charge was unusually detailed, fair, and complete. The jury was told not to select a single instruction, but to consider all instructions in deciding any issue; that contributory negligence was a matter of affirmative defense but that it might be shown by plaintiff's own evidence or inferences to be drawn therefrom; that contributory negligence was not a complete bar to recovery but, if found to exist, the jury could lessen the amount, if any, which it might award to plaintiff; that plaintiff would be guilty of negligence if he "placed any portion of his body in a dangerous position" if he, as a reasonable person, "should have known that said position was unsafe"; that where two courses of action are open—one safe and the other unsafe—the exercise of reasonable care demands the selection of the safe course; that if plaintiff imprudently chose an unsafe method of doing his work, and was injured as a result of such, the verdict should go to the defendant; that plaintiff "was under the duty of being ever watchful of where he was walking or stepping or standing, or climbing as well as where he was placing his hands or any other portion of his body, if an ordinarily prudent person acting underlike circumstances would so conduct himself"; that plaintiff was "under the duty of using his faculties, including his faculty of sight and touch for his own protection and taking such precaution and exercising such care as would be exercised by an ordinarily prudent person acting under like circumstances"; that if it was found that plaintiff imprudently "placed himself in an unduly dangerous position," not upon order, and that he should have known that such position was dangerous and likely to result in injury, he would not be entitled to recover.

[6] Under these circumstances it is obvious that the giving of the questioned instruction could not possibly have been prejudicial.

The appeal from the order denying the motion for a new trial is dismissed; the judgment appealed from is affirmed.

WARD and BRAY, JJ., concur.

85 Cal.App.2d 653

PEOPLE v. HENDERSON et al.

Civ. 16354.

District Court of Appeal, Second District, Division 3, California.

May 25, 1948.

1. Highways 🔑154, 158

Under common law, a structure maintained on public roadway is unlawful and a nuisance per se subject to abatement at instance of proper authority.

2. Highways 🔑158

In action to abate structure on public roadway as nuisance, fact that structure is off traveled part of highway or that sufficient areas remain to allow public use of right of way in accustomed manner is no defense.

3. Highways 🔑156

In determining whether maintenance of structure or obstruction on public roadway is inconsistent with public's full enjoyment of right of way, owner of fee is deemed to possess no greater rights than strangers to title.

4. Highways 🔑159(1)

The state was entitled to injunction against lot owner's maintenance of shed on right of way, granted state by his predecessors in interest for public highway across portion of lot, under common law, independently of statutory law.

5. Highways 🔑153

The state Department of Public Works has power to keep state highways free from encroachments and to determine what constitutes encroachment thereon within statutory definition. Streets and Highways code, § 660(b).

6. Highways 🔑154

On application for permit to place or maintain encroachment on public highway, state Department of Public Works has power to determine whether encroachment would be inimical to full enjoyment of public rights in highway and against public interest. Streets and Highways code. §§ 660 (b), 670.

7. Highways 🔑153

Determinations by public authorities, such as state Department of Public Works, vested with authority to make them, as to whether encroachments, for which permits are sought, on public highways, would be inimical to full enjoyment of public rights therein, are deemed conclusive, unless shown to have been result of capricious or arbitrary action or abuse of discretion. Streets and Highways Code, § 660(b).

8. Highways 🔑156

Owners of fee in lot, as applicants for permit by state Department of Public Works to place or maintain encroachment on public highway crossing lot, have no greater rights than strangers to title, and any structure or obstruction on highway, which would be unlawful if maintained by strangers to title, is unlawful if maintained by owner of fee. Streets and Highways Code, § 660(b).

9. Highways 🔑159(1)

The state, by Department of Public Works, was properly granted permanent injunction against lot owners' erection or maintenance of shed on right of way, granted state by the predecessors in interest, for public highway across portion of lot, in absence of application for and granting of permit to them by department to erect shed, though maintenance thereof did not interfere with actual uses being made of right of way by public and shed was removed before trial. Streets and Highways Code, § 660(b).

10. Highways 🔑153

Whether encroachments on public rights of way would infringe on rights and be adverse to interests of public must be determined by state Department of Public Works in proper exercise of its discretion. Streets and Highways Code, § 660(b).

Appeal from Superior Court, Ventura County; Ray B. Lyon, Judge.

Action by the People of the State, acting by and through the Department of Public Works, against Edward Henderson and others to enjoin,and recover damages for, maintenance of a shed encroaching on the State's right of way for a public highway across defendant's lot. Judgment for plaintiff, and defendants appeal.

Affirmed.

Edward Henderson and William T. Selby, both of Ventura, for appellants.

C. C. Carleton, of Sacramento, George C. Hadley, of San Francisco, and Hodge L. Dolle, R. B. Pegram and John N. McLaurin all of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Defendants are the owners in fee of a certain portion of lot 59, Rancho Santa Paula y Saticoy, in the county of Ventura. Their predecessors in interest had granted to the state of California "a right of way and incidents thereof" for a public highway upon and across a portion of said lot 59. The area of the easement may be generally described as follows: it extends in a northeasterly and southwesterly direction; it is 71.18 feet wide along its northeasterly boundary, and at a distance of 343.56 feet southwesterly it is 114.51 feet wide; its southeasterly boundary is the center line of Telephone Road; its northwesterly boundary is a long curved line inside of and parallel with which is a drainage ditch some 17 feet wide. Defendants constructed a 20 feet by 30 feet temporary shed consisting of a galvanized iron roof on six or eight 2 x 4 upright posts, with no side walls. It was erected on or about July 1, 1946, and upon demand of plaintiff and after the commencement of the present action it was removed August 25, 1946. The action was brought by the state of California to enjoin the maintaining of said structure and for damages. Findings and judgment were for the plaintiff and defendants were perpetually enjoined "from erecting or placing an encroachment as defined in Section 660(b) of the Streets and Highways Code of the State of California in, under or over any portion of plaintiff's highway." Defendants have appealed.

Telephone Road, so-called, is a state highway. It has a pavement 20 feet wide with a five foot oiled shoulder. The shed was located somewhat nearer the northeast line than the southwest line of the right of way and between Telephone Road and the drainage ditch. It was 20 feet away from the paved portion of the highway and 15 feet from the outer edge of the shoulder. The only part of the right of way being used by the state was the area within the described roadway. The shed did not constitute an obstruction to the uses that were then being made of the easement, nor perceptibly interfere with the view of users of the highway.

For many years a shed of the same character had been maintained by defendants in another location for use while tomato crops were being havested and shipped. It was shown by the testimony of the defendants that due to erosion and other surface conditions there was practical necessity for erecting the shed upon the state's right of way. There was no intention to keep it there except during the short harvesting season, and it was removed because defendants no longer had need for it. Their land has now been planted to citrus and there is no foreseeable necessity for future use of the shed.

The principal contentions of the parties may be stated as follows: defendants claim the right as owners of the fee title, subject to the easement, to use the land for any purposes so long as such use does not interfere with the use of the right of way by the public. Specifically, they claim that the maintenance of their shed did not constitute an interference for the reason that it was located 15 feet from the established highway, was on a portion of the land that was not used by others, and did not interfere with the vision of those who had occasion to use the highway. The state does not claim that the shed interfered in any manner with the free use of the highway by the public, but insists that it nevertheless encroached upon the right of the public to use every part of the right of way at any time without interference; that the fact that there was no interference with the actual uses that were being made of the right of way is immaterial; that the shed as maintained constituted a nuisance subject to abatement in the present action; and that defendants had and could have no right to maintain the shed on the right of way except as the holders of a permit issued by the State Department of Public Works, which permit defendants had not received or applied for. The state does not dispute the right of defendants as owners of the fee to use the land embraced by the right of way in such a manner as will not interfere with the public right. Its contention is that the authority to determine whether a contemplated private use is consistent with the full enjoyment of the easement acquired by the public has been vested by the legislature in the Department of Public Works, and that this is an exclusive jurisdiction.

[1-4] We do not doubt the correctness of the state's position. It is a well-settled principle of common law, which has frequently been embodied in statutory form, that a structure maintained upon a public roadway is unlawful (Commonwealth v. King, 54 Mass. 115; State v. Allen, 110 S.C. 278, 96 S.E. 401), and is a nuisance per se subject to abatement at the instance of proper authority. Vanderhurst v. Tholcke, 113 Cal. 147, 151, 45 P. 266, 35 L.R.A. 267; Hill v. City of Oxnard, 46 Cal.App. 624, 627, 189 P. 825; Marini v. Graham, 67 Cal. 130, 132, 7 P. 442; City of Emporia v. Humphrey, 132 Kan. 682, 297 P. 712, 715; Elliott on Roads and Streets, 4th Ed., sec. 828, p. 1026. It is no defense to an action based thereon that the structure is off the traveled part of the highway or that sufficient areas remain to allow public use of the right of way in the accustomed manner. Vanderhorst v. Tholcke, supra; City of Emporia v. Humphrey, supra; National Sign Co. v. Board of Com'rs, 126 Kan. 81, 266 P. 927; Commonwealth v. King, supra; State v. Kean, 69 N.H. 122, 45 A. 256, 48 L.R.A. 102; Robinson v. State, Tex.Cr.App., 44 S.W. 509, 510. Where the sole question is whether the maintenance of the structure or obstruction is inconsistent with the full enjoyment of the right of way by the public, the owner of the fee is deemed to possess no greater rights then those who are strangers to the title. Bequette v. Patterson, 104 Cal. 282, 37 P. 917; Hall v. Kauffman, 106 Cal. 451, 39 P. 756; National Sign Co. v. Board of Commissioners, supra. Cf. Williams v. San Francisco & N. W. R. Co., 6 Cal.App. 715, 722, 93 P. 122. Independently of the statutory law, therefore, it would have been proper to enjoin the defendants from maintaining the shed on the state's right of way. The judgment is supportable upon this ground alone.

[5-7] In accordance with our established distribution of governmental functions which places public streets and highways within municipalities and other political subdivisions under control of public authority, the Streets and Highways Code places the control of the use of state highways in the Department of Public Works. It is within the powers of the department to keep the highways free from encroachments, and to determine what constitutes an encroachment. The term is defined in section 660 as: "Any tower, pole, pole line, pipe, pipe line, fence, billboard, stand or building, or any structure or object of any kind or character not particularly mentioned in this section, which is placed in, under or over any portion of a highway." A highway is defined as including the entire width of the right of way, whether or not actually used for highway purposes. (Sec. 660.) The Department of Public Works may issue written permits authorizing a permittee to place, change, or renew encroachments upon a public highway. One who places or maintains an encroachment upon a public highway without the authority of a permit is guilty of a misdemeanor. (Sec. 670.) The obvious purpose of the legislation is to vest in the department the power to determine, upon an application for a permit, whether the intended encroachment is one that would be inimical to the full enjoyment of the public rights in the highway and against the public interest. Such determinations by public authorities, vested with authority to make them, are deemed final and conclusive except where shown to have been the result of capricious or arbitrary action or abuse of discretion. Vanderhurst v. Tholcke, 113 Cal. 147, 150, 45 P. 266, 35 L.R.A. 267; Laura Vincent Co. v. City of Selma, 43 Cal.App.2d 473, 476, 111 P.2d 17; Robinson v. Otis, 30 Cal.App. 769, 771, 159 P. 465; City of Emporia v. Humphrey, supra.

[8] As applicants for a permit, defendants as owners of the fee would have had no greater right than those who were strangers to the title. Any structure or obstruction that would be unlawful if maintained by a stranger to the title would also be unlawful if maintained by the owner of the fee.

[9, 10] If the defendants had been before the court as plaintiffs seeking to restrain the state from interference with the maintenance of their shed, they would have been required to show that they had exhausted their administrative remedies, that is to say, that they had applied for and been denied a permit by the Department of Public Works. Metcalf v. Los Angeles County, 24 Cal.2d 267, 269, 148 P.2d 645; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715; Teeter v. Los Angeles, 209 Cal. 685, 687, 290 P. 11. While the mere institution of the present action by the state does not actually place the defendants in the position they would have been in had they taken action to enjoin the state from interference with their use of the land, in practical effect their position is no different. Under the conditions which existed as pleaded and found by the court, the only successful defense would have been that defendants were the holders of a permit from the Department of Public Works authorizing them to maintain the shed. It is obvious that a judgment in their favor in the trial court, or a reversal of the present judgment, would have the effect of determining that defendants had an absolute right to maintain the shed upon the right of way, from which holding it would necessarily follow that for the Department of Public Works to deny them a permit would be an abuse of discretion. Since that question is indirectly involved in our determination of the appeal, it may be appropriate to say that our views on that point alone would prevent a reversal of the judgment. In our opinion it would have been within the discretion of the department to grant or to deny an application for a permit. Certainly, it would have been a reasonable exercise of discretion to allow the defendant landowners to make temporary use of a portion of the state's right of way, under the conditions of practical necessity shown, for the short period required for the harvesting of their tomato crop. It would be poor policy, and we doubt that it would be the policy of the department at all, to refuse to make an exception in favor of a landowner under the particular conditions shown. On the other hand, it would be in clear violation of the rights and interests of the public to follow a general policy of permitting structures and obstructions of various types to be maintained upon public rights of way. The reasons for this are so clearly apparent that they need not be stated. A line must be drawn between those encroachments that would, and those that would not, infringe upon the rights and be adverse to the interests of the public, and that line must necessarily be drawn by the Department of Public Works in the proper exercise of its discretion.

Defendants place their chief reliance upon Colegrove Water Co. v. City of Hollywood, 151 Cal. 425, 90 P. 1053, 13 L.R.A., N.S., 904. In that case, the owner of the underlying fee, without complying with an ordinance which required him to obtain a permit, had commenced excavating a public street in order to lay an underground water pipe for the purpose of irrigating his lemon groves planted on both sides of the street. The trial court's decision granting an injunction to restrain the city from interfering with or preventing this work was affirmed by the Supreme Court on the ground that the occupation of the soil by a water pipe was a legitimate use of his land by the owner of the fee, since it was not in conflict with the full enjoyment of the easement granted to the public.

Considered with relation to the present statutory law the decision could mean, at most, that one who found himself confronted by the conditions there considered, and claimed the right there sustained by the court, should be granted a permit by the Department of Public Works to exercise that right. The factual situations are so different that the Colegrove decision cannot be taken as a departure from the well-settled rules referred to above, which have been applied to surface obstruction of public rights of way. Moreover, while we do not question the soundness of that decision, it should be interpreted with relation to the conditions under which roadways were being used in agricultural areas forty years ago.

Although in the present case the shed had been removed before the trial and there was no threat to replace it, the testimony of defendants clearly disclosed that they claim the right to make similar uses of the land in the future if they have occasion to do so. The judgment should be construed as inapplicable to acts that may be authorized by permit of the Department of Public Works, and as thus construed the granting of injunctive relief was proper.

The judgment is affirmed.

WOOD, J., and VALLÉE, J., pro tem., concur.

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85 Cal.App.2d 698

YEDOR et al. v. OCEAN ACCIDENT & GUARANTEE CORPORATION, Limited, et al.

Civ. 16126.

District Court of Appeal, Second District, Division 1, California.

May 27, 1948.

1. Administrative law and procedure 🔑133
Venue 🔑7
Workmen's compensation 🔑1048

The State Compensation Insurance Fund is a governmental agency and not a "corporation", within constitutional provision governing venue of actions against corporations, and statutory provision relating to venue in contract actions governed question of venue in action against Insurance Fund. Code Civ.Proc. § 395; Const. art. 12, § 16.

See Words and Phrases, Permanent Edition, for all other definitions of "Corporation".

2. Venue 🔑28

Under provision of insurance code locating principal office of State Compensation Insurance Fund in city and county of San Francisco, city and county of San Francisco was place of its residence for venue purposes. Code Civ.Proc. § 395; Insurance Code, § 11781.

3. Venue 🔑7

The fact that insured's place of business was in Los Angeles was insufficient to raise presumption that place of performance of obligations under workmen's compensation insurance policy was intended to be in Los Angeles county so as to require suit against State Compensation Insurance Fund to be brought in that county. Code Civ.Proc. § 395.

4. Venue 🔑7

Where compensation insurance policy required payment of initial premium to State Compensation Insurance Fund at its office at San Francisco, city and county of San Francisco was proper place for trial of action on policy against Insurance Fund by insured doing business in Los Angeles. Code Civ.Proc. § 395.

5. Venue 🔑51, 52(1)

Requiring insured doing business in Los Angeles to bring action on workmen's compensation insurance policy in San Francisco did not impose hardship in view of trial court's power to change place of trial if convenience of witnesses and ends of justice would thereby be promoted. Code Civ.Proc. § 397, subd. 3.

DORAN, J., dissenting.

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Action by Samuel S. Yedor and others, general partners of a limited partnership doing business as the Universal Die Casting Company, against the Ocean Accident & Guarantee Corporation, Limited, and the State Compensation Insurance Fund of the State of California, to recover the amount of a judgment rendered against the plaintiffs in a tort action. From an order denying a motion by the State Compensation Insurance Fund for change of venue from Los Angeles County to the City and County of San Francisco, the Insurance Fund appeals.

Order reversed.

Donald Gallagher, of San Francisco, Ira Ratner, of Los Angeles, and Royle A. Carter, of San Francisco, for appellant.

Eugene S. Ives, of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an appeal by defendant State Compensation Insurance Fund (hereinafter referred to as the Fund) from an order denying its motion for a change of venue from Los Angeles County to the City and County of San Francisco.

The complaint herein alleges that a "suit for damages for injuries due to negligence of plaintiffs was filed" by one Garcia, their employee, in which judgment was rendered in favor of Garcia in the sum of $5,000; that on the date the injuries were sustained, plaintiffs were covered by a policy of liability insurance issued by defendant Ocean Accident and Guarantee Corporation, and were also covered by a workmen's compensation insurance policy issued by defendant Fund, "a corporation duly organized and authorized to do an insurance business in the State of California"; a copy of such policy is made a part of the complaint by annexation. It is further alleged that although demand was made by plaintiffs, defendants refused to pay the judgment in favor of Garcia, whereupon plaintiffs paid the same. The prayer of the complaint is for a judgment against defendants for the amount of the judgment rendered in the tort action.

Upon appearance by demurrer, defendant Fund made its application for a change of place of trial of said cause from Los Angeles County to the City and County of San Francisco, alleging therein and in an affidavit of merits and of residence in support thereof, that at the time of commencement of the action the Fund "was and now is a resident of the City and County of San Francisco" where it maintains its principal offices and places of business; that the contract of insurance sued upon "was made and entered into in the City and County of San Francisco, California in this, that: The last acts in consummation of the making of said contract and in incurring the obligations thereof were performed in the City and County of San Francisco, to wit: the signing and countersigning and issuance of said * * * policy of insurance by the duly authorized officer and representative of the defendant, at its office in San Francisco, and the payment of the total initial premium to this defendant at its office in San Francisco; that there is not and never has been any special contract in writing between the plaintiffs and this defendant changing the county in which said * * * policy of insurance was to be performed from the said City and County of San Francisco, in which the obligation thereof was incurred."

Affiant Fund also denied that it was a corporation as alleged in plaintiff's complaint, and alleged that it was "a mandate or agency of the State of California * * * authorized to transact the business of Workmen's Compensation Insurance in this State." Affiant also averred that Ocean Accident and Guarantee Corporation, is a foreign corporation, with its principal place of business and its residence in the City and County of San Francisco, and that, therefore, the Superior Court of the State of California, in and for the City and County of San Francisco is the proper court for the trial of this action.

No counter-affidavits were filed by plaintiffs.

Thereafter, the trial court overruled the defendant Fund's demurrer and made an order denying its motion for change of venue. This appeal followed.

In its supplemental affidavit in support of motion for change of place of trial, appellant avers that the defendant Ocean Accident and Guarantee Corporation, Limited, is a foreign corporation with its principal place of business at the City and County of San Francisco. This averrment is not denied, and the record further discloses that such defendant has made no appearance herein.

It is here contended: "I. That appellant is not a private corporation but is an agency of the State of California; therefore, Section 395 of the Code of Civil Procedure governs the venue in this action.

"II. The residence of the appellant was at the time of the commencement of this action and ever since has been in San Francisco.

"III. The contract was in fact entered into and the obligation involved herein was incurred in San Francisco.

"IV. The obligation involved was to be performed in San Francisco and the liability, if any there was, arose in San Francisco.

"V. The residence of the other defendant below, a corporation, being in another county than the one in which the suit was commenced, its presence as a defendant does not affect appellant's right to a change of venue to the county of appellant's residence.

"VI. The appellant's right to have the case tried in San Francisco, the county of its residence, is absolute in the case at bar. This is so because it has been shown that:

"(A) The contract between it and the respondents was neither made nor the obligation involved incurred nor was that obligation to be performed, in the county where the suit was commenced, and,

"(B) The other defendant does not have its principal place of business in the county where the suit was commenced."

In support of the trial court's order, respondents urge that section 16, Article XII of the California Constitution applies to appellant and governs the venue herein; also, that even under section 395 of the Code of Civil Procedure, the Los Angeles County Superior Court is a proper court for the trial of this action.

Section 16, Article XII of the Constitution of this state reads: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

Section 395 of the Code of Civil Procedure provides: "In all other cases, except as in this section otherwise provided, and subject to the power of the court to transfer actions or proceedings as provided in this title, the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for the trial of the action. * * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

Respondents argue that since the Fund has most of the attributes of a private insurance carrier, it should come within the constitutional provisions on venue.

In the case of Rauschan v. State Compensation Insurance Fund, 80 Cal.App. 754, 760, 253 P. 173, 175, it was contended that the Fund was a corporation and as such liable for damages on account of a tort committed by one of its agents. It was there held that the fund constituted "a governmental mandatory or agency to which the Legislature committed the administration of certain of the state's sovereign powers"; that it is "an agency of the state and was established for the purpose of administering certain portions of the sovereignty of the state"; and that the provisions of statute permitting it to sue or be sued for wrongs committed by it applied not to torts but to breaches of contractual obligations only.

The foregoing case was cited in Gilmore v. State Compensation Insurance Fund, 23 Cal.App.2d 325, 329, 73 P.2d 640, 642, as authority for the following statement: "* * * appropriate legislation was enacted authorizing the State Industrial Accident Commission to engage in compensation insurance business 'to the same extent as any other insurer.' Sections 11770–11778, Insurance Code (St. 1935, pp. 724, 725). The State Compensation Insurance Fund is an agency of the state."

In the late case of De Campos v. State Compensation Insurance Fund, 75 Cal. App.2d 13, 170 P.2d 60, 63, it was also argued that because the Fund has "certain attributes of a corporation it must be considered as such and that the provisions of section 395 of the Code of Civil Procedure are not applicable." It was there held that the Fund is not a corporation within the meaning of section 16, Article XII of the Constitution.

Buck v. City of Eureka, 97 Cal. 135, 138, 31 P. 845, 846, enunciates the rule that Article XII of the Constitution "relates exclusively to private corporations, and consequently the provisions of section 16 have no application to a suit against a public municipal corporation"; and that section 395, Code of Civil Procedure, "alone must be looked to for a definition of the right of defendant as to the place of trial of this action." See, also, cases collected in McKinney's Digest, Corporations, sections 809, 810.

In classifying the various types and kinds of corporations, it is stated in 6a Cal. Jur. p. 104: "An irrigation district is a public corporation, or a quasi-public corporation, organized under a general law enacted for the purpose of promoting the general welfare; and its officers are considered public officers. Water and irrigation companies, either private or mutual, are private corporations; but some of them may be public utility corporations.

"Certain of the earlier decisions have held reclamation and levee districts to be public corporations, or quasi-public corporations for municipal purposes, yet they are sometimes denominated quasi corporations because they do not possess all the powers belonging to corporations, or those usually possessed by municipal corporations. *They are distinctly not private corporations;* neither are they corporations for municipal purposes within the meaning of the constitution. * * *. In the light of later decisions, *it is more accurate to say that they are not corporations at all, but are public agencies or governmental mandatories vested with limited powers to accomplish a limited and specific work* * * *." (Emphasis added.)

[1] Accordingly, it would appear that appellant Fund falls within such last named category i. e., a governmental mandatory or agency of the state; is not a corporation within the meaning of section 16 Article XII of the Constitution, and that section 395 of the Code of Civil Procedure governs the question of venue herein.

[2] Section 11781 of the Insurance Code provides that "The principal office for the transaction of the business of the State Compensation Insurance Fund is located in the City and County of San Francisco."

In its notice of motion for change of place of trial, and also in its affidavit of merits and of residence, appellant so averred, alleging that in consequence thereof it "was and is a resident of said City and County of San Francisco." This was not denied by respondents and there is no allegation in the complaint to the contrary. Moreover, quoting from the opinion in De Campos v. State Compensation Insurance Fund, 75 Cal.App.2d 13, 22, 170 P.2d 60, 66: "several endorsements attached to the policy show the address of the fund to be San Francisco, and that city as the location of its executive offices. And, as held in Gallup v. Sacramento & San Joaquin Drainage Dist., supra, 171 Cal. [71], at page 74, 151 P. 1142, its residence is the same as its principal place of business. Also see Barber v. Galloway, 195 Cal. 1, 14, 231 P. 34; Bohn v. Better Biscuits, Inc., supra, 26 Cal.App.2d [61], at page 64, 78 P.2d 1177, 80 P.2d 484; Cohn v. Central Pac. R. R. Co., 71 Cal. 488, 12 P. 498; Winterburn v. Sheriff, 61 Cal. App. 531, 534, 215 P. 406; Trezevant v. W. R. Strong Co., 102 Cal. 47, 36 P. 395; Krogh v. Pacific Gateway & Development Co., 11 Cal.App. 237, 104 P. 698."

The foregoing erases any doubt as to the place of residence of appellant, and as was so aptly stated by the Supreme Court in Kaluzok v. Brisson, 27 Cal.2d 760, 763, 167 P.2d 481, 482, 163 A.L.R. 1308: "The right of a defendant to have an action brought against him tried in the county of his residence is an ancient and valuable right, safeguarded by statute and supported by a long line of decisions. The right of a plaintiff to have an action tried in a county other than that of the defendant's residence is exceptional. If the plaintiff would claim such right he must bring himself within the exception."

As hereinbefore stated, section 395 of the Code of Civil Procedure provides: "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant * * * resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary."

The policy of insurance here involved contains the following provision: "As a condition precedent, this Policy is null and void unless the total initial premium stated herein is paid to the State Compensation Insurance Fund at its office in San Francisco on or before April 11, 1942, at noon, standard time."

In Limited Mutual Compensation Ins. Co. v. Curtis, 45 Cal.App.2d 507, 509, 114 P.2d 404, 405, where, upon motion for change of venue in an action involving policies of compensation insurance containing clauses almost identical with the above clause, it was held that such a provision in a contract fixed the place where the contract became binding and effective, to wit, the place where the contract was in fact entered into and where the obligation was incurred; the court there stating:

"We agree with the trial court that the foregoing clauses were legally sufficient to justify the conclusion that the obligations imposed by the contracts were 'incurred' in San Francisco, for obviously according to the plain terms of said clauses, as between plaintiff and defendant, no obligations whatever arose under the contracts until defendant performed the 'condition precedent' of making the payments provided for therein to plaintiff 'at its office in San Francisco'. In other words, by the terms of the contracts the parties themselves fixed the time when and the place where the condition precedent should be performed to make the contracts binding and operative; and it follows, therefore, that the place where they become binding and operative is the place where the obligations thereunder were 'incurred'." See also De Campos v. State Compensation Ins. Fund, supra, 75 Cal.App.2d at pages 21, 22, 170 P.2d 60, for a discussion of this point.

[3] The contract here sued upon is the usual form of workmen's compensation insurance policy, and in none of its clauses to which reference is made by respondent, is Los Angeles County mentioned as the place for performance by appellant of any obligation incurred thereunder. True, the address and place of business of insured is shown to be at 5001 Santa Fe Avenue, Los Angeles, California, but that standing alone is insufficient to raise the presumption that the place of performance was intended to be Los Angeles County.

As stated in Armstrong v. Smith, 49 Cal. App.2d 528, 533, 536, 122 P.2d 115, 118: "The obligation of a contract is incident to its making. It is incurred at the time the contract is made and follows it until the contract is extinguished. The obligation arises as soon as the contract takes breath and may be breached at any time while it has life. While it is the law, in conjunction with the contract, which casts the obligation, the law does not wait until it is breached to cast it. This is done when the contract is made. So with the contract before us, all obligations arising under it were incurred at the time and in the county in which it was made. * * *

"It is our opinion that before an action may be brought under section 395, supra, in the county where the obligation forming the basis of the suit is performable, the contract must specifically state the place of performance of such obligation."

[4] In the contract of insurance here in question it was neither specially nor impliedly agreed that it should be performed in Los Angeles County. To the contrary, the obligations accruing thereunder

were to be performed in San Francisco where it was in fact entered into and where such obligations were incurred. It follows that the City and County of San Francisco is a proper place for the trial of the instant action.

[5] The foregoing conclusion reached by this court does not impose a hardship upon respondents for the reason that the trial court may, upon motion made by them after the issues are joined, change the place of trial "when the convenience of witnesses and the ends of justice would be promoted by the change." Sec. 397, sub. 3, Code of Civil Procedure.

In this connection see Woods v. Berry, 111 Cal.App. 675, 296 P. 332, wherein it was held that, the defendant being entitled to a change of venue to the county of his residence, counter-motions on the ground of convenience of witnesses could be made by plaintiffs in the county to which the case was transferred.

For the reasons stated, the order denying appellant's motion for change of venue is reversed.

WHITE, J., concurs.

DORAN, Justice (dissenting).

I dissent:

The respondent herein is the plaintiff in an action against the State Compensation Insurance Fund. The place of business of the plaintiff was in Vernon, California where one Garcia was employed by plaintiff. Garcia was injured and recovered a judgment against the plaintiffs herein for $5,200.69 which the plaintiffs paid. The plaintiffs then sought the collection of said amount from the insurance fund pursuant to the terms of policy which payment was refused. The action herein followed.

The insurance policy which is attached to the complaint as an exhibit and made part thereof, provides in part as follows:

"In consideration of the total initial premium stated in the Schedule of this Policy, the payment of which as herein provided is a condition precedent, * * *

"Does hereby agree with the employer named in this Policy, herein called the Insured, with respect to personal injuries sustained by employees of the Insured within the Policy Period herein stated, including death resulting from such injuries.

"(1) To pay promptly and *directly* to any person entitled thereto under the Workmen's Compensation Laws of the State of California, and as therein provided, any sums due for compensation for injuries * * * and for the reasonable cost of medical, surgical and hospital treatment * * * and, as between the employees and the Fund, the notice to or knowledge of the occurrence of an injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the Fund; and jurisdiction of the employer shall, for the purpose of the law, be jurisdiction of the Fund; and the Fund shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer under the provisions of the Workmen's Compensation Laws of the State of California,

"(2) To indemnify the Insured against loss by reason of liability for damages imposed upon the Insured, as an employer, under any other law of the State of California, for injuries sustained by employees covered by this Policy, including death resulting from such injuries,

"(3) To serve the Insured (a) by the inspection of work places covered by the Policy * * * (b) upon notice of such injuries, by investigation thereof and by settlement of any resulting claims in accordance with the law,

"(4) To defend, in the name of and on behalf of the Insured, claims or suits against the Insured for compensation or for damages whether groundless or otherwise, * * *."

Although not a part of the policy, on the back thereof appears the following:

"The State Compensation Insurance Fund was created by the people of the State of California for the purpose of insuring employers against loss by reason of the liability imposed by law on account of injuries to employees."

It is nevertheless the law that the State Compensation Insurance Fund thus created by the People is a public institution and all of its employees are public servants.

I am neither in accord with the views expressed in the prevailing opinion nor with the views expressed in any of the decisions that support the proposition that the principal place of business of this agency is in San Francisco. There is no resemblance between "principal office" and "principal place of business." Section 11781 of the Insurance Code which provides that "the principal office for the transaction of business of the State Compensation Fund is located in the City and County of San Francisco" has nothing to do with venue; the expression "principal place of business" does not appear. To assume that the legislature, by this provision, intended to establish the principal place of business in San Francisco to the end that the trial of all actions against the "Fund" must be tried in San Francisco exacts more from the rules of construction and interpretation than the law in that regard contemplates.

Actually the principal place of business of this institution is the entire State of California where it maintains numerous branch offices to serve the People and in no sense does the law contemplate that the People are to serve the agency.

Referring to Section 395 of the Code of Civil Procedure quoted in the prevailing opinion, the contract here in question was just as much "entered into" in the town of Vernon as it was in San Francisco and the payment of the premium by the insured which constitutes the consideration for the agreement does not necessarily determine the place of its execution. The premium may have been paid in a branch office or it may have been deposited in the United States mail in cash or its equivalent, addressed to the San Francisco office postage prepaid, in which event it would have been paid when it was deposited in the mail.

Under the terms of the contract, the insuror was obliged to perform under the terms therein specified, first to pay the injured person (in this case Garcia) or, second, to indemnify the insured (in this case the plaintiff). In neither case does the contract provide that the payment and the indemnity were to be in San Francisco. The contract specifically recites that jurisdiction of the employer shall for the purpose of the law be the jurisdiction of the "Fund."

The only performance ever required by the insuror in the circumstances would be the payment of some amount due an injured employee of the insured or the reimbursement of the insured. In any event, it is the place where the *delivery* of either one of these amounts is required to be made that in my opinion is the test as to where the contract is performed or required to be performed on the part of the insuror.

In my judgment it is not the law that either an employee protected by the State Compensation Fund or an employer insured by such institution is required to go to San Francisco to collect any amount due under the terms of a policy issued by this agency.

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85 Cal.App.2d 732

PRICE v. PRICE.

Civ. 13465.

District Court of Appeal, First District, Division 2, California.
May 28, 1948.

1. Appeal and error 🔑863

On appeal from judgment on pleadings, court may consider only matters and things appearing in pleadings themselves, and where divorce decrees were not made a part of appellant's pleading they could not be considered on appeal.

2. Appeal and error 🔑659(4)

On appeal from judgment on the pleadings, appellant's motion to augment the record and produce additional evidence would be denied since record could not be augmented outside proceedings in trial court, and there could be no additional evidence where no evidence at all was introduced in any proceeding prior to appeal.

3. Appeal and error ⚷712

On appeal from judgment on pleadings, statements aliunde the record could not be considered.

4. Divorce ⚷249(2)
Husband and wife ⚷280

Where property settlement is copied into and made a part of divorce decree, it is merged therein and no action on the agreement as such may be maintained, but where the agreement is merely referred to with approval, an action thereon may be maintained.

5. Pleading ⚷345(1)

Where complaint in action on property agreement alleged that such agreement was made a part of the interlocutory and final divorce decrees which were not contained in complaint in action on agreement, judgment on the pleadings for defendant was improper.

6. Appeal and error ⚷173(10)

Where question of the bar of statute of limitations was not raised or discussed by either party on appeal, it would not be considered. Code Civ.Proc. §§ 336, 337, 366, 377.

◆

Appeal from Superior Court, San Francisco County; Thomas M. Foley, Judge.

Action by Barbara Price against Harold H. Price for breach of contract. From a judgment for defendant on the pleadings, the plaintiff appeals.

Judgment reversed and cause remanded for further proceedings.

Wm. F. Rose, of San Francisco, for appellant.

Augustin C. Keane, of San Francisco, for respondent.

FINLEY, Justice pro tem.

This is an appeal from a judgment for defendant on the pleadings.

The complaint is titled: "Complaint for Damages for breach of contract." The first two paragraphs read as follows:

"I.

"That on the 24th day of January, 1935, plaintiff and defendant being then married to each other, entered into a property settlement agreement, a copy of which is hereto attached, made part of this complaint and marked Exhibit 'A' for identification.

"II.

"That thereafter in the proceedings Numbered 254543 in the Superior Court of the State of California, in and for the City and County of San Francisco, an interlocutory decree of divorce was entered in favor of plaintiff and against defendant, and that the aforementioned Exhibit 'A' was, by order of the Court, made a part of its decree; and that on or about the 6th of February, 1936, in the said proceedings, a final decree of divorce was entered, and that said Exhibit 'A' was likewise made a part of the said final decree."

The complaint was filed on November 4, 1945, more than ten years after the date of the agreement as alleged in paragraph I above. On February 2, 1945, defendant interposed a general and special demurrer specifying, in part, in addition to the general ground: (a) That the complaint according to its allegations was based upon matters theretofore adjudicated in another action wherein final judgment had been entered; (b) That it did not appear that plaintiff had exhausted her remedies in that action; and (c) That the action was barred by the provisions of Chapter III, Title 2, Part 2, of the Code of Civil Procedure and in particular the provisions of sections 336 and 337.

On March 1946 this demurrer was overruled without prejudice and later defendant filed his answer reasserting the grounds for demurrer above set forth in addition to the ordinary denials. At the time of trial, July 12, 1946, defendant moved for judgment on the pleadings which motion was granted. Judgment filed on September 5, 1946.

[1, 2] In her brief plaintiff refers to provisions of the Interlocutory and Final Decrees of Divorce which were not before the trial court nor are they before us. According to the complaint the property settlement agreement, attached thereto as an exhibit (Ex. A), was "made a part" of both decrees so those portions only of said decrees which may be represented by

the agreement are a part of the record and properly before us. All reference and quotations in the brief to other portions of those decrees will not be considered, for in passing upon the propriety of a judgment based upon the pleadings alone we can consider only the matters and things appearing in the pleadings themselves. We cannot examine or consider documents merely mentioned and not incorporated into the pleading by reference or otherwise. Likewise plaintiff's motion to augment the record and produce additional evidence will be denied for this record cannot be augmented by something outside of the proceedings in the trial court and there can be no additional evidence where no evidence at all was introduced in any proceeding prior to appeal.

[3] The sole question presented by the appeal is whether the trial court erred in granting defendant's motion for judgment on the pleadings. On this point the parties have confined their arguments as to the question of whether if a property settlement agreement has by a recital in the decree been *made a part* of the Interlocutory and Final Decrees of Divorce, a separate action may be maintained on the agreement itself apart from these decrees. Plaintiff in argument states "that the divorce decrees adopted the property settlement by reference thereto, but that the agreement itself, or any part thereof is not attached to the interlocutory or final decrees of divorce." This is an observation aliunde the record and cannot be considered as a fact here. Whatever the actual situation may be, the complaint, referring to both divorce decrees, states that the agreement "was, by order of the court, made a part of its decree", and it is with the import of these words that we are concerned in passing upon the propriety of this judgment on the pleadings.

[4] The question confronting us has recently been discussed in Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15. Therein the Court states at page 609 of 26 Cal.2d at page 17 of 160 P.2d: "Turning first to the relation between the separation agreement and the divorce decree, it appears to be well settled, that if the agreement is presented to the court in the divorce proceeding for adjudication, and the agreement, or a part thereof, is *incorporated* in the decree and *made a part thereof,* the part so *incorporated* is merged in the decree". (Citing cases.) And further on in the opinion (quoting with approval from Holloway v. Holloway, 130 Ohio St. 214, 198 N.E. 579, 154 A.L.R. 439), "A decree which *incorporates* an agreement is a decree of court nevertheless, and as soon as *incorporated* into the decree the separation agreement is superseded by the decree, and the obligations imposed are not those imposed by contract, but are those imposed by decree, and enforceable as such. Once the contract is merged into the decree, the value attaching to the separation agreement is only historical". After concluding this quotation from Holloway v. Holloway, the court then goes on to say: "And it should logically and justly follow therefrom that thereafter there is no right of action on the agreement *incorporated* in the decree." (Emphasis added.)

It will be noted from this language that the determining factor is whether the agreement is *incorporated* into the decree and made a part thereof rather than being made a part of the decree by *reference.* Obviously there is a difference for if there is an actual *incorporation* of the agreement into the decree, the decree standing alone then carries within itself the complete measure of the rights and obligations of the parties. In the court's files, the decree or judgment itself supplies all the information necessary to whomsoever may be interested. If recorded it announces to the world the respective interests of the parties in any property involved.

If on the other hand the agreement is *made a part of the* decree by *reference* only the above is not true. One searching the file could not construct a complete picture of the rights and obligations of the parties from the decree or judgment alone. Reference might be to an exhibit attached to a *pleading,* to another judgment, or even to an agreement offered in evidence and withdrawn and not available as a part of any public record. In such a case it would not follow that the value attaching to such an unincorporated document would be "only historical". It or a true copy thereof would of necessity have to be sought out and produced in order to determine what the complete judgment actually provided. If it could not be produced, or its terms definitely established, then that part of the judgment represented by it could not be enforced. In particular it could not be enforced by contempt proceedings. Hough v. Hough, supra; Lazar v. Superior Court, 16 Cal.2d 617, 107 P.2d 249; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749.

In Lazar v. Superior Court, supra, which case involved an agreement quite similar to the one here, at page 620 of 16 Cal.2d, at page 250 of 107 P.2d, appears the following language: "The question to be decided therefore is whether the provision for payment of $130 per month to the former wife is merely a part of an agreement between the parties under which *only the usual contract remedies are available,* or whether such provision is a part of the court's decree and, as such, an order for payment of support, maintenance or alimony which may be enforced by contempt proceedings. * * * If a property settlement agreement is complete in itself and is merely referred to in a divorce decree or approved by the court but not *actually* made a part of the decree, then the provisions of such agreement cannot be enforced by contempt proceedings. (Citing cases). On the other hand, if, by the language of the agreement itself, it is shown that the intent was to make the agreement a part of a future divorce decree and, if the agreement is *actually incorporated* in the decree, then such provisions become a part of the order of the court and may be enforced as such." (Emphasis added.)

The plain import of this language seems to be in sensible conflict with the rule announced in the comparatively recent case of Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536, 539, where it is said: "* * * an order of the court that the terms of the contract be carried out will be implied from the incorporation of the agreement in the decree, either bodily *or by reference.*" The cases of Tripp v. Superior Court, 61 Cal. App. 64, 214 P. 252, and Ex parte Weiler, 106 Cal.App. 485, 289 P. 645, are cited as authority for this statement, but an examination of those cases discloses that the Tripp case does not sustain such a rule, and that it is cited as sole authority for the pronouncement of such a rule in Ex parte Weiler. In the Tripp case the agreement was set out *in full* in both the interlocutory and final decrees and there is no statement in the opinion concerning any situation involving an incorporation by reference. As was stated in Andrews v. Superior Court, 103 Cal.App. 360, 365, 284 P. 494, 496, referring to the Tripp case, "the court, after setting forth the property settlement in full in the interlocutory judgment, ordered in said judgment 'that said plaintiff shall take all of the community property as set forth in said property settlement and agreement as aforesaid.' Therefore that case is not authority for the contention that a mere incorporation by reference of a property settlement (not set forth in any pleading) in an interlocutory judgment of divorce is equivalent to a direct order for payment in accordance with such property settlement." A point of information in connection with the Andrews case is that the complaint did not mention or refer to any property settlement agreement nor was any request made therein that property rights be adjudicated or support money allowed. It differs in this respect from the present case and all others cited herein.

Ex parte Weiler, supra, was a proceeding on habeas corpus to secure release from custody for contempt of court by reason of refusal to comply with the court's order directing petitioner to make payments to his wife as provided in a property settlement which was referred to in the wife's complaint for divorce and treated in the interlocutory decree as follows: "It is further ordered, adjudged and decreed that this court does hereby approve and confirm and make a part of this decree the provisions of that certain property settlement agreement made and entered into between the parties hereto and executed by them on the 15th day of May, 1928." [106 Cal.App. 485, 289 P. 646.] At page 488 of 106 Cal.App., at page 646 of 289 P., the court states: "The trial court having confirmed the agreement, it became a part of the court's decree." Citing Locke Paddon v. Locke Paddon, 194 Cal. 73, 227 P. 715. In reviewing this cited case we find nothing therein to support said statement. The opinion in Ex parte Weiler continues, page 488 of 106 Cal.App., page 646 of 289 P.: "The fact that a copy of the agreement was not attached to, nor pleaded in haec verba, in the complaint is of no moment. We are not considering a demurrer. By an appropriate passage contained in the interlocutory decree and repeated in the final decree the agreement was made a part of each decree. What was formerly merely an agreement of the parties became a part of the judgment of the trial court." Citing Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252. As stated above the Tripp case is not authority for this statement since in the Tripp case the property settlement agreement was set forth in full in both interlocutory and final decrees.

It seems therefore that of the authorities coming to our attention, Baxter v. Baxter, supra, for which the only valid authority cited, is Ex parte Weiler, supra, are the only cases holding that a property settlement agreement actually becomes part of a divorce decree merely by referring to it with the statement that it is made a part of the decree. The several Supreme Court cases above referred to and discussed hold that in such an event there can be no enforcement of the provisions of the agreement by contempt proceedings. If this be so then the agreement is not a part of the decree for *all* purposes. If not, then where is the line to be drawn separating the sameness or difference between an agreement made a part of a decree by reference only and one incorporated bodily into, and the provisions thereof set forth and copied into the decree itself? In Lazar v. Superior Court, supra, the Supreme Court states that if a provision is merely a part of an agreement then "only the usual contract remedies are available. * * * If a property settlement agreement is complete in itself and is merely *referred to* in a divorce decree or approved by the court but not *actually made* a part of the decree, then the provisions of such agreement cannot be enforced by contempt proceedings." (Emphasis added.) It would seem to logically follow then that if a property settlement is made a part of a divorce decree by mere reference it is not incorporated into the decree within the meaning of that term as it is used in the Supreme Court cases of Hough v. Hough, supra, and Lazar v. Superior Court, supra, and in the District Court of Appeal case of Schnerr v. Schnerr, supra. That consequently contempt proceedings are unavailable to assist in its enforcement and that resort may be had only to "the usual contract remedies".

That an agreement referred to in a decree and made a part thereof by reference only does not actually become a part of the decree for the purpose of enforcement as part of a judgment, but for purposes only of giving life and legal standing to an otherwise easily assailable contract even where by its own terms it does not require court approval to render it operative seems apparent from the theory of these cases. Therefore such an agreement may be enforced as such by resort to "The usual contract remedies", with its standing as a fair and equitable agreement res judicata when it has been approved in a divorce decree or by *reference* made a part thereof.

[5] From the pleadings and record in the present case we cannot determine whether the agreement, Exhibit "A", was "made a part" of the divorce decrees alluded to by *actual incorporation*, that is by being copied in the decree or by being attached thereto as an integral part thereof or whether it was "made a part" thereof by merely referring to it. This was likewise unascertainable by the trial court from the pleadings. If the agreement was not actually attached to the divorce decrees or the provisions thereof copied into the decree then a separate action such as the one we are here concerned with based upon the contract itself is proper and a judgment on these pleadings predicated upon this issue alone was not proper. It is not mandatory that the usual contract remedies sought in connection with a property settlement agreement be invoked by further proceedings in the divorce action itself.

[6] The allegation that any remedy sought by plaintiff is barred by the Statute of Limitation, Chapter III, Title 2, Part 2 of the Code of Civil Procedure and specifically sections 336 and 337 as enumerated in the Demurrer or 366 and 377 as enumerated

in the answer was also before the trial court. The judgment does not specify any particular ground or grounds upon which it is based. The question of the bar of the statute was not raised or discussed by either party on appeal and will therefore not be considered here.

The judgment on the pleadings is therefore set aside on the ground that from the pleadings it is not ascertainable whether an action predicated upon the property settlement agreement may or may not be maintained and that such a determination can only be made through an amendment to the complaint or through the introduction of the divorce decrees into evidence. The action is therefore remanded for further proceedings in the trial court.

NOURSE, P. J, and DOOLING, J., concur.

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85 Cal.App.2d 545

KLEIN v. FARMER.

Civ. 13530.

District Court of Appeal, First District, Division 2, California.

May 19, 1948.

Rehearing Denied June 18, 1948.

Hearing Denied July 15, 1948.

1. Estoppel 🔑112

In suit by administratrix to quiet title to certificates of stock, claim in answer that, under circumstances alleged relative to delivery by decedent of certificates to defendant, attempt of administratrix to deprive defendant of stock was a fraud upon defendant constituted a plea of estoppel.

2. Estoppel 🔑52

He who by his language or conduct leads another to do what he would not otherwise have done may not subject such other person to loss or injury by disappointing the expectations upon which other person acted. Code Civ.Proc. § 1962, subd. 3.

3. Estoppel 🔑99

The remedy of estoppel is so applied as to promote ends of justice, being available only for protection and not as a weapon of assault. Code Civ.Proc. § 1962, subd. 3.

4. Estoppel 🔑101

Where, because of defendant's reliance on what decedent said and did in promising to transfer to her certain stock certificates in addition to monthly compensation for services rendered if she would give up her business and care for decedent, course of defendant's life for almost seven years was substantially altered, defendant was entitled to full measure of equitable relief under her plea of estoppel in action by administratrix to quiet title to certificates of stock. Code Civ.Proc. § 1962, subd. 3.

5. Estoppel 🔑85

General rule that in order to furnish basis of an estoppel, a representation must relate to some present or past fact or state of things, is qualified by doctrine of "promissory estoppel" in that an estoppel may arise from making of a promise, even though without consideration, if it was intended that promise be relied upon, and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction perpetration of fraud. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Promissory Estoppel".

6. Executors and administrators 🔑85(5¼)

In suit by administratrix to quiet title to certificates of stock which decedent had indorsed and delivered to defendant, administratrix being out of possession, had burden to establish a superior title in herself if she were to prevail over defendant's plea of estoppel which was advanced purely as a shield. Code Civ.Proc. § 1962, subd. 3.

7. Estoppel 🔑85

Executors and administrators 🔑85(5¼)

To establish a promissory estoppel predicated on decedent's promise to give defendant property if defendant would perform services, consideration is not necessarily a factor, hence, defendant's alleged failure to show adequate consideration for decedent's promise does not defeat plea of estoppel to suit by administratrix to quiet title to property delivered by decedent to defendant. Code Civ.Proc. § 1962, subd. 3.

8. Estoppel ⚷112

Answer which alleged all the facts on which defendant relied to sustain her plea of estoppel was sufficient. Code Civ.Proc. § 1962, subd. 3.

9. Estoppel ⚷107, 112

An estoppel must be pleaded so that opposite party may know its nature. Code Civ.Proc. § 1962, subd. 3.

10. Estoppel ⚷101

Where defendant's plea of estoppel to suit by administratrix to quiet title to stock was based on defendant's performance of agreement to give up business and work for decedent in reliance on his promise to give defendant stock certificates, plea could not be defeated because defendant could have been compensated in money. Code Civ.Proc. § 1962, subd. 3.

11. Estoppel ⚷85

Where decedent contemplated when he turned corporate stock over to defendant that defendant would stay with him and care for him during remainder of his life, and defendant did so in reliance upon decedent's promise that stock would be hers, with respect to validity of defendant's plea of estoppel to suit by administratrix to quiet title to stock, it was immaterial whether promise to decedent was bilateral or unilateral. Code Civ.Proc. § 1962, subd. 3.

12. Evidence ⚷584(1)

Uncorroborated testimony of a litigant is sufficient to support a finding for such litigant. Code Civ.Proc. § 1844.

13. Estoppel ⚷87

Defendant's showing of change of position in leaving her family and devoting herself entirely to decedent's service in reliance upon decedent's promise that stock certificates would be hers sustained her plea of estoppel in action by administratrix to quiet title to stock certificates which decedent had delivered to defendant without any reliance by defendant upon giving up of her business, hence any failure to prove value of business would not defeat plea. Code Civ.Proc. § 1962, subd. 3.

14. Appeal and error ⚷1180(2)

Where defendant interposed a plea of estoppel or an alternative demand for reasonable value of her services rendered decedent in suit by administratrix, reviewing court's conclusion giving defendant a monetary award and calling for judgment in defendant's favor on her defense of estoppel automatically eliminated her alternative money demand, since defendant could not enjoy both remedies.

15. Appeal and error ⚷1008(1)

In action by administratrix to quiet title to certificates of stock, findings which closely followed defendant's pleading of estoppel did not support conclusion that administratrix was not estopped from asserting ownership of stock. Code Civ. Proc. § 1962, subd. 3.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Suit by Dicka Klein, as administratrix of the estate of William Otto Emerson, deceased, against Florence M. Farmer to quiet title to corporate stock wherein defendant cross-complained. From a decree quieting title of plaintiff to stock but awarding defendant a money judgment both parties appeal.

Judgment reversed with directions on defendant's appeal.

Augustin Donovan, Louis B. De Avila and Rode, Burnhill, & Rode, all of Oakland, for appellant.

John L. McVey, of Oakland, and Jess H. Miller, of San Francisco, for respondent.

GOODELL, Justice.

The decree in this case quiets the title of the plaintiff, as administratrix of the estate of William Otto Emerson, to 400 shares of Pacific Gas and Electric Co. stock and 12 shares of American Telephone and Telegraph Co. stock, all valued at $14,289 as of the time of decedent's death, and orders the defendant to deliver to the plaintiff the certificates evidencing the stock. At the same time it awards the defendant a money judgment for $8,855 against the estate, less an offset of $928 representing dividends collected by her. Both sides have appealed, and it will avoid confusion to refer to the appellant administratrix as the plaintiff, and to the appellant Florence M. Farmer as the defendant.

At the time of decedent's death the certificates evidencing the 412 shares, endorsed to defendant in decedent's handwriting and contained in a sealed envelope, were in the defendant's safe deposit box where they had been for almost 7 years, and they have been in the defendant's (or the county clerk's) possession throughout this litigation. The same envelope contained a deed, signed and acknowledged by decedent, conveying to defendant that portion of decedent's real property near Hayward on which his home stood. It also contained a letter from decedent to defendant dated April 9, 1934.

After decedent's funeral defendant opened the envelope, recorded the deed, and had the stock transferred into her own name. It was while it stood in her name that the dividends amounting to $928 were paid to her.

Soon after decedent's death Dicka Klein, as the grantee of her mother (who was decedent's sister and sole heir at law) sued this defendant and George A. Gray (defendant's former husband) to quiet title to the home place near Hayward. Defendant asserted title to the parcel described in her said deed. The court held that there had not been a sufficient legal delivery of the deed and entered a decree quieting the plaintiff's title, which was affirmed on appeal in Klein v. Farmer, 57 Cal.App.2d 542, 135 P.2d 21.

The present case, which deals only with the stock, has been tried twice. On the first trial the court decided in plaintiff's favor, but the judgment was reversed in Klein v. Farmer, 70 Cal.App.2d 51, 160 P.2d 30.

Decedent died on December 24, 1940 at the age of about 85 years. He had been badly crippled for many years and walked with great difficulty. He had never married. He and his mother had lived at the home place, and when she died in 1927 that property and the stock in question (and other property) went to him. He had never engaged in any gainful occupation. Ornithology was apparently his chief interest and he did some writing on that subject. He did some painting and sketching as well.

Defendant had been a close friend of decedent and his mother for some years. In 1932, when decedent was about 77 and living alone, he asked her to keep house for him. For some years she had been a real estate broker, notary public and public stenographer, with an office in her home. She agreed to work for him from 10 a. m. to 4 p. m. five days a week, for which he paid her $40 a month. This arrangement enabled her to continue with her business to a limited extent, before 10 and after 4, and some of her own work was done in decedent's home.

On April 9, 1934 a more definite arrangement was made. Defendant then agreed to work from 9 a. m. to 5 p. m. five days a week and to give up her business, and she did give it up at once. Decedent on that day and in defendant's presence placed the endorsed certificates and the deed in the envelope and sealed it with some stickers containing his name and address. Defendant testified that she knew at the time that the certificates were for these 412 shares, but did not know what they were worth, except that decedent told her they would yield about $600 a year.

Defendant testified that many times before April 9, 1934, decedent had said to her: "Florence, if you will give up the business completely and give me your full time from nine to five and what time I might need you after five, I will give you a deed to part of my property,—the home; and I will also give you 400 shares of P. G. & E. and 12 shares of the telephone stock; that will give you an income of around $50.00 a month; and you will have the home; * * * I will make out a deed to the property and I will also sign the stock to you and give it into your possession—." She testified that decedent had offered her the deed in 1933 and that in April, 1934, when he finally handed her the envelope containing the stock and the deed he said: " 'You take this envelope and put it in your safe deposit box—' he said, 'it is yours.' He said, 'I am going to keep my part of the bargain, if you keep yours and as long as you stay with me it is yours.' He says, 'If you ever leave me, why, you are to return it to me in the same condition—' and on the front of the envelope was written, 'To be opened at my death and put of record immediately.' " She put the envelope in her safe deposit box and there it remained until after decedent's death.

In July, 1939 the arrangement was changed so that the defendant should devote practically all her time to decedent. A room for her was added to the home, and she lived there night and day except Sundays, which she spent with her married children. When this full-time arrangement was made the monthly payment was increased from $40 to $65 but the arrangement made in April, 1934, as to the stock and the deed was not disturbed.

The services which defendant rendered from April, 1934, to the time of decedent's death were about as follows: she did the housework; cooked and served decedent's meals; bathed him, shaved him, and cut his hair; dressed injuries on his body which were draining; drove him in his automobile wherever he wanted to go, helping him in and out; when he visited art galleries or such places, she helped him from the automobile into his wheel-chair and wheeled him around in it; when he wanted to sketch or paint she drove him into the hills. She handled his correspondence; typed his articles on technical subjects; catalogued his books and papers. Several witnesses testified that he often expressed himself as highly pleased with her services, and had said that whenever she was away he missed her and did not know what to do without her help, and that he was very fond of her.

Defendant's children on numerous occasions urged her to quit her employment because the work was too heavy and because she did not have to work anyway. Her reply invariably was that decedent had turned over the stock and deed to her, thereby performing his part of the bargain, and she proposed to carry out her part, and would not go back on her word however arduous and unpleasant the work might be.

It so happened that at the time of decedent's death and for three or four days before, defendant was ill and confined to her own home. The record, with this one exception, shows no interruption in defendant's services and no inattention or neglect on her part over the entire period. Even when she suffered a sprained ankle, and at another time a broken arm, she kept on with her duties.

None of defendant's testimony respecting the foregoing matters is contradicted and most of it is corroborated. Practically the only dispute in the case arose out of the following circumstances: when defendant opened the envelope she found within it, according to her testimony, a letter reading as follows: "April 9, 1934, to Florence M. Farmer. Dear: All my household furniture, books, pictures, curiosities and everything contained in my home are hereby given to you and are to be under your full control, to be disposed of as you may see fit. This gift is in appreciation of your care and kindness to myself and my mother. It is to be understood that I am to have the use of these personal belongings during my lifetime. W. O. Emerson." While the property mentioned therein is not now involved, the letter is pertinent because it helps to fix the time of the turning over of the stock to defendant and shows the decedent's high regard for her. Mr. McVey, plaintiff's attorney, testified that he telephone to defendant shortly after the funeral to inquire whether she had a will and that she replied in the affirmative and added that she had received it in the mail but she did not know the person by whom it had been mailed. This the defendant flatly denied. Her version was that she told him she found a letter (not a will) in the envelope and that he could examine it. He later examined it at the office of her attorneys, who supplied him with a copy. There is no other conflict of any importance in the whole record. With respect to this conflict the court found that "Nothing contained in the foregoing findings is intended as a finding that the testimony of John L. McVey, * * * was untruthful in any respect; and said testimony was believed by the Court to be true in every respect."

[1] The complaint alleges that at the time of decedent's death he was the owner of the 412 shares but that defendant claimed them as her own. In her answer defendant, in addition to denying plaintiff's title, alleges ultimate facts substantially in accord with the facts narrated above, concluding with the claim that "the attempt of plaintiff to deprive defendant of the said stock [is] a fraud upon the defendant," which is a plea of estoppel.

Defendant also set up an alternative cause of action based on a contingent creditor's claim against the estate, for the difference between the payments made to her each month and the full value of her services, on which she could rely in case of a judicial determination that she was not the owner of the stock.

On all the facts pleaded in the estoppel count the court found in defendant's favor but concluded that the plaintiff was "not precluded or estopped from asserting ownership of said stock * * *" The court then gave judgment for $8,855 on said count for the reasonable value of defendant's services over and above the $40 a month which she received for 63 months and the $65 a month for 17½ months.

[2, 3] The defendant contends that she is entitled to a favorable decision on her plea of estoppel and that the money judgment "only partially remedies the injustice of depriving her of that for which she worked." She invokes the rule, codified in section 1962, subd. 3, Code Civ.Proc., that "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." She relies also on the rule of Dickerson v. Colgrove, 100 U.S. 578, 580, 25 L.Ed. 618 (repeatedly quoted in the California cases) as follows: "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both." To this the court added: "This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault." It is sufficient to remark that here the estoppel is invoked purely defensively, in opposition to the estate's assertion of title to the stock.

[4] We are satisfied that this case comes within the rules just quoted and that it is not essentially different from Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am.St.Rep. 154. Because of the defendant's reliance on what the decedent said and did, the course of her life for almost seven years was substantially altered, and in our opinion she is entitled to the full measure of equitable relief under her plea of estoppel. In Seymour v. Oelrichs the plaintiff was a captain of police in San Francisco. Messrs. Fair and Oelrichs, representing the Fair estate, entered into negotiations with him looking to his employment under a ten year contract at $300 a month. Fair and Oelrichs knew that by accepting this new position Seymour would lose his police pension rights, wherefore a written contract took on added importance. Fair was busy winding things up preparatory to a trip abroad and told Seymour " Now, in regard to this contract, you leave that stand until I get back, and I will give you the contract" and when Seymour pressed him for it before leaving, Fair told him not to be afraid, it would be all right. Oelrichs told him substantially the same thing. They wanted him to start working at once. Relying on these promises he resigned and entered the employ of the Fair estate on June 1, 1902. Two months later Fair was accidently killed in France and the contract was never drawn up. After two years Seymour was discharged and he sued for his salary for the remainder of the 10 year term, less his earnings elsewhere. The court held that the conduct and promises of the defendants, and Seymour's change of position in reliance thereon, estopped the Fair estate from pleading

the statute of frauds; that if the court permitted them to take advantage thereof it would work a fraud on Seymour.

The estoppel just discussed was not based on the conventional representation or assurance as to an existing or past fact or state of things, but solely on the promises of Fair and Oelrichs to give Seymour a written contract in the future, with no consideration whatever moving from promisee to promisors.

[5] In 3 Pomeroy's Equity Jurisprudence (5th Ed.) sec. 808b this is said on the subject of "promissory estoppel":

"The general rule stated in a preceding section (sec. 808) that in order to furnish the basis of an estoppel, a representation or assurance must relate to some present or past fact or state of things, as distinguished from mere promises or expressions of opinion as to the future, must be qualified. There are numerous cases in which an estoppel has been predicated on promises or assurances as to future conduct. Thus an estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise be relied upon and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or result in other injustice. The name 'promissory estoppel,' has been adopted as indicating that the basis of the doctrine is not so much one of contract, with a substitute for consideration, as an application of the general principle of estoppel to certain situations. On the other hand, it has been said by good authority that the doctrine of promissory estoppel has been adopted as the equivalent of consideration, or substitute for consideration. It is important to bear in mind that the doctrine is much older in its origin and applications than the terminology now employed to describe it. Illustrative cases abound in the reports, especially since the formal embodiment of the principle by the American Law Institute in the Restatement of the Law Contracts, as follows: " 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise' * * *"

Illustrative of the statement "that the doctrine is much older in its origin and application than the terminology now employed to describe it" are the cases cited inter alia by the editor, namely Dickerson v. Colgrove, supra, and Seymour v. Oelrichs, supra. Indeed thirteen years before the Seymour case, our Supreme Court in Carpy v. Dowdell, 115 Cal. 677, 687, 47 P. 695, 698 said: "* * * the principle of equitable estoppel does not rest upon a consideration moving to the party estopped" citing Van Syckel v. O'Hearn, 50 N.J.Eq. 173, 175, 24 A. 1024.

In the latter case the holder of a mortgage promised to withhold its enforcement for one year, on the strength of which O'Hearn purchased the property against which the mortgage lien stood. When foreclosure was commenced within the year the plaintiff was held to his promise. The chancellor, after conceding that ordinarily a consideration must be shown to support a promise, said: "But a court of equity will sometimes prevent parties from disregarding their promises, even when no consideration has accrued to them upon the making of such promise. If a party asking the aid of the court waive strict performance of his contract, and makes promises to the defendant, upon which the latter has acted and altered his position, and it should appear to the court to work a hardship to the defendant to allow the complainant to withdraw his waiver, a court of equity always applies the doctrine of estoppel. In such case, although no consideration or benefit accrues to the person making the promise, he is the author or promoter of the very condition of affairs which stand in his way; and, when this plainly appears, it is most equitable that the court should say that they shall so stand. [citations]."

Section 1962 (subd. 3), Code Civ.Proc., supra, speaks of *a declaration, an act, or an omission* which leads "another to believe a particular thing true." In this case you have both a declaration and an act: " 'You take this envelope and put it in your safe deposit box * * * *it is* *yours* * * * I am going to keep my part of the bargain, if you keep yours and as long as you stay with me *it is yours'* * * *" (Emphasis added). Although this may not have constituted an absolute and unqualified *legal* delivery, equity, under the facts and circumstances shown by this record, should not permit the defendant's claim to this stock to be defeated. We agree with defendant's statement that in handing the endorsed certificates to the defendant decedent "used language which, regardless of legal refinements as to the exact time when title was to pass, must necessarily have been calculated to convey to the defendant the impression that if she continued in his service until his death, she would be the unqualified owner of the stock. Believing that she had been provided for, and relying on that belief, the defendant carried out her part of the agreement by discontinuing her business and sacrificing the income she had derived from it, and by assuming for [almost] the ensuing seven years, the arduous and often unpleasant duties involved in the care of an aged and crippled person. In addition, during the latter part of the period, she gave up her normal home life, including the frequent visits that she had previously enjoyed with her children." Unlike most cases of estoppel the promisor in this case did everything he thought necessary to make good his promise.

[6] In examining the several reasons advanced by plaintiff why defendant has not made out a case of estoppel, it should be borne in mind that in this lawsuit plaintiff is the actor, suing to quiet title to the stock and to recover it for the estate. Plaintiff is out of possession of the certificates which evidence ownership; "paper title" is in defendant and the certificates are in her possession (or the court's). If plaintiff is to prevail she must establish a superior title in herself. Against plaintiff's claim of title defendant pleads estoppel purely as a shield, seeking to retain as her own, stock which the decedent admittedly endorsed and turned over to her and which he could never have conceivably recovered back as long as defendant continued (as she did) faithfully in his service.

[7] 1. One of plaintiff's principal contentions is that defendant has not shown an adequate consideration for decedent's promise, but it is already clear that in cases such as this consideration is not necessarily a factor. Moreover, defendant does not seek specific performance, hence plaintiff's authorities on that subject are not in point.

[8, 9] 2. As to defendant's pleading: she alleged all the facts and circumstances on which she relies, and as long as the estoppel is pleaded "so that the opposite party may know its nature" (Burrow v. Carley, 210 Cal. 95, 103, 104, 290 P. 577, 581) that is sufficient.

[10] 3. Several arguments of plaintiff are predicated on something which never happened. Let it be assumed that it was part of the understanding between decedent and defendant that *if she did not remain with him until his death* he would pay her (a) the full value of her services theretofore rendered, or (b) what she had lost in discontinuing her real estate business, or both. Plaintiff argues that this shows that she could be compensated in money, hence her case does not commend itself to a court of equity. The fact is that she remained to the very end, and the arrangement for money compensation (which at best was alternative and substitutional) was never, therefore, brought into operation.

[11] 4. Plaintiff also argues that although defendant claims stock of considerable value (over $14,000), she made no promise binding her to stay, and could have quit at any time. It makes no difference whether she made a bilateral promise to decedent to stay, in exchange for his promise, or whether the arrangement was purely unilateral. The fact remains, as just pointed out, that she did stay as long as decedent lived, which was precisely what was contemplated when the stock was turned over to her.

[12, 13] 5. Plaintiff claims that defendant did not prove that she gave up

something of substantial value in discontinuing her real estate business, and that a finding that she did so is conspicuous by its absence. She testified that her business had yielded her about $200 a month. Her former husband corroborated her testimony that she had had a going business, but even if all defendant's testimony on the subject remained uncorroborated it would still be sufficient evidence to prove the fact (Sec. 1844, Code Civ.Proc.). There can be no question that defendant did give up her business about April 9, 1934. Wholly aside from that, however, her change of position in leaving her family, devoting herself entirely to decedent's service, and doing the kind of work she had to do for almost seven years, would alone suffice without any reliance at all on the giving up of her business. For this reason, if for no other, corroboration of what defendant's earnings had been in the real estate business is neither important nor material.

6. Plaintiff's contention that there is no "finding of substantial injury, or any reasonable evidence to sustain such finding" is difficult to understand or follow in view of the record in this case.

In the first case (Klein v. Farmer, 57 Cal.App.2d 542, 135 P.2d 21) plaintiff sued as grantee of her mother (not as executrix) to quiet title to decedent's home place. Although defendant's deed and the stock certificates were in the same envelope; the issues there were much narrower then those in this case, and defendant's claim under the deed came to an end by that decision.

In the present case the court awarded defendant $8,855 on her alternative claim, but she is dissatisfied with that judgment because it denies her the stock itself.

Plaintiff, also, is dissatisfied, and has appealed from that part of the judgment which awards the $8,855, contending (a) that defendant's demand is barred by the statute of limitations; (b) that the event which would mature such demand had not arrived; (c) that there was no competent evidence of the reasonable value of defendant's services and the court could not take judicial notice as to such value; (d) that certain offsets should have been allowed, and (e) that defendant failed to show a compliance with the Welfare and Institutions Code.

[14] Our conclusion herein calls for a reversal of the judgment which quiets plaintiff's title to the stock and at the same time awards defendant the $8,855. It calls, also, for a judgment in defendant's favor on her defense of estoppel, thereby automatically eliminating her alternative money demand, for "she cannot enjoy both remedies". Klein v. Farmer, 70 Cal.App. 2d 51, 60, 160 P.2d 30, 35. It follows of course that there is no need to discuss any of the points, enumerated above, raised on plaintiff's appeal.

[15] The findings closely follow defendant's pleading of estoppel in her fifth defense, and they are sufficient as far as they go. They conclude, however, that the plaintiff is "not precluded or estopped from asserting ownership of said stock * * *" As already indicated, the record in this case calls for a finding or conclusion that the plaintiff *is* so precluded and estopped. The trial court is directed, therefore, to change the findings in that respect and in any other respect which it may deem proper, not inconsistent with this opinion; likewise, of course, to change the conclusions of law accordingly, and thereupon to enter a decree quieting defendant's title to the stock, awarding her the dividends accrued thereon since decedent's death, and her costs.

The judgment is reversed (on defendant's appeal) with the directions just stated. Defendant to recover her costs on appeal.

NOURSE, P. J., and DOOLING, J., concur.

In re FERRALL'S ESTATE.

HAMILTON v. BANK OF AMERICA NAT. TRUST & SAV. ASS'N et al.*

Civ. 16447.

District Court of Appeal, Second District, Division 3, California.

June 9, 1948.

Hearing Granted Aug. 5, 1948.

1. Appeal and error ⚷151(3)

Generally, executors, administrators, receivers and trustees, in their official capacities, have no interest in distribution of estate further than for their own protection and they cannot litigate claims of one heir or claimant against those of others, and if they dispose of property in accordance with orders of court having jurisdiction they will be completely protected and thus are not "parties aggrieved" so as to be entitled to appeal from orders directing them how to disburse funds. Code Civ. Proc. § 938.

See Words and Phrases, Permanent Edition, for all other definitions of "Parties Aggrieved".

2. Appeal and error ⚷151(3)

Executors, administrators, receivers and trustees are entitled to appeal from orders which direct them how to disburse trust fund where they may become subject to personal liability through compliance with the order or judgment, or where they have a duty to appeal in order to protect the estate which they represent. Code Civ. Proc. § 938.

3. Appeal and error ⚷151(3)

Testamentary trustees were not "parties aggrieved" entitled to appeal from order directing them to increase payments to life tenant out of income and principal of trust estate from the $50 per month which she had been paid to $400 a month to be paid out of income and principal of estate until further order of court. Code Civ. Proc. § 938.

4. Appeal and error ⚷417(1)

Where notice of appeal from order directing testamentary trustees to increase payment to life tenant out of principal and income of trust estate to $400 per month stated that corporate trustee and individual trustee "as co-trustees under last will and testament * * *, hereby appeal to the Supreme Court," etc., notice of appeal was required to be construed solely as notice of appeal by trustees in their representative capacities, notwithstanding that individual trustee was also a remainderman who was aggrieved by the order. Code Civ.Proc. § 938.

◆

Appeal from Superior Court, Los Angeles County; Raymond McIntosh, Judge.

Proceeding in the matter of the estate of John C. Ferrall, also known as John Charters Ferrall, deceased. A petition was filed by Faye F. Hamilton for an order requiring Bank of America National Trust & Savings Association and George D. Ferrall, cotrustees, to pay petitioner the sum of $10,231.46 which she had expended in addition to monies received from trust for her care and maintenance and also for sum of $450 a month to be paid from trust until further order of the court. From judgment denying respondent reimbursement for any sum she had expended but ordering trustees to pay her $400 a month from the income and principal of the estate until further order of the court, the trustees appeal. On motion to dismiss appeal.

Appeal dismissed.

Earle N. Daniels, of Los Angeles, Burdette J. Daniels, of Sacramento, and Hallam Mathews, of Los Angeles, for appellants.

Potter, Potter & Rouse, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Appellants, Bank of America National Trust and Savings Association and George D. Ferrall, are trustees of an estate distributed to them pursuant to the will of John C. Ferrall, deceased. Respondent, Faye F. Hamilton, who moves by her guardian to dismiss the appeal, is entitled to all of the income from the trust estate available for distribution, to be paid over monthly during her lifetime. By the terms of the trust, if at any time the income is insufficient to meet her needs, then, in the sole discretion of the trustees, they may pay her such amounts from the principal of the trust as are sufficient to meet her needs, care and comfort. Respondent will take all the property of the trust upon the death of her husband, Alex C. Hamilton, providing she survives him. Upon her death the trust will terminate and the property will be distributed one-half to George D. Ferrall, son of the testator, and one-half to three grandchildren, George D. Ferrall, Jr., John Charters Ferrall, and Frank M. Ferrall.

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* Subsequent opinion 200 P.2d 1.

Respondent, an invalid, and for many years confined to a sanitarium, petitioned the court for an order requiring the trustees to pay her the sum of $10,231.46, which she had expended in addition to moneys received as income from the trust for her care and maintenance, while she was without the benefit of counsel and unaware of her right to receive allowances from the principal of the trust estate, and she petitioned also for the sum of $450 a month to be paid from the trust until the further order of the court. After due notice, the petition came on for hearing; the trustees appeared by counsel in opposition to the petition and a trial was had. The court found the facts to be as alleged by respondent and that the estate was of the present value of $27,000, consisting almost entirely of negotiable and readily liquidatable assets; that respondent has received only about $50 per month from the trust estate and that her expenses in the sanitarium amount to approximately $400 a month. It was also found that respondent's husband was in receipt of earnings sufficient to support her. The judgment denied respondent reimbursement for any sums she had expended and ordered the trustees to pay her $400 a month from the income and principal of the estate until the further order of the court.

[1, 2] The grounds of the motion to dismiss the appeal are that the trustees are not parties aggrieved by the order, and therefore are not entitled to appeal therefrom (Code Civ.Proc. sec. 938), and also that the order is one from which an appeal will not lie. The first point is well taken. The trustees are not aggrieved by the order. Although trustee George D. Ferrall is one of the remaindermen, he does not appeal as such. With certain exceptions to be noted, the law is that executors, administrators, receivers and trustees are, in their official capacities, indifferent persons as between the real parties in interest; they cannot litigate the claims of one heir or claimant against those of others; they have no interest in the distribution of the estate further than for their protection; if they dispose of the property in accordance with orders of a court having jurisdiction they will be completely protected and thus they are not parties aggrieved by orders which direct them how to disburse trust funds. Estate of Williams, 122 Cal. 76, 54 P. 386; Goldtree v. Thompson, 83 Cal. 420, 23 P. 383; Estate of Wright, 49 Cal. 550; Bates v. Ryberg, 40 Cal. 463. The rule is sustained by many other authorities. The exceptions to the rule are that such representatives have a right to appeal where they may become subject to personal liability through compliance with the order or judgment, or where they have a duty to appeal in order to protect the estate which they represent. The trustees rely upon cases which come under the exceptions.

[3] It is clear that the trustees, as such, have no interest of their own to protect. It is also clear that they have no duty to appeal. They do not represent the remaindermen any more than they represent the life tenant, and the converse, of course, is true. If it was their duty to appeal from the order in the interests of the remaindermen, because the latter considered the allowance too great, it would have been equally their duty to appeal on behalf of the life tenant if she had considered the allowance too small. This might lead to the absurd result that the trustees on the appeal would be contending that the allowance was both too great and too small. The fact is that they have no duty in the premises except to comply with the order of the court, and having no further duty, and no interest in the result, they are not entitled to appeal.

[4] Although it has been held, in construing notices of appeal, that the words "administratrix of the estate of," following the name of the appellant, or the words "executrix of the estate of," appended opposite the name of the appellant, do not necessar-

ily show that the appeal was intended to be taken in a representative capacity, and in the interests of justice may be considered as mere descriptio personae. Estate of Strong, 10 Cal.2d 389, 74 P.2d 231; Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231. The rule has no application here. The notice of appeal states "that Bank of America, National Trust and Savings Association and George D. Ferrall, as co-trustees under the last Will and Testament of John C. Ferrall, also known as John Charters Ferrall, deceased, hereby appeal to the Supreme Court" etc. Nothing could be plainer than this. The trustees must be deemed to have given the notice of appeal solely in their representative capacity and under a misconception of their duty in the premises.

The appeal is dismissed.

WOOD, J., and McCOMB, Justice Assigned, concur.

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86 Cal.App.2d 24

PEOPLE v. FISHER.

Cr. 2072.

District Court of Appeal, Third District, California.
June 5, 1948.

1. Assault and battery 🔑92

Evidence sustained conviction of assault with deadly weapon as against plea of self-defense.

2. Criminal law 🔑1159(2)

Reviewing court may not reverse a judgment of conviction on ground that testimony is inherently improbable unless it is so apparently false and unbelievable that reasonable minds may not differ in that regard.

3. Criminal law 🔑875(1), 883

No particular form of verdict is required so long as it clearly indicates intention of jury to find defendant guilty of identical offense of which he is charged, nor need it specify in terms the nature of the offense; and it is sufficient if it finds him guilty by reference to a specified count contained in the information.

4. Criminal law 🔑886, 889

Court has authority while jury is before it to see that verdict expresses jury's clear intention, and that any doubtful or insufficient statements contained therein are corrected by jury before it is finally pronounced or becomes a part of records of trial; and in giving effect to manifest intention of jury, matters of surplusage and clerical errors will be disregarded.

5. Criminal law 🔑1040

A defendant may not for the first time on appeal object to the form of a verdict if it is susceptible of a construction which may have a lawful and relevant application and is determinative of the issues involved.

6. Criminal law 🔑890

In prosecution for assault with a deadly weapon under information containing two counts, where jury found defendant guilty upon first count and not guilty upon second, and unnecessarily added "we find defendant guilty of the felony charge," action of court in erasing surplus words with permission of counsel and acquiescence of jury in open courtroom without objection on part of defendant or his attorney was proper.

7. Criminal law 🔑890

When informalities in a verdict amount to mere matters of form, the court instead of directing jury to retire for that purpose may of its own motion order verdict to be corrected.

8. Criminal law 🔑1037(1, 2)

A defendant must ordinarily object to alleged prejudicial statements of a prosecuting officer made in his argument to jury and request court to instruct jury to disregard them before they may be assigned on appeal as reversible error, except that when it appears that alleged prejudicial statements are of such a nature that an admonition to the jury to disregard them would be ineffectual, they may then be raised on appeal without first requesting court to charge jury to disregard them.

9. Criminal law ⚷1037(1, 2)

In prosecution for assault with deadly weapon, wherein defendant, prosecuting witnesses and jury were composed entirely of Negroes, improper remarks by district attorney on argument in regard to race prejudice and public interest in that particular trial were not prejudicial where objection was waived by failure of defendant to criticize on the trial and by his neglect to ask court to instruct jury to disregard them.

10. Assault and battery ⚷67

Rule which justifies use of excessive force in self-defense is based on circumstances which would warrant a reasonable person in a similar situation to believe that it was necessary to prevent bodily harm at hands of his assailant, and not what defendant himself in excitement and heat of the affray might honestly think was necessary.

11. Criminal law ⚷829(5)

In prosecution for assault with deadly weapon, defendant's instruction containing erroneous statements justifying use of excessive force in self-defense based on defendant's belief that it was necessary to prevent bodily harm, rather than upon circumstances which would justify a reasonable person in using such force, was properly refused where jury was otherwise fully instructed.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Willie Fisher was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

C. Ray Robinson and Willard B. Treadwell, both of Merced, for appellant.

Fred N. Howser, Atty, Gen., and Doris Maier, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was charged by two counts of an information filed in Merced County with separate assaults upon different named individuals with a deadly weapon, to-wit, a knife. Both charges grew out of the same affray. The first count charged him with assaulting William Solomon. The second count charged an assault upon Columbus Glynn. All parties concerned in the affray were Negroes. The defendant was tried with a jury composed entirely of Negroes. The jury found the defendant guilty of the crime alleged in the first count, and not guilty of the second charge. Judgment was rendered accordingly. From the judgment of conviction on the first count the defendant has appealed.

It is contended that the judgment of conviction is not supported by the evidence; that the testimony of certain prosecuting witnesses is inherently improbable; that the verdict is unlawful and void because a statement which was written therein by the jury was eliminated in open court by unanimous consent of the jury to render the verdict more certain and to make it conform to the jurors' declared intention; that the district attorney was guilty of prejudicial misconduct in his argument to the jury, and that the court erred in refusing to give a certain instruction which was offered by the defendant.

The prosecuting witnesses, William Solomon, Columbus Glynn and Leo Norris met at the Casimira Beer Tavern in South Dos Palos about 7 o'clock P.M., November 21, 1947. They drank together one or more glasses of beer. Solomon then went home. About 8 o'clock that night, after purchasing a can of kerosene, he returned to the saloon where he again met his companions and they each drank several glasses of beer. The defendant arrived about 8:45, and parked his car in front of the place. He entered the saloon, but did not talk with the prosecuting witnesses inside the building. About 9 o'clock the prosecuting witnesses left the tavern to go home. Mr. Glynn walked around back of the building to a lavatory. Solomon and Norris walked about 50 feet toward their home and then stood there talking while they waited for Glynn to return. According to the testimony of Solomon, while they stood there, the defendant came out and, approaching them, said "all of you guys is framing up on me." They denied that statement and a controversy followed about that charge. The defendant testified that he did not follow them, but that, on the contrary, they intercepted and attacked him as he came from the saloon and proceeded toward his parked car.

It appears that three or four weeks previously the defendant attacked Glynn in a gambling joint and knocked him down. Neither Solomon nor Norris was then present. When the defendant was asked at the trial about that former affray, he first denied having had previous trouble with any of the prosecuting witnesses. But on cross-examination he admitted that he knocked Glynn down in a gambling place.

Regarding the assault for which the defendant was being tried, Mr. Solomon testified that while he and Norris were waiting for Glynn to return from the lavatory, the defendant came out of the tavern and approached them, cursing them and charging them with "framing" him; that he saw the defendant take out his knife and "open it" as he came toward them. Glynn had not then returned. Solomon said he became frightened, and "backed off" a distance of 10 or 15 feet; that Mr. Norris stepped between him and the defendant and remonstrated with the defendant against his threatened assault. Both Solomon and Norris said that no one struck the defendant or threatened to attack him before his assault. None of the prosecuting witnesses was then armed with a knife or with any other weapon. The defendant, nevertheless, rushed at Solomon with his knife. As he struck at Solomon the latter grabbed the knife and received a slight cut on one finger. The defendant then attacked Solomon again and cut an incision with the knife in his left side some five or six inches in length. Solomon was later taken to the hospital for medical care and stitches were taken to close the wound.

There is a conflict between the testimony of Solomon and Norris as to whether Glynn had actually returned before the defendant assaulted and cut Solomon in his side. The attack upon Glynn occurred later. The testimony of Norris otherwise substantially corroborated Solomon's evidence. Solomon testified that Glynn returned while he was engaged in the affray with the defendant. He said that it was after he was cut in the side that Glynn returned and then ran some distance and picked up a piece of two-by-four timber which he threw at the defendant. He said that Glynn later picked up a bottle and threw it at the defendant, and that the defendant then ran after Glynn and cut him in the back with the knife. The last mentioned cutting of Glynn was the foundation of the second count of the information, of which the jury found the defendant not guilty.

Glynn testified that when he and his companions first came from the tavern, he "went to the lavatory". He said that Solomon and Norris waited for him in front of the building, and that "almost immediately after" he "got back the fight started." Glynn was not clear regarding the circumstances of the affray. He did say that all three of them were standing and talking together when the defendant "came up and said we was framing on him." He said the defendant said "I will kill all three of you and get rid of you now." He added, "I don't know what time or when he hit Solomon with his knife, but I turned my back to walk away and I have a scar in my back on this left side." When he was asked who received the first stab, he replied, "As far as I know, Solomon did." He said nothing about procuring the two-by-four timber or the bottle, and throwing them at the defendant.

The defendant claimed that he used his knife in necessary self-defense. He said that when he came out of the saloon, Norris ran between him and his car and that, "without any word of warning", Solomon hit him with a two-by-four timber and knocked him down, and that Glynn hit him in the head with a pocket knife. He said "I struck at Glynn with the knife because he struck me." When he was asked who else he struck with the knife, he replied, "Well, Solomon."

[1] The evidence of the opposing parties is absolutely conflicting. There are some inconsistencies of testimony on both sides. If the defendant's story is true, of course he should have been acquitted of both charges. But all prosecuting witnesses testified positively that the defendant was the aggressor, and that he came to them and assaulted them with his knife, without

any threats or provocation on their part; that none of them was armed with a knife or other weapon, and that none of them first struck him. His former conflict with Glynn might account for his enmity toward them. It was the sole province of the jury to determine who was the aggressor in that affray, and to decide the credibility of the witnesses. We are of the opinion we may not interfere with that province of the jury, under the circumstances of this case. The evidence is adequate to support the verdict and judgment of conviction of the first charge of the information. It is not necessary to discuss the evidence regarding the second count of the information, since the verdict was favorable to the defendant upon that charge. Both Solomon and Norris admitted they did not see the defendant cut Glynn.

[2] Nor may we hold that the evidence of the three prosecuting witnesses, or of any one of them, is inherently improbable. Evidently the jury believed their stories of the defendant's attack upon Solomon, and were able to satisfactorily reconcile any inconsistencies which may exist in any of their testimony. It has been repeatedly held that a reviewing court may not reverse a judgment of conviction in a criminal case on the ground that the testimony is inherently improbable unless it is so apparently false and unbelievable that reasonable minds may not differ in that regard. People v. Mitchell, 48 Cal.App.2d 422, 429, 119 P.2d 1000; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Jefferson, 31 Cal.App.2d 562, 566, 88 P.2d 238; People v. Stangler, 18 Cal.2d 688, 692, 117 P.2d 321, 323. In the case last cited, the court said:

> "* * * An appellate tribunal cannot disturb the findings of the triers of fact unless it be made clearly to appear that upon no hypothesis is there sufficient substantial evidence, circumstantial or otherwise, to support the conclusion reached in the lower court."

So, also, the Supreme Court said, in the recent case of People v. Eggers, 30 Cal.2d 676, at page 685, 185 P.2d 1, 6, regarding the prohibition against a reviewing court interfering with the exclusive province of the trial jury or court in their determination of the weight or sufficiency of the evidence or of the credibility of witnesses, that: "* * * This court may not, in reviewing the evidence, substitute its judgment for that of the jury, and, where there is substantial evidence in support of the jury's verdict, its determination must be upheld. (Citing authorities.) Conversely, to justify the reversal of a judgment of conviction, the record must clearly show that the evidence could not be interpreted as supporting the verdict. People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467."

The form of the verdict which was rendered by the jury is not uncertain or invalid. It clearly found the defendant "Guilty as charged in Count One of the Information." The verdict was returned upon one of the forms supplied by the court. It was duly dated and signed by the foreman. To the language above quoted the jury had added, "We the jury find Willie Fisher guilty of the felony charge." In open court, before the verdict was declared, the judge looked at the verdict and then called attention to the last quoted written statement, and asked the jury: "What did you decide that he was guilty on Count One or Two or guilty as to Count One and not Count Two of the information?" A juror replied: "We decided Guilty on Count One." The judge then said, "Well, *with permission of counsel and the acquiescence of the jury*, I will have you erase the words, 'We the jury find Willie Fisher guilty of a felony charge.'" That was done by the jury. The court then asked, "That meets with the unanimous approval of the jurors, does it?" The jurors nodded affirmatively. The verdict was not otherwise changed. The court then directed the clerk to enter the verdict as it appears in the record, which reads: "We the jury in the above-entitled cause, find the Defendant, Willie Fisher Guilty as charged in Count One of the Information and Not Guilty as charged in Count Two of the Information."

After the verdict was entered in the minutes of the court, it was read to the jury, and they were asked, "Is that your verdict?" to which they unanimously nodded approval. The attorney for the defendant made no objection to the erasure of the surplusage matter or to the procedure in court. He merely asked that the jury be polled. The jury was thereupon polled and each juror asserted that it was his verdict as recorded.

It will be observed that the verdict originally returned by the jury, in addition to the erased language, specifically found that the defendant was "Guilty as charged in Count One of the Information and Not Guilty as charged in Count Two of the Information." The erased language was surplusage. The added statement that the defendant was "guilty of the felony charge" neither changed nor rendered uncertain the intention of the jury to find him guilty of the offense charged in count one of the information. All that the court did was, by the unanimous consent of the jurors and counsel, to direct the jury to eliminate the unnecessary language. That was done by the jury and without objection on the part of the defendant or his attorney. It was not necessary for the jury to retire to the jury room for that purpose, under the circumstances of this case.

[3] The verdict, as originally presented to the court, definitely found the defendant guilty of count one of the information. No particular form of verdict is required, so long as it clearly indicates the intention of the jury to find the defendant guilty of the identical offense with which he is charged. It is not necessary that the verdict shall specify in terms the nature of the offense. It is sufficient if it finds him guilty by reference to a specified count contained in the information. That form of verdict has received uniform approval of our courts. People v. Mercado, 59 Cal.App. 69, 209 P. 1035; People v. Flohr, 30 Cal.App.2d 576, 581, 86 P.2d 862; People v. Cassella, 58 Cal.App. 547, 209 P. 40; 8 Cal.Jur. 400, sec. 430. In the text last cited, which is supported by numerous California authorities, it is said: "Although a verdict be informal, it is sufficient if the intention to convict the defendant of the crime charged or of a crime necessarily included therein be unmistakable expressed. * * * In giving effect to the manifest intention of the jury, matters of surplusage and clerical errors will be disregarded."

[4] The court had authority, while the jury was before it, to see that the verdict expressed the clear intention of the jury, and that any doubtful or insufficient statements contained therein should be corrected by the jury before it was finally pronounced or became a part of the records of the trial. In People v. Jenkins, 56 Cal. 4, at page 7, it is said in that regard: "It is the duty of a Court to look after the form and substance of a verdict, so as to prevent a doubtful or insufficient finding from passing into the records of the Court; for that purpose the Court can, at any time while the jury are before it, and under its control, see that it is amended in form so as to meet the requirements of the law. *The informality in the case in hand was in a mere matter of form, which the Court of its own motion might have ordered to be corrected, instead of directing the jury to retire for that purpose.*" (Italics added.)

[5-7] Moreover, the defendant waived his objection to the modification of the original verdict, under the circumstances of this case. A defendant may not, for the first time on appeal object to the form of a verdict, if it is susceptible of a construction which may have a lawful and relevant application and is determinative of the issues involved. People v. McKinney, 71 Cal.App.2d 5, 15, 161 P.2d 957; Johnson v. Visher, 96 Cal. 310, 314, 31 P. 106. When informalities in a verdict amount to mere matters of form, the court, instead of directing the jury to retire for that purpose, may of its own motion order the verdict to be corrected." 8 Cal.Jur. 412, sec. 440.

The District Attorney is charged with prejudicial misconduct in his argument to the jury. The defendant is a Negro. He was tried by a jury consisting entirely of Negroes. The district attorney, in his opening argument, told the jury that "this is the first occasion in the history of our national jurisprudence where a member of your own race has gone to trial before a jury of his peers composed entirely of members of his own race." After speaking generally of racial prejudice, and asserting, in effect, that racial prejudice could not be charged in this case, he concluded by saying to the jury he knew that, "even though a member of your race be involved, you will meet your obligations and your duties courageously and discharge them in the same way and that evenhanded justice will be done." The defendant argues that the statement of the district attorney amounted to a warning to the jury that if they wanted to avoid public criticism for favoring a defendant belonging to their own race they should convict him of the charges. Evidently the jurors were not prompted, on that account, to render their verdict, for they found him *not guilty* of count two of the information, although they did convict him of the first count. Even though some of the language employed may be susceptible of the construction placed upon it by the defendant, it does not affirmatively appear that the defendant was prejudiced thereby. The district attorney closed that phase of his statement by saying the jurors should perform their duty courageously and render "evenhanded justice." They were definitely instructed that they must render their verdict solely on the evidence adduced at the trial.

We do not approve of the language used by the district attorney with regard to race prejudice or the public interest in that particular trial. That language should not have been used in the argument. But we are of the opinion it does not appear, as a matter of law, that it was prejudicial to the defendant.

[8] Moreover, no objection was made to those statements at the trial. The court was not asked to direct the jury to disregard them. The objection to that language was made by the defendant for the first time on appeal. It has been repeatedly held that a defendant must ordinarily object to alleged prejudicial statements of a prosecuting officer in his argument to the jury, and request the court to instruct the jury to disregard them, before they may be assigned, on appeal, as reversible error. People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881; People v. Knott, 15 Cal.2d 628, 633, 104 P.2d 33, 128 A.L.R. 1367; People v. Ward, 40 Cal.App.2d 143, 150, 104 P.2d 537; People v. Swenson, 28 Cal.App.2d 636, 641, 83 P.2d 70; Rogers v. Foppiano, 23 Cal.App.2d 87, 95, 72 P.2d 239; People v. DuBois, 16 Cal.App.2d 81, 87, 60 P.2d 190; People v. Chilcott, 18 Cal.App.2d 583, 588, 64 P.2d 450; People v. Dunlop, 79 Cal.App.2d 207, 211, 179 P.2d 658; 24 Cal. Jur. 746, sec. 29. In the Codina case, supra, the Supreme Court said [30 Cal.2d 356, 181 P.2d 884]: "Moreover, defendant made no attempt to correct these alleged improprieties at the trial; and it is the general rule that any objectionable remarks or argument of the prosecuting attorney must be opposed at the time they are made, and the court requested to admonish the jury concerning them, before they can be made a ground for appeal."

The only exception to the foregoing rule is that when it appears that the alleged prejudical statements are of such a nature that an admonition to the jury to disregard them would be useless and ineffectual, they may then be raised on appeal without first requesting the court to charge the jury to disregard them.

[9] We are of the opinion the appellant waived his objection to the alleged prejudicial statements of the district attorney by failing to criticise them at the trial and by neglecting to ask the court to instruct the jury to disregard them.

Finally, the appellant contends that the court's refusal to give to the jury one instruction offered by him is reversible error. We think not. It contains an erroneous statement justifying the use of excessive force in self-defense *based on the defendant's belief* that it was necessary to prevent bodily harm, rather than upon circumstances which would justify *a reasonable person* in so doing. The rejected instruction was also fully covered by others which were given to the jury. The instruction reads: "It is proper for you to consider who made the first attack, and, if the defendant was required to act at once, in the excitement and heat of the affray, he could not be expected to exercise that nice discretion and accurate judgment which a jury, by a careful sifting of the testimony of all the witnesses, aided by the argument of the counsel and charge of the Court, would be able to do; and, therefore, his conclusion, though he acted honestly and in good faith, might not be perfectly correct and just. If you find that the defendant did use more force than was actually necessary for self-protection, but also find that he honestly believed at the time that he was using only so much force as was necessary for his own defense, and if he acted honestly and in good faith in coming to that conclusion, and if such a belief was reasonable on his part, under the circumstances surrounding him at that time, and the situation as it appeared to him then he would not be quilty of an assault by reason of the use of such excessive force."

The foregoing instruction was properly refused.

[10] The rule of law which justifies the use of excessive force in self-defense is based on circumstances which would warrant "a reasonable person in a similar situation" to believe that it was necessary in order to prevent bodily harm at the hands of his assailant, and not what the defendant, himself, "in the excitement and heat of the affray," might honestly think was necessary. People v. Semikoff, 137 Cal.App. 373, 376, 30 P.2d 560; People v. Albori, 97 Cal.App. 537, 544, 275 P. 1017; Lowry v. Standard Oil Co., 54 Cal.App.2d 782, 790, 130 P.2d 1; People v. Moody, 62 Cal.App.2d 18, 22, 143 P.2d 978. In the Albori case, supra, 97 Cal.App. at page 544, 275 P. at page 1020, the court, approved an instruction which reads in part as follows: "A person may * * * believe that his apprehension is based on sufficient cause and supported by reasonable grounds * * * as they present themselves to him. If, however, he acts on these appearances, he does so at his peril, because the law leaves it to no man to be the exclusive judge of the reasonableness of the appearances upon which he acts, but prescribes a standard of its own, which is not only, did the person acting on appearances himself believe that he was in deadly peril of his life or of receiving great bodily harm, *but would a reasonable man, situated as the defendant was, seeing what he saw, and knowing what he knew, be justified in believing himself in danger?*"

In the case before us the previously quoted rejected instruction was fully covered by other instructions which were given to the jury. The court instructed the jury that one who is assaulted by another has a right to stand his ground and use "all force and means" of defending himself "which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent."

The jury was also instructed that the defendant, if attacked, was not required to retreat, but could stand his ground or even pursue his assailant, as a means of self-defense, "until he has secured himself from danger, * * * even though he might more easily have gained safety by withdrawing from the scene," if it would appear to a reasonable person in the same situation "to be reasonably and apparently necessary."

[11] The jury was fully and fairly instructed on all the necessary elements of the offense of which he was convicted.

The judgment is affirmed.

ADAMS P. J., and PEEK, J., concur.

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86 Cal.App.2d 101

HUMISTON et al. v. HOOK et al.

Civ. 16070.

District Court of Appeal, Second District, Division 3, California.
June 9, 1948.

1. Evidence 🔑542

Chief of fire department was properly held qualified to testify generally on the subject of petroleum products and paint thinners, particularly in view of fact that most of his testimony related to matters which were of common knowledge.

2. Appeal and error 🔑971(2)
Evidence 🔑546

The sufficiency of the showing of qualifications of witness to testify as an expert is a matter resting largely in the discretion of the trial court whose ruling will not be disturbed if there is any substantial evidence to support it.

3. Negligence ⚷134(10)

In action for damages caused by fire through defendant's negligence, evidence was sufficient to justify finding that fire was started by sparks from cutting wheel which ignited paint and paint thinner in nearby vat.

4. Appeal and error ⚷931(1)

On defendant's appeal court must assume that trial court believed testimony which was contrary to that of the defendant.

5. Evidence ⚷76

Where defendant was in a position to prove the composition of liquid allegedly set afire through his negligence but offered no evidence on the subject, it must be presumed that such evidence would have been adverse to defendant. Code Civ.Proc. § 1963, subd. 5.

6. Negligence ⚷25, 67

It was the duty of the defendant sued for negligent destruction of property on adjoining premises by fire, not of plaintiffs, to know whether conditions under which the defendant was operating were dangerous and to remedy them if they were.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Fred George Humiston and another against Elmer G. Hook and another for damages for loss of plaintiffs' property by fire through negligence of the defendant. From a judgment for plaintiffs, named defendant appeals.

Judgment affirmed.

Clarence G. Weisbrod and Clarence Hansen, both of Los Angeles, for appellants.

Hindman & Davis and Cobb & Utley, all of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

Defendant Elmer G. Hook appeals from a judgment for damages for the loss of plaintiffs' property through fire allegedly caused by the negligence of defendant. Plaintiffs, copartners, doing business as M. E. Gray Co., maintain a place of business in Huntington Park, where they sell pipe, plumbing supplies and other materials. Defendant operates a machine shop next door. The building, 50 feet in width, was occupied in part by both parties, 40 feet of it by defendant and 10 feet by plaintiff, a partition separating the two portions of the room, and plaintiffs' business extended onto other property. The complaint contained two causes of action. In addition to Hook, others were sued under fictitious names, but no one except Hook appeared in the action. In the first cause of action it was alleged that defendants so carelessly, negligently and unlawfully maintained and conducted their premises as to cause a fire to occur as a proximate result of their acts, which fire destroyed and damaged merchandise, fixtures and equipment of plaintiffs, to plaintiffs' damage in the sum of $57,199.43. There was an allegation that plaintiffs were out of business for some time and sustained a further loss of $20,000 by reason thereof. The second cause of action alleged that defendants permitted and maintained on their premises an open vat containing highly inflammable petroleum liquids, contrary to a city ordinance of Huntington Park, and that as a proximate result of defendants' acts done in violation of the ordinance defendants caused said fire to occur. By reference to the paragraphs of the first cause of action the charge of negligence was incorporated into the second cause of action. Defendant answered, denying the negligence and violation of the ordinance, and alleging "that plaintiffs were at all times familiar with and in daily contact with the activities of this answering defendant in the operation of his business" etc. No contributory negligence of plaintiffs was pleaded. Plaintiffs proved that they had sustained the loss of merchandise, fixtures, equipment, etc. to the amount alleged in the complaint, but they offered no evidence as to loss of profits. The court found in favor of plaintiffs on the issues of negligence, proximate cause and damage for loss of the property, and also found that defendants were maintaining their property in violation of an ordinance of the city of Huntington Park, in that they permitted and maintained on the premises an open vat which contained highly inflammable petroleum liquids. It was also found that the fire was started in the open vat by sparks emanating from a grinding machine which was being used on metal. It was further found that there was no evidence that any of the plaintiffs knew that defendant was maintaining the open vat containing inflammable metals and using said grinding machine in the proximity thereof, although plaintiffs' office manager had seen the machine and had seen defendant using said vat for the painting of metal prior to the date of the fire.

Defendant's first contention is that there was no evidence of negligence on his part. The building was approximately 130 feet deep; 90 or 100 feet from the front of the building was a vat, approximately 10 feet long and a foot wide which contained paint and paint thinner. There was usually 7 or 8 inches of paint in the vat. Defendant deposited in the paint the articles he was fabricating and then placed them on a rack above the vat to dry. Thinner was brought into the building in five-gallon cans and was poured into the vat from time to time as necessary to keep the paint from becoming too thick. Immediately before the fire, defendant was cutting 1⅛ or 1¼ inch cold rolled steel rods on a Mercury High Speed abrasive metal cutting machine having a carborundum wheel. The machine is covered by a hood, sparks fly from it when in operation, some of the ground off material is held in the machine but the greater part of it reaches the floor. The machine was located 25 or 30 feet from the vat. Defendant testified that he had cut off one piece of rod, had stopped and was examining it as to size when he heard "a sort of a swish like," turned around and saw a fire in the paint vat. The vat had paint and thinner in it at the time. No one else was working within 30 feet of the vat when the fire started. Efforts to put out the fire were unsuccessful and it burned all but about 40 feet of the front of the building occupied by defendant and the one occupied by plaintiffs. There was testimony that about ten per cent of the material thrown off in sparks reached the floor as sparks; defendant testified that during his cutting he saw sparks falling to the floor. A witness for defendant whose company sold the thinner to defendant testified to that fact but did not testify as to the composition of it. Mr. Slocum, chief of the fire department, took a sample of the thinner after the fire but did not have it analyzed. He testified that he had made some study of petroleum products, had seen actual demonstrations at many different institutions which he had attended and had learned that petroleum products give out gas which is inflammable, that he had made studies of the combustion qualities of petroleum products, had found that some paint thinners were easily ignited, that vapors coming from petroleum products in a container located on the ground would be likely to creep along the floor and could be ignited by sparks coming from an emery wheel. He also testified that there are several products besides petroleum products that might have been ignited in the same way, that he had experienced burns from sparks flying from an emery wheel, and that in his opinion a fire in a burning cigarette would not be as likely to cause ignition.

[1, 2] During the direct examination of the witness defendant objected to any testimony he might give on the ground that he had not been shown to be sufficiently qualified to testify on the subject of paint thinners. The court did not rule on the objection and it was developed that the witness who had been with the fire department for 27 years, had made studies of the combustion qualities of petroleum products, and had found that some paint thinners could be easily ignited by a spark. The objection to his qualifications was not renewed and the matter was gone into at considerably greater length in the cross examination, during which it was developed that the witness had done some reading on the subject and that his knowledge was based in part upon "seeing the actual demonstrations given by these many, many different institutions that we attended."

The direct and the cross examination of the witness was conducted on the assumption by the witness and by counsel that the paint thinner in question was a petroleum product. At the conclusion of the cross examination defendant moved to strike out all of the testimony of the witness which he had given as an expert, upon the ground he was not properly qualified and was testifying from hearsay. The motion was denied and the ruling is assigned as error. It was not error to deny the motion. Although defendant objected to the sufficiency of the showing of qualifications of the witness, further evidence was received on that point, no further objection was made and the motion to strike came at the conclusion of the cross examination. The witness was shown to be sufficiently qualified to testify generally on the subject of petroleum products and paint thinners. Most of his testimony on the subject related to matters which are of common knowledge. He was not asked for and gave no opinion as to whether under the conditions described the fire was caused by sparks from the emery wheel. The sufficiency of the showing of qualifications of a witness to testify as an expert is a matter resting largely in the discretion of the trial court, and its ruling will not be disturbed if there is any substantial evidence to support it. Mirich v. Balsinger, 53 Cal. App.2d 103, 114, 127 P.2d 639; Johnson v. Western Air Exp. Corp., 45 Cal.App.2d 614, 630, 114 P.2d 688; Vallejo & N. R.R. Co. v. Reed Orchard Co., 169 Cal. 545, 575, 147 P. 238; Howland v. Oakland Consol. St. Ry. Co., 110 Cal. 513, 521, 42 P. 983. The ruling as to the qualification of the witness was well within the discretionary power of the court.

[3-5] The evidence, in our opinion, was not insufficient to justify the finding that the fire was started by sparks from the cutting wheel. The witness, Slocum, further testified that on the day of the fire he had a conversation with defendant and that defendant stated that the fire was caused by sparks from an emery wheel, and that he did not know how inflammable the material in the paint vat would be. Mr. Ginsbach, the chief building inspector, testified that in a conversation he had shortly after the fire, in discussing the conditions in the building, defendant stated that he caused the fire by grinding something on an emery wheel. Although defendant denied that he stated to Slocum or Ginsbach that the sparks started the fire, we must assume that the court believed the testimony of the chief of the fire department and the building inspector. There was at least prima facie evidence that the paint thinner was highly inflammable. Defendant, who was in a position to prove the composition of the liquid, offered no evidence on the subject. It must be presumed that such evidence would have been adverse to defendant. Code Civ. Proc. sec. 1963 (5). The testimony of defendant that the fire started with a "swish" indicated that the vapors from the mixture were ignited. Defendant offered no testimony to refute that given by the witness Slocum that vapors from petroleum paint thinner are heavier than air and would creep along the floor. Although there was a sparsity of expert testimony on both sides, it was sufficiently shown that the sparks from the cutting wheel could have ignited the vapors, and the evidence disclosed no other conditions to which the fire could reasonably have been attributed. The finding in question is in accordance with the reasonable probabilities established by the evidence.

[6] A further point urged by defendant is that plaintiffs had knowledge that defendant was using the cutting wheel and paint vat, that if the conditions were dangerous plaintiffs should have known it, that they made no objection to these conditions and should be deemed to have acquiesced in them. The contention is that plaintiffs should be held estopped to maintain their action by reason of their failure to complain of the dangerous practices being followed by defendant. The testimony upon which defendant relies is that of Mr. Monahan who was the office manager of plaintiff company. It was not shown to have been any part of the duties of this witness, as office manager, to inspect the premises of plaintiff or surrounding premises for the discovery of dangerous conditions, or that any of the plaintiffs had knowledge of the

conditions in question. Neither was it shown that the witness Monahan had any knowledge as to the use of paint thinner by defendant nor as to the existence of dangerous conditions on defendant's premises. It was the duty of defendant, not of plaintiffs, to know whether those conditions were dangerous and to remedy them if they were. Defendant's statement, "it was the duty of plaintiffs to make known to defendant the existing conditions of plaintiffs' [sic] vat and machinery prior to the time of the fire," is unsupportable as a legal proposition.

The views we have expressed on the issue of negligence render it unnecessary to consider defendant's further point that the evidence was insufficient to prove that the presence and use of the painting vat in the manner in which it was used by defendant, was in violation of any ordinance of the city of Huntington Park.

The judgment is affirmed.

WOOD, J., and McCOMB, J. assigned, concur.

86 Cal.App.2d 58

PERRINE v. PERRINE.

Civ. 16203.

District Court of Appeal, Second District,

Division 1, California.

June 8, 1948.

1. **Husband and wife** 🔑264

In divorce case, evidence sustained finding that property involved was cummunity property.

2. **Divorce** 🔑286

In divorce case, question as to division of community property was for trial court to determine, and its decision would be upheld on appeal in absence of showing of abuse of discretion.

Apeal from Superior Court, Los Angeles County; Caryl Warner, Judge.

Action for divorce on ground of cruelty by Dorothy L. Perrine against Herschell Hall Perrine, wherein the defendant filed a cross-complaint for separate maintenance. From the judgment granting a divorce, but dividing the property, the plaintiff appeals.

Judgment affirmed.

B. Warren Vinetz, of Los Angeles, for appellant.

Hahn, Ross, Goldstone & Saunders, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment in a divorce action.

The action, which was commenced by the wife, was based on alleged extreme cruelty; the complaint further alleged that there was no community property. The answer "denies generally and specifically each and every allegation contained therein" and alleges affirmatively that "the parties hereto own, as community property, improved real property," household goods, an automobile, a diamond ring, "and other property which the defendant is unable at this time to describe with particularity by reason of the fact that defendant is now undergoing treatment in a hospital outside the State of California, in an attempt to restore his sight." A cross-complaint for separate maintenance was also filed by defendant husband.

The court found for plaintiff on the issue of extreme cruelty and awarded the divorce accordingly. With regard to the dispute as to the character of the property involved, the court found it to be community property. The real property consisted of a home and four "interment spaces" in a cemetery. The parties were each awarded a one-half interest in the home which was ordered sold and the proceeds equally divided; the cemetery lots were awarded to plaintiff. Certain, if not all of the personal property was itemized and awarded to the parties. For example, plaintiff was awarded the automobile, a diamond ring and the household furniture; defendant, among other items, was awarded "one axe, hammer, alarm clock, electric drill, fountain pens, medical instruments, Eastman Kodak and tripods, tennis racket and accessories."

Plaintiff contends on appeal that, "The finding that the real and personal property described in plaintiff's first amended complaint was community property is against the law and the evidence" and in substance that the court's rulings with regard to the property were erroneous.

[1, 2] An examination of the record reveals that appellant's contentions are without merit. The findings are supported by the evidence; the question as to how the property was to be divided was for the trial court to determine and in the absence of a showing of abuse of discretion will be upheld on appeal. The record reveals no prejudicial errors.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

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85 Cal.App.2d 724

D. E. SANFORD CO. OF SAN FRANCISCO v. CORY GLASS COFFEE BREWER CO. et al.

Civ. 13462.

District Court of Appeal, First District, Division 2, California.

May 28, 1948.

Rehearing Denied June 26, 1948.

Hearing Denied July 22, 1948.

1. Judgment 🔑186

In passing on a motion for summary judgment, trial court's primary duty is to decide whether there is an issue of fact to be tried, and if it finds one, it is then powerless to proceed further, but must allow a jury trial, unless a jury trial is waived. Code Civ.Proc. § 437c.

2. Judgment 🔑181

Issue finding rather than issue determination is pivot on which summary judgment law turns. Code Civ.Proc. § 437c.

3. Judgment 🔑185

In action for commissions under a sales agency contract alleged to have been wrongfully terminated, for an accounting and for declaratory relief, where pleadings and affidavits in support of and in opposition to defendants' motion for summary judgment on ground that there was an accord and satisfaction disclosed major issues as to nature of contract and as to method of computing commissions, together with various minor issues, and plea of accord and satisfaction itself raised triable issues as to existence of a dispute, a consideration and an intention to reach an accord, granting of summary judgment was error. Civ. Code, § 1521; Code Civ.Proc. § 437c.

4. Accord and satisfaction 🔑27

On a plea of accord and satisfaction, whether there was a dispute concerning amount due and whether tender was on condition that acceptance would be in full satisfaction are primarily questions of fact. Civ.Code, § 1521; Code Civ.Proc. § 437c.

5. Accord and satisfaction 🔑5

An agreement of accord must be founded upon a valid new consideration. Civ.Code, § 1521.

6. Accord and satisfaction 🔑27

Sufficiency of consideration to support an agreement of accord is a triable issue of fact. Civ.Code, § 1521; Code Civ.Proc. § 437c.

7. Accord and satisfaction 🔑9

The imposition of an accord and satisfaction on creditor against his will can be justified only where his taking check would be tortious except on assumption of a taking in full satisfaction. Civ.Code, § 1521

8. Accord and satisfaction 🔑1
Judgment 🔑181

Whether an agreement amounts to an accord and satisfaction is a question of intention of the parties and is, therefore, a triable question of fact which cannot be disposed of by summary judgment. Code Civ.Proc. § 437c; Civ.Code, § 1521.

9. Judgment 🔑181

Where defendants predicated plea of accord and satisfaction upon act of plaintiffs in cashing checks but plaintiffs contended that several letters exchanged after checks were cashed indicated that there was no intention to arrive at an accord, matter could not be disposed of by summary judgment. Code Civ.Proc. § 437c; Civ. Code, § 1521.

10. Appeal and error ⚿863
Judgment ⚿186

On motion for summary judgment predicated upon a plea of accord and satisfaction, neither trial court nor appellate court should decide whether there was a dispute, a sufficient consideration, or an intention to arrive at an accord, but must merely decide whether a triable issue of fact is raised by the pleadings. Code Civ. Proc. § 437c; Civ.Code, § 1521.

11. Judgment ⚿185

On motion for summary judgment, affidavits of moving party should be strictly construed and those of his opponent liberally construed. Code Civ.Proc. § 437c.

12. Judgment ⚿185

For purpose of a motion for summary judgment, better rule is that facts alleged in affidavits of party against whom motion is made must be accepted as true.

13. Judgment ⚿179

The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in the trial of issues of fact.

◆

Appeal from Superior Court, San Francisco County; Herbert C. Kaufman, Judge.

Action by D. E. Sanford Company of San Francisco, a copartnership, and others, etc., against Cory Glass Coffee Brewer Company, a copartnership, and others, etc., to recover commissions under a sales agency contract, for an accounting and for declaratory relief. Summary judgment for defendants and plaintiffs appeal.

Reversed.

A. Don Duncan and Seaman & Jackson, all of San Francisco, for appellants.

Philip S. Ehrlich, Bartley C. Crum, and Albert A. Axelrod, all of San Francisco, for respondents.

GOODELL, Justice.

The plaintiffs sued for $15,762.49 claimed to be owing for commissions, both earned and prospective, under a sales agency contract alleged to have been wrongfully terminated, also for an accounting as to unascertained commissions, and for declaratory relief. The answer denies the wrongful termination and pleads an accord and satisfaction. On the filing of the answer defendants moved for a summary judgment, which was granted. Judgment was entered in favor of defendants for their costs, and this appeal was taken.

The motion, under section 437c, Code of Civil Procedure, was made "on the ground that plaintiffs' action has no merit, in that prior to the filing of the complaint * * * there was an accord and satisfaction between the plaintiffs and defendants."

[1, 2] In passing upon a motion for summary judgment "the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further, but must allow such issue to be tried by a jury unless a jury trial is waived. * * * issue finding rather than issue determination is the pivot upon which the summary judgment law turns. [Citations.]" Walsh v. Walsh, 18 Cal.2d 439, 441, 116 P.2d 62, 64. See, also, Eagle etc. Co. v. Prentice, 19 Cal.2d 553, 556, 122 P.2d 264, where some of the reasons for the rule are given.

The only question, then, which has to be decided herein is whether there is any issue of fact in the case.

The complaint sets forth in some detail the antecedents of the organizations of the respective parties and the various changes in their personnel and control. It is sufficient, however, to say that from 1933 to the middle of 1945 plaintiffs acted as exclusive selling agents of the products of defendants and their predecessors, in California, Nevada, Oregon, Washington and the Hawaiian Islands under an oral contract, which relationship apparently had been profitable and satisfactory to both sides. Defendants brought this to a sudden end by their letter to plaintiffs of

April 27, 1945, reading in part as follows: "We therefore give you this notice that on and after June 1st of this year, all Hawaiian business will be handled by our Export Department, and on any shipments made up to that date, you will be protected with your usual sales commission. After this date, no further commissions will be paid to you on any Hawaiian business."

This was followed by defendants' letter of May 12 reading in part as follows: "We have already notified Fred of the termination of your representation in the Hawaiian territory. We are hereby notifying you that as to the balance of the territory represented by you, you may consider this letter as a termination of such representation, to take effect immediately. However, nevertheless, we will pay to your company your usual sales commission on all shipments made into your territory up to June 30, 1945."

On June 16 defendants wrote plaintiffs: "Enclosed please find our check * * * in the amount of $1782.25 being the commissions in full due you covering shipments made to your territory during the month of May, 1945 in accordance with our letters to you dated April 27th and May 12th, 1945 in which we terminated your representation. In accordance with said letters of termination, we will send you in July, 1945, a final check to cover the shipments made by us to your territory during the month of June, 1945 which will be in full of all obligations due and owing to you."

Plaintiffs on June 22 answered as follows: "This will acknowledge your letter of the 16th with accompanying check. We are glad to accept this check and will also be glad to receive the check you mention that will be forthcoming during July for shipments made in June. We cannot, however, consider these checks, in any way, to fulfil all your obligations due us. We are endeavoring to ascertain the regularity of your cancellation of our contract. Also, we note that no mention has been made by you regarding payment of commissions on orders taken by us for post-war delivery. In due time you will be advised of our position in the matter."

On July 19 defendants wrote plaintiffs: "Enclosed please find our check * * * in the sum of $1383.39 to cover all shipments of our merchandise made to your territory in the month of June, 1945. In accordance with our letters of termination dated April 27th and May 12th, 1945, this constitutes a final settlement."

The plea of accord and satisfaction is based on these letters and on the cashing of the checks in the face of what the letters say. The trial judge held that "The letter of plaintiff dated June 22, 1945, raises a dispute between the parties" and that an accord and satisfaction was established as a matter of law.

In determining whether there is a triable issue of fact the pleadings of course must be examined, together with the affidavits for which section 437c provides.

[3] An important question in the case is whether the agency relationship which started back in 1933 on a year-to-year basis continued on such basis up to the time of the cancellation in 1945, or whether at the time of the break it was terminable on 30-days notice. Two items included in the demand, one of $1001.91 and one of $8634.12, are for estimated commissions which it is claimed (based on plaintiffs' past record of sales) would have been earned had the agency been permitted to run to the end of 1945 instead of being cut off at June 30 by the 30-day notices. It is as to these prospective profits that the accounting is sought.

On this question the complaint alleges that selling campaigns were planned and arranged between the parties on a calendar-year basis and that plaintiffs made their financial commitments and their arrangements for rentals, salesmen, and traveling expenses on such annual basis; that this arrangement was renewed each year up to and including 1945. The answer denies this.

The affidavits on the defendants' side admit that from 1933 to 1942 this annual arrangement was in effect but state that in 1942 at a conference held in Chicago it was discontinued and plaintiffs agreed that thenceforth the distributorship would be subject to termination on 30 days notice.

The affidavit on the plaintiffs' side flatly states that this annual arrangement was continued and renewed and was in effect all the way into 1945. Issue was definitely joined on this question.

Another question of importance concerns the agency for DEO stoves. The complaint alleges that by a letter of September 23, 1943, defendants instructed plaintiffs to launch a selling campaign and take orders for deliveries after the war for DEO stoves (electric warming plates), the manufacture of which had been suspended in 1942 because of the war, and that plaintiffs did put on such campaign and obtained and forwarded to defendants many such orders. The answer expressly admits this.

The importance of this question is shown by the fact that plaintiffs are claiming that they turned in orders for $36,971.69 of DEO stoves which were accepted by defendants, and on information and belief plaintiffs allege that defendants shipped and collected for all such shipments. A commission of $3,697.17 is claimed on this account.

The complaint then alleges that the letter of April 27, 1945, ended the DEO stove project, and attempted to confine plaintiffs' commissions to orders actually shipped up to May 31, 1945. The answer claims that such cancellation was in accordance with the contract, which contemplated that commissions would be paid only on shipments made and not on orders placed, and in their affidavits defendants state that plaintiffs have always been paid on that basis.

Plaintiffs' affidavit asserts not only their right to commissions for sales made during all of 1945 but "to commissions for the orders they took and sent to defendants for the said 'DEO stoves' at the express instance and request of defendants, which were for post-war delivery, all of which orders * * * had been shipped by defendants and of which orders the defendants had taken the benefit" and for which they had collected. Issue was definitely joined on the DEO stove question.

Another important issue was presented by plaintiffs' claim for $2,429.29 unpaid commissions (apart from the DEO stove account, and over and above commissions admittedly paid) on sales made and orders taken which had been accepted by defendants, aggregating $24,292.97.

In addition to the three major issues just discussed, there were several minor ones namely (1) that raised by defendants' denial of the making of the original sales agency contract; (2) that raised by defendants' denial of an assignment of the contract to the present defendants, and (3) those raised by various denials of the legal form, composition and succession of the predecessors of both litigants.

Moreover, the plea of accord and satisfaction itself raised at least three triable issues of fact namely (1) Whether there was a dispute, (2) Whether there was a consideration, and (3) Whether there was an intention to reach an accord. At the threshold the inquiry arises whether there exists a bona fide dispute respecting an *amount* due. See Berger v. Lane, 190 Cal. 443, 447, 452, 213 P. 45; Whepley Oil Co. v. Associated Oil Co., 6 Cal.App.2d 94, 112, 44 P.2d 670; Sharp v. Conti, 57 Cal.App.2d 1007, 1009, 136 P.2d 99. The trial judge held that "The letter of plaintiff dated June 22, 1945, raises a dispute between the parties." The record shows, however, that on June 22 there was no dispute as to any *amount,* although in that letter plaintiffs suggested in general terms that they had a potential cause of action based on wrongful cancellation and a claim for *unascertained commissions* on orders booked for post-war deliveries.

[4] 1. *Dispute:* in Lapp-Gifford Co. v. Muscoy Water Co., 166 Cal. 25, 27, 134 P. 989, 990, the court says: "Whether there was a dispute concerning the amount due, and whether the tender was on condition that acceptance would be in full satisfaction, are primarily questions of fact for the trial court." Followed in Berger v. Lane, 190 Cal. 443, 452, 213 P. 45; Sierra etc. Co. v. Universal etc. Co., 197 Cal. 376, 387, 388, 241 P. 76; B. & W. Engineering Co. v. Beam, 23 Cal.App. 164, 171, 137 P. 624; Everhardy v. Union Finance Co., 115 Cal.App. 460, 465, 1 P.2d

1024; and Biaggi v. Sawyer, 75 Cal.App.2d 105, 114, 170 P.2d 678.

[5-7] 2. *Consideration:* "An agreement of accord, like any other contract, must be founded upon a sufficient consideration * * *" (1 Cal.Jur. p. 128) "upon a valid new consideration". Shortell v. Evans-Ferguson Corp., 98 Cal.App. 650, 654, 277 P. 519, 520. Whether or not there is a sufficient consideration to support a contract is always a question of fact. Estate of Thomson, 165 Cal. 290, 296, 131 P. 1045; 6 Cal.Jur. p. 167. "The imposition of an accord and satisfaction on the creditor against his will" says Williston at vol. 6 on Contracts (Rev.Ed.), p. 5220, sec. 1856, citing inter alia Egan v. Crowther, 74 Cal.App. 674, 241 P. 900, "can be justified only where his taking the check would be tortious except on the assumption of a taking in full satisfaction."

As both checks in this case were sent to pay earned commissions which defendants in their letters of transmittal admitted were due and owing, it can scarcely be claimed that the checks were for "something different from or less than that to which the person agreeing to accept is entitled" (sec. 1521, Civil Code). In this connection a comparison of this case with Egan v. Crowther, 74 Cal.App. 674, 679, 241 P. 900, and Swerdfeger v. United Acceptance Corp., 9 Cal.App.2d 590, 597, 50 P.2d 818, is interesting, both of them being cases where the check sent by the agent to his principal was admittedly due and owing. See, also Sharp v. Conti, 57 Cal.App.2d 1007, 136 P.2d 99; Moore v. Bartholomae Corp., 69 Cal.App.2d 474, 478, 159 P.2d 436.

[8, 9] 3. *The intention of the parties:* "The question whether an agreement amounts to an accord and satisfaction is * * * a question of the intention of the parties and is, therefore, a question of fact * * *" Everhardy v. Union Finance Co., 115 Cal.App. 460, 466, 1 P.2d 1024, 1027, quoting 1 Cal.Jur. p. 136-7. See also Whepley Oil Co. v. Associated Oil Co., supra; Carpenter v. Pacific States etc. Co., 19 Cal.App.2d 263, 268, 64 P.2d 1102, 66 P.2d 656; Wallace v. Crawford, 21 Cal.App.2d 394, 404, 405, 69 P.2d 455; and Kinkle v. Fruit Growers Supply Co., 63 Cal.App.2d 102, 112, 146 P.2d 8. Moreover, in the case at bar several letters were exchanged after the checks were cashed which show, according to plaintiffs' contention, that there was no intention to arrive at an accord. Plaintiffs were entitled to a deliberate interpretation of these letters in the light of all the facts and circumstances which the evidence at the trial might disclose.

[10] On this appeal it is not our function (any more than it was the function of the trial court) to decide whether (1) there was a dispute, or (2) a sufficient consideration, or (3) an intention to arrive at an accord, but simply to decide whether a triable issue of fact is raised by the pleadings.

[11, 12] Section 437c provides that the motion shall be granted "unless the other party [plaintiffs], by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." It is settled that "* * * the affidavits of the moving party * * * should be strictly construed and those of his opponent liberally construed" and that for the purpose of the motion "the better rule is that the facts alleged in the affidavits of the party against whom the motion is made must be accepted as true * * *". Eagle etc. Co. v. Prentice, 19 Cal.2d 553, 556, 122 P.2d 264, 265.

Applying those rules to the affidavits in this case there appear to be several triable issues of fact herein the presence of which called for a denial of the motion.

In view of our discussion of the major issues in this case it is not necessary to pass upon the question whether the fact that a declaratory judgment was sought, itself called for a denial of the motion.

[13] We conclude by again quoting Walsh v. Walsh, 18 Cal.2d 439, 444, 116 P.2d 62, 65: "The summary judgment statute is drastic and its purpose is not to provide a substitute for existing methods in the trial of issues of fact."

The judgment is reversed.

DOOLING, J., concur.

85 Cal.App.2d 680

In re HILKER'S ESTATE.

HILKER v. HILKER et al.

Civ. 16308.

District Court of Appeal, Second District,
Division 3, California.
May 26, 1948.

1. Descent and distribution ⇨69
Wills ⇨82

A testator, who cares more for some of his relatives than others, has right to give expression to his feeling by gifts during his lifetime or in the division he makes of his estate by will.

2. Wills ⇨163(1)

Where there is no direct evidence of exertion of undue influence and it is claimed that evidence of circumstances are sufficient to shift burden of proof on that issue to proponent, such evidence must show relations between one charged with exercising undue influence and testator affording former, opportunity to control testamentary act, that testator's condition was such as to permit of a subversion of freedom of will, that there was activity on part of person charged with exercising undue influence and that such person unduly profited as beneficiary under will.

3. Wills ⇨82

It was for testator, not for court, to be satisfied with reason upon which testator acted and to determine whether terms of will were just and fair.

4. Wills ⇨166(1)

Evidence was insufficient to establish that execution of will was procured by undue influence of testator's nephew who was residuary legatee.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Proceeding in the matter of the estate of William Hilker deceased, wherein Minnie D. Hilker filed a petition for revocation of probate of the deceased's will opposed by Roy E. Hilker and another. From a judgment of non-suit, Minnie D. Hilker appeals.

Affirmed.

Elza C. Mowry, of Los Angeles, for appellant.

J. J. Hughes and Stanley M. Evans, both of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

Minnie D. Hilker, widow of William Hilker, deceased, appeals from a judgment of nonsuit in a contest initiated by her for revocation of the probate of her husband's will. She charged undue influence of Roy E. Hilker in the making of the will, and alleged upon information and belief that the will was not subscribed by decedent or by any one with his authorization. The latter ground of contest was abandoned by petitioner at the trial. Roy E. Hilker and Helen Hilker, his wife, answered the petition and a trial upon the sole issue of undue influence resulted in the judgment of nonsuit. The question on appeal is whether the evidence of the contestant given only the construction, application and effect most favorable to her would have been sufficient to support a finding that Roy E. Hilker exercised undue influence upon decedent in the making of the will. We shall proceed to a resume of the evidence.

William Hilker was 81 years of age at the time of his death on December 8, 1945. When he married appellant in 1935 he was a widower and childless. He died without issue, leaving surviving him, in addition to appellant, Walter L. Hilker and Roy E. Hilker, sons, and Leona H. Hadsell, daughter, of a deceased brother, and Frank Fetter and Alma Wissinger, children of a deceased sister. He was possessed of an estate which was appraised at approximately $75,000. The bequests of the will were $1,000 to appellant, $500 to Frank W. Dillon, son of appellant, $500 to the wife of Frank Dillon, and $500 to Helen Hilker, described in the will as a niece of decedent. The remainder of the estate was left to Roy E. Hilker and in case of his predeceasing the testator, to Helen Hilker. Roy E. Hilker was appointed executor, and Helen Hilker was appointed executrix in the event her husband should predecease the testator, bond in each case being waived.

Appellant's evidence consisted solely of the testimony of Roy E. Hilker, which was in substance as follows: He, Roy, is 59 years of age; he visited in California with his family some time in the fall of 1904; he came to California shortly thereafter to stay, and for about a year lived with his uncle, William; he was employed by his uncle for about six years and until his uncle obtained employment for him in San Diego, and he worked off and on for his uncle until he went into business for himself; there was a very close relationship between the two, and William treated Roy as he would a son; he never was in business with his uncle but there had been some business dealings between them; in 1928 or 1929, at the time Roy was married, he borrowed $2,500 from William upon his unsecured note, and after the death of William's wife in 1932 he, without solicitation by Roy, cancelled the note. Roy became the father of a son and William, before his second marriage, paid $1,000 for an insurance policy upon the life of the son, payable to William if the son predeceased him, and to the son if he survived William. Shortly thereafter, the policy was increased to $3,000 on the same terms. Also shortly after the death of William's first wife he gave Roy $300 and a like amount to Roy's brother and his sister. Upon another occasion Roy loaned his uncle $4,000 with which to make an investment; at times he made him other loans of smaller amounts, and all these sums were repaid. It was alleged in the petition that for a period of at least five years immediately preceding the date of the will Roy had acted as agent for William, collected his rents, looked after his property for him, deposited money in his, Roy's account, advised him on matters of business and exercised great influence over him to the extent, as alleged, of substituting his will for that of decedent in the disposition of decedent's estate. It was alleged that decedent reposed trust and confidence in Roy. The answer admitted that for about three years immediately preceding the date of the will Roy acted as agent for decedent in the collection of rents; that he had deposited collections in his own account to an amount of not to exceed $100, and it was admitted that for some five years he had acted for decedent in attending to the repair and maintenance of his rental properties and advised decedent concerning said properties. It was also admitted that decedent did repose trust and confidence in Roy in these matters, but it was denied that Roy had acted for or advised decedent in any other matters, or that decedent was guided or influenced by his advice or suggestions. Such was the evidence as to the relationship existing between the two men.

[1] The evidence touching the execution of the will was the following: Helen Hilker was a beneficiary under the will of Julia Voss, whose estate was settled in 1936; a Mr. Hughes acted as attorney for the estate and Roy became acquainted with him at that time; William expressed a desire to meet Mr. Hughes and in 1936 Roy took him to Mr. Hughes' office and introduced him; Roy remained for about five minutes during which there was no discussion of business, and when he left William remained with Mr. Hughes; the occasion for the visit was not disclosed. So far as disclosed by the evidence, the next meeting between William and Hughes was in February, 1938, when William visited Hughes' office and the will in question was prepared. Stanley Evans, an associate of Hughes, was one of the subscribing witnesses. On that occasion William telephoned to Roy and arranged a meeting in Pershing Square near Hughes' office. When they met, William handed Roy his executed will contained in an envelope; Roy took the will home, showed it to his wife and kept it in his possession until the death of William. He had never at any time discussed with William the making of a will. He had met Mr. Evans in the office, but neither Hughes nor Evans had ever acted for him or his wife as attorney, and there was no evidence that the matter of William's will was ever mentioned until after the death of William when Hughes called Roy and told him he should file the will for probate. There was no evidence that William, at the time he executed the

will, was suffering from any physical or mental weakness or was not in full possession of his faculties, his age considered. There was no evidence to suggest that he was unable to look after the matters of business which he delegated to Roy or that the services of the latter were more than a mere convenience to William. It is clear from the above recital that there was not a shred of evidence tending to show any effort of whatsoever nature on the part of Roy to encourage his uncle to make a will, or to influence him in the slightest in the matter of disposing of his estate. Almost eight years elapsed between the making of the will and the death of William. Presumably he was living with appellant during that time. So far as shown, he was mentally able to remember and understand the terms of his will, and perfectly free from any influence or pressure to induce him to change the will or not to change it. The evidence furnishes no basis for a doubt that the testator formed his desires, which he expressed in the will, unaided and uninfluenced by others. The facts do not justify a presumption that undue influence was exercised by Roy. That decedent entertained a considerable degree of affection for his favorite nephew cannot be doubted. It was but natural that the nephew would be called upon for the inconsequential assistance that the uncle required. William was childless, it happened that one of his nephews came into his employ, that a close relationship sprang up between them, and that the nephew enjoyed a greater degree of affection than the other relatives. There is nothing unusual in a man's caring more for some of his relatives than for others, and there certainly is no principle of law or justice that deprives him of the right to give expression to his feelings by gifts during his lifetime, or in the division he makes of his estate by will.

The will contained the following provisions: "I further declare that all the property I possess, whether real or personal, is my sole and separate property; that I owned all of said property, aside from certain rents, issues and profits of my separate property, prior to my marriage to my present wife, and for that reason and for the further reason that my present wife is well provided for in her own right, I make no provision for her, except in this will provided. * * * After the payment of my just debts, funeral expenses and expenses of administering my estate, because of the loyalty and constancy, always, of my beloved nephew, Roy E. Hilker, I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal or mixed, of whatsoever kind the same may be or wheresoever situated, of which I die possessed or to which I may be entitled, to the said Roy E. Hilker, his heirs and assigns forever. Should Roy E. Hilker predecease me, all of my estate to which he would have been entitled, had he survived me, I give, devise and bequeath to Helen Hilker, wife of said Roy E. Hilker."

The amended petition for revocation of the will contained the following allegation: "That, during said period, preceding the alleged execution of said purported will, said Roy E. Hilker stated to decedent that your petitioner, the wife of said decedent, was a wealthy woman and possessed property of the value of $100,000.00; that said statements were untrue, known by said Roy E. Hilker to be untrue and made by him for the sole purpose of influencing the mind and will of said decedent; that said decedent believed the said false statements and was so influenced thereby in the execution of said purported will."

At the time of trial appellant moved to strike this paragraph from her petition and the motion was granted. In view of the fact that decedent stated in the will as one of the reasons for the small bequest of $1,000 to appellant that she was well provided for in her own right it is quite significant that having made an issue of the correctness of this statement in the will she was unwilling to attempt to prove that it was a false or erroneous statement. The will also states the appreciation of the testator of the loyalty and constancy of Roy and expresses affection for him. These recitals, based upon beliefs reasonably entertained, furnish a satisfactory explanation for the small bequest to the wife and the generous provision for the nephew, and it must be remembered also that appellant had only been William's wife for some three years at the time he made his will.

Moreover, it is to be presumed that in the eight years that elapsed before the testator's death nothing occurred which was deemed by him a sufficient reason for altering the terms of the will with respect to either his wife or his nephew.

[2-4] Where there is no direct evidence of the exertion of undue influence and it is claimed that the evidence of circumstances preceding and attending the making of the will are sufficient to shift the burden of proof on that issue to the proponent, such evidence must show "(1) the relations between the one charged with exercising the undue influence and the decedent, affording the former an opportunity to control the testamentary act; (2) that the decedent's condition was such as to permit of a subversion of her freedom of will; (3) that there was activity on the part of the person charged with exercising undue influence, and (4) that such person unduly profited as beneficiary under the will." In re Estate of Hull, 63 Cal.App.2d 135, 142, 146 P.2d 242, 245. No one of these evidentiary requirements was met. A relationship between the testator and his nephew that would have afforded the lattter an opportunity to control the testamentary wishes of his uncle was not established by evidence that the uncle trusted the nephew to collect his rents and attend to the upkeep of his property, especially where there was no evidence that he was dependent upon or received personal or business advice from the nephew in other matters and was at all times residing with his wife. The testator was not shown to have been susceptible to the influence of Roy Hilker or any other persons with respect to the terms of his will. There was no evidence of any activity of Roy in connection with the making of the will. The will stated sufficient reasons for the disparity in the provisions made for testator's wife and his nephew. It was not shown that he acted under a mistaken belief that his wife was well provided for financially or that his nephew had always shown toward him loyalty and constancy and enjoyed his uncle's affection. It was for him, not for the court, to be satisfied with the reasons upon which he acted and to determine whether the terms of the will were just and fair. In re Estate of Shay, 196 Cal. 355, 364, 237 P. 1079; In re Estate of Packer, 164 Cal. 525, 528, 129 P. 778. The evidence was so obviously insufficient to establish the charge of exertion of undue influence as to require no further discussion.

The judgment is affirmed.

WOOD, J., and McCOMB, J. assigned, concur.

86 Cal.App.2d 59

FOLTZ v. FIRST TRUST & SAVINGS BANK OF PASADENA et al.

Civ. 16313.

District Court of Appeal, Second District, Division 2, California.

June 8, 1948.

1. Executors and administrators 🔑202(1)

A letter wherein decedent declared intention of making quarterly payments to plaintiff, whose intercession had prevented decedent from being disinherited, did not warrant recovery from decedent's executor or sole devisee when decedent failed to provide by will, trust or annuity for continuing the payments. Civ.Code, §§ 1606, 1614.

2. Pleading 🔑312

Construction of a written instrument, pleaded in haec verba, is controlled by its terms and not by allegation in complaint as to its legal effect.

3. Contracts 🔑88

The statute providing that written instrument is presumptive evidence of consideration is inapplicable to ordinary letters. Civ.Code, § 1614.

4. Contracts 🔑76

Moral obligation will not support an express promise in absence of prior legal obligation founded on good and valuable consideration. Civ.Code, § 1606.

5. Executors and administrators ⚷202(1)

The gift of a donor's promise, either inter vivos or causa mortis, does not create an obligation in favor of donee against donor's estate.

◆

Appeal from Superior Court, Los Angeles County; Paul Nourse, Judge.

Action by Robert Pitcairn Foltz against First Trust & Savings Bank of Pasadena, as executor under the will of Robert Pitcairn, deceased, and another, to enforce alleged agreement by decedent to make quarterly payments to plaintiff. From a judgment for defendants, plaintiff appeals.

Affirmed.

John H. Klenke and Earle L. Winnett, both of Los Angeles, for appellant.

Brooke, Dunlap & Ross and Emrys J. Ross, all of Pasadena, for respondents.

McCOMB, Justice.

Plaintiff appeals from a judgment in favor of defendants predicated upon the sustaining of defendants' demurrer to the first amended complaint.

It was alleged in plaintiff's complaint, as amended, that he was a second cousin of Robert Pitcairn, deceased; that prior to decedent's death, his mother, who was an affluent person, had an altercation with her son and threatened to disinherit him. The plaintiff interceded with the mother on behalf of her son (decedent) with the result that upon her death she left her son a substantial portion of her estate. On February 17, 1946, decedent wrote plaintiff a letter reading as follows:

"Dear Bob: In reply to yours of the 9th., I will start in March between the 15th. and 30th. each quarter, that is, in March, June, Sept. and Dec. and send you a check for $210.00 or $840.00 per year. That will give you, with your Social Security and pension, $1,354.56 income a year or a little better than $112.00 a month and we see how that works out. If I send your check every three months it makes it simpler for me than monthly and it just happens that I have more cash on hand in March, June, Sept. and Dec. than at other times. I hope this is sufficient to carry you along without causing you any hardships. I may turn this into an annuity later, but have not had time yet to investigate the matter.

"I note what you say about the Cemetary lot and will wait until I hear from you.

"I don't think I will forget to send check, but if I should do so, write me a note and be sure to keep me posted on any change in your address.

"If I ever come to Pittsburgh, will surely get in touch with you, but I cannot see any prospect of my coming East in the near future. On second thought I enclose first check and caution you not to blow it all in at once, as the next check will not arrive until June.

"With love to you both, your cousin
"Robert Pitcairn"

It is further alleged that decedent did not make any provision, either by will, trust or annuity to pay plaintiff the $70 per month referred to in the above letter. The complaint then seeks in the prayer a judgment against defendant bank as executor of decedent's estate, and defendant McComb as the sole legatee and devisee under Robert Pitcairn's last will and testament.

This is the sole question presented for our determination:

Do the foregoing facts state a cause of action against defendants, or either of them?

[1] This question must be answered in the negative and is governed by these rules;

[2] (1) Where a written instrument on which a cause of action is founded is pleaded in haec verba, the construction of the instrument is controlled by its terms and not by any allegation in the complaint as to its legal effect. (M. Friedman § Co. Ltd., v. Sterling Furniture Co., 140 Cal. App. 685, 688, 35 P.2d 1064.)

[3] (2) Section 1614 of the Civil Code of California[1] is not applicable to ordinary letters and does not raise a presumption that there is consideration for them.

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[1] Section 1614 of the Civil Code reads:
"A written instrument is presumptive evidence of a consideration."

(Weisbrod v. Weisbrod, 27 Cal.App.2d 712, 718, 81 P.2d 633.)

[4] (3) Under section 1606 of the Civil Code,[2] a moral obligation is insufficient to support an express promise where there has not been a prior legal obligation founded on good and valuable consideration. (Estate of McConnell, 6 Cal.2d 493, 498, 58 P.2d 639.)

[5] (4) The gift of a donor's promise, either inter vivos or causa mortis, does not create an obligation in favor of the donee against the estate of the donor. (Estate of McConnell, supra, 6 Cal.2d 495, 58 P.2d 639.)

Applying the foregoing rules to the facts of the present case, it appears that the document signed by decedent was merely a letter written by him to plaintiff in which he made certain promises. The letter not being an instrument within the provisions of Section 1614 of the Civil Code, there is no presumption that it was supported by consideration, and as the pleading failed to allege any prior valuable consideration for the promise, under Rule 3, supra, any moral obligation resting upon decedent in favor of plaintiff did not constitute a sufficient consideration to constitute the letter a contract between the parties. Finally, since a promisor may not make a gift of his own promise, which is enforceable against the promisor's estate (see Rule 4, supra), there is no merit in the contention that decedent gave plaintiff an annuity during his lifetime.

Authorities Cited by Plaintiff-Appellant

Driscoll v. Driscoll, 143 Cal. 528, 77 P. 471, is not applicable to the present case for the reason that in the cited case a deed was involved, which obviously was a formal written instrument importing a consideration.

In Dabney v. Dabney, 9 Cal.App.2d 665, 51 P.2d 108, the decedent employed plaintiff to care for decedent's invalid brother. Thereafter, he signed a written agreement providing that if she married his brother and continued to care for him, he would pay her $100 per month during the brother's lifetime, and so long thereafter as she remained his widow. It is evident that in this case there was a clear promise supported by a past, present and future legal consideration.

In the Estate of Bourn, 25 Cal.App.2d 590, 78 P.2d 193, the decedent bequeathed to plaintiff an annuity of such an amount as, when added to any annuity or annuities provided for plaintiff by decedent's husband, would equal a total of $8,400 per year. The only question involved was whether a bequest of the income from a portion of the husband's estate was an annuity.

In Carrington v. Smithers, 26 Cal.App. 460, 147 P. 225, there was a definite employment and promise to pay a broker's commission. The relevant issue was whether, since the promise to pay was not reduced to writing until after most of the services had been rendered, it was enforceable. In such case it was held that the moral obligation to pay for the services was sufficient to support the written promise to pay, and it is obvious that the consideration rendered was not a mere moral obligation but was good and valuable consideration.

In Medberry v. Olcovich, 15 Cal.App.2d 263, 59 P.2d 551, 60 P.2d 281, plaintiff's son was injured by an automobile operated by defendant's son. Defendant told plaintiff to incur reasonable and necessary medical expenses for the injured boy, and to present the bills to him and he would pay them. This plaintiff did. Clearly, in such case, as pointed out by the Supreme Court in denying a petition for hearing, (see Medberry v. Olcovich, supra, 15 Cal.App.2d 271 and 272, 59 P.2d 551, 60 P.2d 281) there was sufficient legal consideration for defendant's promise and the consideration was not purely a moral obligation.

Estate of Hall, 154 Cal. 527, 98 P. 269; Francoeur v. Beatty, 170 Cal. 740, 151 P. 123; Driscoll v. Driscoll, 143 Cal. 528, 77

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[2] Section 1606 of the Civil Code reads: "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise."

P. 471, did not involve an attempt by a donor to make a gift of his own promise.

Since each of the cases relied upon by defendant is clearly factually distinguishable from the present case, they are here not applicable.

The judgment is affirmed.

MOORE, P. J., and WILSON, J., concur.

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86 Cal.App.2d 128

HOWARD v. JUDSON et al.

Civ. 16255.

District Court of Appeal, Second District, Division 1, California.

June 10, 1948.

1. Municipal corporations 🔑982

Evidence authorized quieting title based on tax sale to city, on ground that irregularities in assessment and sale did not mislead or prejudice landowners. Revenue and Taxation Code, § 3791 et seq.

2. Taxation 🔑614, 688

Compliance with every detail of law is not necessary to validate tax sale, and errors and irregularities not violating jurisdictional and constitutional due process requirements are innocuous under modern curative acts. Gen.Laws, Act 8443a.

3. Taxation 🔑688

Curative acts are valid as respects nonjurisdictional errors in tax proceedings. Gen.Laws, Act 8443a.

4. Municipal corporations 🔑980(3)

Tax sale to city was not invalid because delinquent tax list was published August 8, though ordinance required such publication on or before June 10, where subsequent ordinance extended time for publication to August 20, due to seismic disturbance. Revenue and Taxation Code, § 3791 et seq.

5. Municipal corporations 🔑980(3)

Where published delinquent tax list referred in heading and elsewhere to city of Long Beach, description of particular property therein as being in "Alamitos Heights" was not insufficient for failure to specify city and state. Revenue and Taxation Code, § 3791 et seq.

6. Municipal corporations 🔑980(4)

Notice of tax sale to city, purporting to be for taxes of 1933–34 "unless otherwise stated," but stating the tax year correctly as 1932 with respect to particular property, was valid as respects such property. Revenue and Taxation Code, § 3791 et seq.

7. Municipal corporations 🔑980(4)

Record did not sustain claim that tax sale to city was invalid because notice was posted instead of published as required by ordinance. Revenue and Taxation Code, § 3791 et seq.

8. Municipal corporations 🔑972(3)

Tax assessment was not invalid because of failure to use dollar sign to indicate meaning of assessment figures. Revenue and Taxation Code, § 3791 et seq.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by George E. Howard against Leamon H. Judson, also known as L. H. Judson, also known as Leamon Harvey Judson, and others, to quiet title to land acquired by tax deeds. From a judgment for plaintiff, defendants appeal.

Affirmed.

John F. Poole, of Los Angeles, for appellants.

John O. Akin, of Long Beach, for respondent.

DORAN, Justice.

The respondent herein instituted the present action for the purpose of quieting title to Lots 6 and 7 of Block 27 in the City of Long Beach, acquired by way of two tax deeds issued by the city on August 31, 1945. The appellants are the record owners of these lots, and contest the validity of respondent's tax title. On August 11, 1945, the property in question had been conveyed by the Los Angeles County Tax Collector to the City of Long Beach pursuant to Article 2, Chapter 8, Part 6 of Division 1 of the Revenue and Taxation Code; upon this deed, however, appellants make no attack. The trial court rendered judgment quieting title in the respondent. Appellants "submit that in view of the existing defects in the tax proceeding the deed to Howard is void and judgment should be for defendants, the record owners."

Appellants' brief, based upon the general proposition that "every detail of the law must be complied with to make the (tax) sale valid," alleges specific errors as follows: (1) "Published delinquent list August 8, 15, 22, 1933, should have been on or before June 10, 1933"; (2) "no sufficient description"; (3) Notice of sale specified "taxes of 1933–34" in place of correctly describing the taxes as of 1932–33 for which the tax deed to the city was issued; (4) "the Notice of Sale was posted instead of published as required by said Ordinance"; and (5) that the assessment was invalid. Finally, appellants argue that if any part of the tax proceeding is void, then all is void.

[1] At the trial of the issues herein, respondent introduced in evidence the relevant tax deeds and ordinances, making out a prima facie case thereby, and as stated by appellant's counsel, the burden thereafter rested "on the defendant under these records." The trial court, in finding for the respondent, determined that the burden of defeating the prima facie tax title, had not been satisfactorily met. In view of the nature of the procedural defects relied upon by appellants, the curative acts and ordinances presented by respondent, and the general situation as disclosed by the record, no reversible error is apparent.

The case of Hall v. Chamberlain, Cal. App., 183 P.2d 743, has been cited by respondent. Appellants reply that the ruling therein was reversed by the Supreme Court in 192 P.2d 759, holding that a curative tax statute is of no avail where the right of a transferee of the person having title at the time the delinquent tax proceedings were initiated, had vested prior to the effective date of the curative statute. The action to quiet title therein had been brought by holders of a mortgage foreclosure deed against claimants under a tax deed. Also, a tax deed from the state was held not conclusive evidence of the regularity of the proceedings where the intervening owner's interest had vested prior to an enactment making the tax deed conclusive evidence.

Relying on the Hall decision appellants maintain that "Mr. Judson's rights were all vested at the time of the tax sale and the City could do nothing that would change them." It is apparent, however, that there is but little similarity in the two cases. There is nothing, by way of analogy or otherwise, which will warrant a reversal of the trial court's decision in the instant case. The record fails to indicate that appellants were intervening transferees within the meaning of the Hall case; or that, by reason of any other unusual circumstances the appellant's rights were entitled to special consideration. The issues of the instant case involve no rights acquired by virtue of a mortgage foreclosure deed. Moreover, it may be noted that the judgment rendered in the present case does not depend, for its validity, upon a conclusive presumption of regularity arising from the issuance of a tax deed. That the respondent made out a prima facie case shifting the burden of proof to appellants is admitted. The trial court could well find, from substantial evidence in the record, that appellants had not satisfactorily met this burden.

[2, 3] Appellants' averment that "every detail of the law must be complied with to make the (tax) sale valid," cannot be accepted as a correct exposition of the present rule. The tendency of the law, as reflected in the decisions and in the various curative acts, has been definitely away from earlier and more rigorous holdings in respect to minor irregularities. Modern curative acts, such as that found in Statutes of 1945, page 2176, Gen.Laws, Act 8443a, have rendered innocuous those errors and irregularities which do not violate the jurisdictional and constitutional due process requirements. In this connection, attention is also called to Ordinance No. C–2443, adopted by the City of Long Beach on October 26, 1945, which confirms and val-

idates previous tax proceedings. The validity of curative acts, in so far as nonjurisdictional errors are concerned, can hardly be doubted. See Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531; Compton v. Boland, 26 Cal.2d 310, 158 P.2d 397. Clearly, the law does not require that absolute perfection of form which appellants' brief seems to insist upon.

[4] It is argued that the delinquent tax list was published August 8, 15, 22, 1933, and that pursuant to Ordinance B 55, Sec. 48, it should have been published on or before June 10; that the actual publication was unauthorized and therefore constituted no notice. As supporting this view, appellants cite Jones v. Walker, 47 Cal.App.2d 566, holding a tax sale void where the notice failed to set forth the amount due for penalties, and other similar cases, none of which directly deal with the situation here presented. The respondent's brief, however, refers to Ordinance C-1179, adopted on April 7, 1933, extending the time for publication to August 20, 1933, "due to the seismic disturbance of March 10, 1933." It is also pointed out that "On constitutional grounds, the delinquent list was not required to have been published at any particular time but could have been published at any time which would afford reasonable notice. * * * Therefore this irregularity is certainly disposed of by either Ordinance No. C-2443 (hereinbefore referred to) or by the state curative act of 1945."

[5] Appellants also complain of the description in the published delinquent list as follows: "'Judson, Leamon H Alamitos Heights—Lot 6, Blk. 27'—No City, County or State Venue. No book and page of maps, no nothing." However, as pointed out in respondent's brief, the published list is headed "Delinquent Tax List of the City of Long Beach The Fiscal Year 1932–33," and elsewhere in the list is again found the local determinative—"City of Long Beach." No reasonable person, reading the publication, could have had any doubt that the "Alamitos Heights" there referred to was located in the City of Long Beach, California.

[6, 7] Other alleged errors are likewise inconsequential. For example, the claim that the "Notice published was for the wrong year" is without merit, for although the notice purported to be "for the taxes of the year 1933–1934, *unless otherwise stated*," (italics added), the year was elsewhere correctly stated as 1932 in reference to appellants' property. Again, the record fails to establish appellants' claim that "The notice of sale was posted instead of published as required by said Ordinance," although it is true that there is an affidavit of posting. As respondent's brief states, the appellants' attorney introduced in evidence the published lists from the Long Beach Sun, stating to the trial court—"And it is published, if your Honor please, in the Long Beach Sun."

[8] Appellants' effort to avoid the tax assessment because of a failure to make use of the dollar sign to indicate the meaning of the assessment figures, is answered by the case of Knobloch v. Associated Oil Co., 170 Cal. 144, 147, 148 P. 938, 939, and other cases, holding that where an assessment book otherwise complies with legal requirements, the mere absence of the dollar sign does not invalidate the tax. The court there said: "No person could be misled upon an examination of the assessment book."

In the present case, it is clear that the trial court in effect determined that appellants could not have been misled or prejudiced by any of the alleged irregularities in either assessment or sale, and that such conclusion is supported by the evidence.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

86 Cal.App.2d 35

In re JONES' GUARDIANSHIP.

JONES v. JONES.

Civ. 13605.

District Court of Appeal, First District,
Division 2, California.
June 7, 1948.

1. Guardian and ward ⚿13(1)

In proceeding to determine whether mother or paternal grandfather of minor should be appointed guardian of person and estate of minor, the fact at issue was the present fitness of the mother to have the custody of the minor and not her past fitness.

2. Parent and child ⚿2(1)

Mother's right to custody of minor child was superior to the right of the paternal grandfather on establishment of the mother's fitness to have custody of the child. Probate Code, § 1442.

3. Parent and child ⚿2(4)

In proceeding to determine whether mother or paternal grandfather should have custody of minor child, evidence of prior misconduct of mother was only admissible in so far as it might have evidentiary value on question of her present fitness at time of hearing to have custody of child.

4. Evidence ⚿145

In proceeding in 1947 to determine whether mother or paternal grandfather was entitled to custody of minor, wherein grandfather was permitted to produce evidence of mother's adultery in 1945 and 1946 with certain person, trial court was clothed with considerable amount of discretion in passing on question whether evidence of acts of alleged misconduct by mother with other men in 1943, 1944 and 1945 would be admitted over objection that it was too remote.

5. Evidence ⚿145

In proceeding in 1947 to determine whether mother or paternal grandfather was entitled to custody of minor, wherein grandfather was permitted to produce evidence of mother's adultery in 1945 and 1946 with certain person, trial court did not err in refusing to admit evidence concerning alleged acts of misconduct on part of mother with other men in 1943, 1944 and 1945, over objection that it was too remote.

6. Courts ⚿99(1)

In proceeding to determine whether mother or paternal grandfather was entitled to appointment as guardian of minor, wherein evidence concerning alleged misconduct of mother was excluded on ground that it was too remote, grandfather could not open the subject and introduce the evidence for impeachment purposes, to contradict the mother's testimony elicited under code section dealing with examination of adverse party. Code Civ.Proc. § 2055.

7. Parent and child ⚿2(3)

Fact that mother voluntarily admitted perjury in matter of her past adulterous relations, did not establish the mother's unfitness for the custody of her child as a matter of law, but was merely a fact to be weighed by the trial judge with all other evidence.

8. Guardian and ward ⚿13(4)

Evidence sustained trial judge's finding that mother was a fit and proper person to be guardian of the person and estate of her minor son.

◆

Appeal from Superior Court, Alameda County; Ezra W. Decoto, Judge.

Proceeding in the matter of the guardianship of the person and estate of Gary Allen Jones, a minor, wherein William Jones filed a petition for guardianship, which was opposed by Edna May Jones. From an order appointing Edna May Jones the guardian of the person and estate of the minor and denying the petition of William Jones for letters of guardianship, William Jones appeals.

Affirmed.

Crozier C. Culp, of Oakland, for appellant.

Roos & Jennings and Leslie L. Roos, all of San Francisco, for respondent.

DOOLING, Justice.

This is an appeal by the paternal grandfather of Gary Allen Jones, a minor, from an order appointing respondent, the mother of said minor, the guardian of his person and estate and denying appellant's petition for letters of guardianship. The minor was born in 1943. In 1946 Kenneth George Jones, the father of the minor, secured an interlocutory decree of divorce from the respondent by which the custody of the minor was awarded to the father. On March 5, 1947, a final decree of divorce was entered in this action and a few days later the respondent married Paul Hiskey. On February 13, 1947, the father of the minor disappeared under circumstances suggesting suicide. On May 8, 1947, the respondent mother secured temporary custody of the minor by an ex parte order made pursuant to Probate Code section 1442, the minor having been in the physical custody of his paternal grandparents from the time of his father's disappearance.

On the hearing of the petitions for guardianship which commenced on April 22, 1947, the appellant produced evidence of the respondent's adulterous relations with one Thackeray extending over a period of approximately one year from May or June 1945 to June 1946. The respondent first denied under oath any such relations with Thackeray but at a subsequent stage of the hearing she resumed the witness stand and voluntarily admitted the falsity of her previous testimony in this respect. Her explanation of her original denial of misconduct with Thackeray was that while her husband knew the facts other relatives and friends present in the courtroom did not and she was reluctant to have them disclosed in their presence.

[1] Appellant sought to prove similar acts of misconduct with other men in the years 1943, 1944 and 1945. The trial judge, relying on the settled rule that the fact at issue was the present fitness of the respondent to have the custody of her child (Prouty v. Prouty, 16 Cal.2d 190, 105 P.2d 295; In re Green, 192 Cal. 714, 221 P. 903; Guardianship of Case, 57 Cal.App.2d 844, 135 P.2d 681; Guardianship of McCoy, 46 Cal.App.2d 494, 116 P.2d 103; Ott v. Ott, 127 Cal.App. 322, 15 P.2d 896) excluded all such evidence on the ground that it was too remote and (except in the case of Thackeray where the evidence of the entire course of conduct was allowed to be proved) ruled that no evidence of acts occurring prior to January 1, 1946 would be admitted.

[2] There was ample evidence to support the trial court's finding of respondent's present fitness to have the custody of her child in the testimony of relatives, friends and neighbors and in a written report of the probation officer which was introduced into evidence by stipulation. As against the grandfather the respondent mother's right to the custody of her child upon her fitness being established is settled. Robertson v. Robertson, 72 Cal.App.2d 129 and cases cited at page 132, 164 P.2d 52 at page 54. Appellant insists, however, that the trial court committed reversible error in excluding the proffered evidence of misconduct with men other than Thackeray which occurred prior to January 1, 1946.

[3] Evidence of the prior misconduct of the mother was only admissible insofar as it might be said to have evidentiary value on the question of her present fitness at the time of the hearing to have the custody of her child. The court said in Prouty v. Prouty, supra, 16 Cal.2d 190, 194, 105 P.2d 295, 297: "Evidence of prior acts of misconduct may be admissible if it can be said to have a direct bearing upon the issue of present unfitness, but such evidence should be limited to this issue alone."

[4] In the determination of the question whether evidence of acts of misconduct occurring in 1943, 1944 and 1945 was too remote to be admissible on the question of the mother's present fitness to have the custody of her child the trial court was clothed with a considerable amount of discretion and "the admissibility of evidence in the face of objection upon the ground of its remoteness, ordinarily should be left to the sound discretion of the trial court." People v. Boggess, 194 Cal. 212, 235, 228 P. 448, 458; Earl v. Times-Mirror Co., 185

Cal. 165, 170, 196 P. 57; Ott v. Ott, supra, 127 Cal.App. 322, 324, 15 P.2d 896.

[5] The court had before it the evidence of respondent's quite persistent course of misconduct with Thackeray which was not terminated until June, 1946. The other acts sought to be proved antedated the course of misconduct with Thackeray. They might have added a flavor of promiscuity to the respondent's conduct at an earlier date but the court's real problem was to determine whether since breaking off with Thackeray the respondent had rehabilitated her character to such a point that at the time of the hearing she was a fit and proper person to have the custody of her child. It was found on sufficient evidence that she had done so. The more remote evidence of earlier misconduct could have little bearing on this crucial question. We cannot find any abuse of discretion in the exclusion of this evidence on the ground of remoteness.

[6] The claim that this evidence should at least have been allowed for impeachment purposes, to contradict the respondent's testimony elicited under section 2055, Code of Civil Procedure, is untenable. The evidence having been excluded on the ground of remoteness the appellant could not open the subject with respondent "for the purpose of eliciting something to be contradicted." 27 Cal.Jur. 107.

[7,8] The fact that respondent voluntarily admitted perjury in the matter of her relations with Thackeray does not establish her unfitness for the custody of her child as a matter of law. That was a fact to be weighed by the trial judge with all the other evidence and his conclusion that respondent was a fit and proper person finds support in the evidence as a whole.

The appellant's attack upon the ex parte order for temporary custody is moot since custody obviously cannot be restored to him retroactively.

The order is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

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86 Cal.App.2d 165

ZOGARTS v. SMITH et al.

BARRY v. SMITH et al.

Civ. 16056.

District Court of Appeal, Second District, Division 3, California.
June 14, 1948.

1. Bills and notes ⚷131

Notes stating that they were payable only from specified percentages of net profits of partnership to be organized by makers were payable only out of such profits, if any, whether obligation, also assumed by makers, to pay all debts of old dissolved partnership, was personal or on behalf of new partnership.

2. Bills and notes ⚷131

Generally, obligor, whose inability to pay notes out of partnership profits as agreed, is due to involuntary dissolution of partnership and loss of his business, is excused from paying, but if such inability is due to his voluntary acts, duty to pay becomes absolute.

3. Partnership ⚷239(1)

A contract by makers of notes, payable from new partnership's profits, to assume, pay and satisfy all debts of previous dissolved partnership, obligated them to pay such debts, not merely to have new partnership assume them.

4. Bills and notes ⚷131

Liquidation of partnership, as direct result of failure of organizers of new partnership to liquidate dissolved partnership's debts, as they agreed to do at time of executing notes payable from profits of new partnership, was voluntary, and since it rendered earning of profits by new partnership impossible, makers' obligation to pay notes became absolute.

5. Evidence ⚷461(1)

In action on notes payable from net profits of new partnership organized by makers, who agreed to pay all debts of old dissolved partnership, testimony of one of makers that they intended only to have such debts assumed by new partnership was inadmissible.

6. Contracts ⚿314

One who voluntarily deprives himself of power to do what he has agreed to do breaks his contract and may be sued for damages immediately, without demand, though time specified for performance of contract has not expired.

7. Partnership ⚿341

Amounts received in liquidation of partnership, from net profits of which two of partners' notes were payable, should have been applied first to payment of such notes, instead of previous dissolved partnership's debts, which makers agreed to pay, though such amounts were not profits in strict sense.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Actions, consolidated for trial, by Rudy Zogarts and Josephine Barry, respectively, against Walter E. Smith and another on two notes and for money had and received in the amounts thereof. Judgments for plaintiffs, and defendants appeal.

Affirmed.

J. G. Moser and Richard A. Lavine, both of Los Angeles, for appellants.

Bernbaum & Kleinrock, Francis F. Quittner and Robert H. Shutan, all of Los Angeles, for respondent Barry.

Lyndol L. Young, of Los Angeles, for respondent Zogarts.

SHINN, Acting Presiding Justice.

Rudy Zogarts and Josephine Barry brought separate actions on promissory notes, dated January 2, 1945, against the makers, Walter E. Smith and Thelma I. Smith. The Zogarts note was for $7,200 and stated "this note is payable only out of eight and one-third per cent (8-1/3%) of the net profits of that certain partnership known as Keystone Tool & Supply Company hereafter to be organized by and between Walter E. Smith and Thelma I. Smith, the makers hereof." It was further provided that the profits were to be calculated "as of July 30, 1945, and said percentage paid on account hereof, and the balance, if any, shall be similarly calculated and paid on July 30 of each successive year until the total be paid." The Barry note was for $16,800, payable only out of 194/9 per cent of the net profits of the said partnership. It had been given to Emmett D. Barry, now deceased, who, before his death, transferred it to Josephine Barry, his wife. It was alleged in each complaint upon information and belief that on July 30, 1945, defendants had received from the respective percentages of profits, namely 81/3 per cent and 194/9 per cent, sums of money which were more than sufficient to pay said notes in full, but that during the month of August, 1945, defendants, the sole partners of Keystone Tool & Supply Company, closed the business of said partnership and liquidated its assets for a sum of money in excess of $100,000 and that the notes had not been paid in whole or in part. Each complaint contained an additional cause of action for money had and received in the amount of each note. Defendants answered, admitting the liquidation of the business and the receipt of more than $100,000 therefor, and alleging that a loss was incurred in the liquidation. They denied the causes of action for money had and received. The cases were consolidated for trial, findings were in favor of plaintiffs, separate judgments were entered and defendants appeal.

There are two approaches to the legal questions involved: the first relates to the question whether there were any profits of the partnership between January 2 and July 1, 1945, and the second is whether, regardless of the profits, the liquidation of the business by defendants obligated them to pay the notes in full. We will first discuss the second proposition, but in doing so will have to refer briefly to the recent history of the company, to the events attending the execution of the notes, and to some extent to the state of the company finances.

In February of 1943 defendants, doing business as Keystone Tool & Supply Company, a partnership, sold a 49 per cent interest to, and formed a new partnership with, Emmett D. Barry, Rudy Zogarts and others, namely, to Barry a 10 per cent interest for $10,000, to Zogarts a six per cent interest for $6,000, and to the others various percentages at the same rate. The agreement called for ten per cent of the respective purchase price to be paid down and the balances in five equal annual installments, the first payable March 1, 1944. Under date of January 2, 1945, defendants Smith and wife agreed to purchase the interests of Barry, Zogarts and three other partners, the Barry interest for $19,500, the Zogarts interest for $7,800, and the remaining interests at comparable figures. Barry was to receive and did receive $2,700 and a note for $16,800; Zogarts received $600 and a note for $7,200; and the agreement provided that the balances due the respective sellers "shall be paid from the net profits of Keystone Tool & Supply Company, a co-partnership hereafter to be organized by and between Walter E. Smith and Thelma I. Smith, in the following proportions: Emmett D. Barry 194/9% * * * Rudy Zogarts 81/3%" etc. In the agreement and also in the notes it was provided that in calculating the profits Walter E. Smith might first deduct a drawing account of $1,500 a month as an expense of the partnership. The sixth paragraph of the agreement read as follows: "That Walter E. Smith and Thelma I. Smith covenant to assume, pay and satisfy, or cause to be paid and satisfied, all debts and other liabilities of the partnership hereby dissolved, including but not restricted to the claims of any governmental authority on account of renegotiation of governmental contracts, any liabilities accruing to the partnership hereby dissolved or to its members by reason of any violation of the Treasury Department or War Manpower Commission or War Labor Board Regulations respecting the employment and payment of employees, and including but not restricted to the claims of Paul Seward and any other former associate or partner of the parties hereto in connection with any former partnership conducted under the name of Keystone Tool & Supply Company, except only such debts or liabilities (if any), as may, at any time or times, have been contracted by the said Emmett D. Barry, Guy Whitaker, Orvile Felt, Rudy Zogarts and Frank Huffman, or any of them, in behalf of the partnership and that have not been entered in or upon the partnership books of account; and the said Emmett D. Barry, Guy Whitaker, Orvile Felt, Rudy Zogarts and Frank Huffman shall each pay and satisfy all of such debts and other liabilities of the partnership not so entered by him, all as more particularly enumerated in paragraph 3 hereof. The said Walter E. Smith and Thelma I. Smith also hereby agree to pay and satisfy, or cause to be paid and satisfied all personal income tax liability whatsoever incurred by the said Emmett D. Barry, Guy Whitaker, Orvile Felt, Rudy Zogarts and Frank Huffman up to and including the 31st day of December, 1944, for and on account of any earnings, income or profits accruing to the said Emmett D. Barry, Guy Whitaker, Orvile Felt, Rudy Zogarts and Frank Huffman by reason of the business of the said partnership up to and including the said 31st day of December, 1944. That the said Walter E. Smith and Thelma I. Smith covenant at their own cost and expense to hold and save harmless the said Emmett D. Barry, Guy Whitaker, Orvile Felt, Rudy Zogarts and Frank Huffman, and each of them, against any and all liability or claims or damages or expenses (including attorneys' fees and court costs) that the said Emmett D. Barry, Guy Whitaker, Orvile Felt, Rudy Zogarts and Frank Huffman, and each of them, may sustain, become liable or answerable for, or shall pay for and on account of the aforesaid debts, or the aforesaid other liabilities, or the said income tax liability, all of which are heretofore in this said paragraph assumed as aforesaid by the said Walter E. Smith and Thelma I. Smith."

[1] Defendants did not pay all the debts of the existing partnership and there was no evidence that they paid any of them, nor as to the amount of funds of the new partnership that were applied on the old debts. Defendants say they did not personally undertake to pay and satisfy the existing obligations, but that they assumed that duty for and on behalf of the partnership which they were to form later. Of course, in either case, plaintiffs' notes were to be paid only out of profits earned by the new partnership, and it is clear that if profits had been earned the notes would have been payable therefrom whether defendants' obligation was personal or on behalf of the

partnership. But the case turns upon this very point. It will appear from our discussion of the evidence that although the new partnership might have survived if it had been free from debt, it was not financially able to take care of the heavy obligations of the dissolved partnership, and it failed in the attempt. Mr. Felt, defendants' auditor, who was one of the sellers under the January 2nd agreement, testified that the books of the new partnership were set up showing the assumption of current liabilities of $982,000 as of December 31, 1944, "without giving effect whatever to renegotiation or any suits filed as of that time," and book assets of $393,979.48 as of the same date. He also testified that the company did a business of $2,026,666.49 in the first seven months of 1945, paid for goods purchased $1,278,000, suffered a material reduction of inventories, had expenses of $438,794.61, a gross profit from operations of $16,087.04, and net profit for the period of $11,693.29. This testimony was based upon the assumed correctness of a report of operating income and expense made by Arthur Young & Company from an examination of defendants' books, which report was received in evidence as one of plaintiffs' exhibits. The account books were not in court. Mr. Felt also testified that the partnership was operating at a monthly loss of approximately $30,000 and in the seven months sustained a loss of $141,070.45. He did not undertake to break down or explain these figures. He further testified that the assets of the business were sold at auction for $156,000 in August, 1945, and, that the liquidation resulted in a deficit net worth of $218,000. In arriving at this figure he charged the partnership with various obligations such as renegotiation, wage stabilization, and two suits that were pending at the time and also the balance of the unpaid debts of the old partnership of some $115,000. The Arthur Young & Company figures did not take these factors into consideration.

The evidence pertaining to the matter of operating profits was wholly unsatisfactory. The differences in the conclusions of Mr. Felt and of Arthur Young & Company were not explained. It is clear, however, that the new partnership had insufficient capital with which to carry on its business and at the same time satisfy the creditors of the old partnership. There was no evidence as to the amounts that had been paid on the old debts and the effect that was given to them in the profit and loss calculations made by Mr. Felt or by Arthur Young & Company. If the differences in their respective figures cannot be attributed to opposing theories respecting the matter of the old debts, the record furnishes no basis upon which they can be reconciled. And although there obviously were opposing theories the evidence did not disclose what they were or wherein they differ.

The findings were that the partnership profits earned up to July 30, 1945, were sufficient to pay the notes of plaintiffs from the stipulated percentages applicable thereto. If these findings are supported by the evidence the judgment should be affirmed. But it is impossible to determine from the record whether the evidence supports them. There was a complete failure to explain any of the major items which entered into the calculations of the accountants. For the same reason we cannot hold that the findings as to profits are unsupported, or that defendants proved that they sustained an over-all loss during the period. However, in our discussion of the next point it will be developed that it is immaterial whether the partnership operated at a profit or a loss.

[2-5] If, as the court found to be the case, defendants dissolved their partnership, liquidated its assets and went out of business, they thereby deprived themselves of the ability to pay the notes out of profits and lost that privilege. The general rule is that if the obligor's inability to pay out of profits is due to the involuntary loss of his business, he is excused from paying, but if it is due to his voluntary acts his duty to pay becomes absolute. The question then is whether the sale of defendants' partnership assets was voluntary, in a legal sense. All the evidence relating to the business operations of the new partnership has a direct bearing upon this question. It was established by the evidence of defendants that the partnership went out of business and

was liquidated because it had lost its credit standing and was being pressed by creditors. There was no bankruptcy and no assignment for the benefit of creditors. The partnership succumbed by reason of the loss of credit standing, the insufficiency of its capital, and its heavy debts. As nearly as we can determine from the evidence the unpaid balance of these debts amounted to at least $115,000 at the time of the liquidation. The question then is whether defendants were obligated by their contract to pay and satisfy all debts and other liabilities of the old partnership or merely to have the new partnership assume them. The trial judge construed the contract to mean that defendants were to pay the debts and this, we believe, was the proper construction. Paragraph 6 of the agreement provides for the payment by defendants of said debts and liabilities unequivocally and unconditionally, excepting only undisclosed liabilities of the partnership, if any, that might have been created by the retiring partners. In addition, defendants agreed to pay all personal income tax liabilities of the retiring partners through the year 1944, based upon partnership earnings. The agreement was not merely to hold the retiring partners harmless, against liability or claims, based upon the partnership obligations or income tax liabilities; the concluding part of the paragraph contains such an indemnity agreement. It may be granted, for the purposes of our present discussion, that the new partnership did operate at a loss and that there were actually no earnings to be applied on plaintiffs' notes. But defendants, instead of liquidating the old debts, as they agreed to do, merely allowed the new partnership to assume them, with the result that they could not be and were not met, the creditors closed in and the partnership went out of business. Defendants say that liquidation of the business was involuntary, but it was not involuntary if it was the direct result of the failure of the defendants to liquidate the old debts as they had agreed to do. They cannot be heard to say that the new partnership would not have prospered if it had been allowed to commence business unburdened with the old debts. Defendants argue that it would be unreasonable to believe that they would have undertaken to personally pay the debts of the old partnership and turn all of the assets over to the new partnership with no liabilities whatever. They offered to prove by defendant Walter E. Smith that it was only the intention of defendants to have the debts assumed by the new partnership. The court sustained an objection to this testimony and the ruling in our opinion was proper. It may be that defendants made an improvident agreement, or one that they could not fulfill, but we agree with the trial court that the agreement was unambiguous and that there was no uncertainty as to the obligations which defendants assumed. The inability of the new partnership to earn profits from which to pay plaintiffs' notes must be attributed to the failure of defendants to comply with the terms of their agreement.

[6] There is no question as to the law which governs in this situation. In the early case of Wolf v. Marsh, 54 Cal. 228, defendant, who had executed a note payable out of the profits of a coal mine, voluntarily sold the mine but was held liable on the note, the court stating, 54 Cal. page 232: "Before the mines had yielded any profits to the defendant, he sold and conveyed his interest in them to a stranger. By so doing he voluntarily put it out of his power ever to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary, that 'if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not expired.' (Bishop on Cont. sec. 690.)"

There are many cases to the same effect and we think none to the contrary. Bagley v. Cohen, 121 Cal. 604, 53 P. 1117; Poirier v. Gravel, 88 Cal. 79, 25 P. 962; Carter v. Rhodes, 135 Cal. 46, 66 P. 985; Grant v. Warren, 31 Cal.App. 453, 160 P. 847.

Since the retirement from business and liquidation of the partnership consisting of the defendants Smith must be regarded as a consequence of their voluntary acts, and since they thereby rendered impossible the earning of profits by the partnership from which plaintiffs' notes could have been paid, their obligation to pay the notes was properly determined by the trial court to be absolute.

[7] The facts as related furnish an additional basis of liability. The new partnership operated on a strictly cash basis, as it was obliged to do. The evidence was that it paid its material and labor bills and there was no evidence that it did not meet its other current obligations. It received $156,000 from the sale of its assets or more than enough to pay plaintiffs' notes from the stipulated percentages. Instead of paying the notes the management applied the amount on the other debts which, as we have seen, consisted largely, if not entirely, of the debts of the former partnership. Inasmuch as it was the duty of defendants to pay those debts, the amount received in the liquidation, while not profits in the strict sense, should have been applied first to the payment of plaintiffs' notes.

The judgments are affirmed.

WOOD, J., and McCOMB, J. assigned, concur.

85 Cal.App.2d 776

TRANS-OCEANIC OIL CORPORATION v. CITY OF SANTA BARBARA et al.

Civ. 16227.

District Court of Appeal, Second District,
Division 3, California.

June 2, 1948.

Hearing Denied July 29, 1948.

1. Municipal corporations 🔑600

Owner of realty within city limits may erect any structure thereon or use it for any lawful purpose that he may see fit, subject to restrictions municipality may, in exercise of police power, reasonably impose.

2. Municipal corporations 🔑600

Restrictions by municipality upon use of realty within city limits do not violate rights of individual when confined within proper limits of police power.

3. Municipal corporations 🔑621

Legislation requiring issuance of permit by municipality as condition precedent to erection of structure on private property or to use that may be made of property, if reasonable, is valid exercise of police power.

4. Municipal corporations 🔑621

A city council may not exercise unlimited discretion in revocation of permits.

5. Municipal corporations 🔑621

A permit may properly be revoked if permittee does nothing beyond obtaining permit or fails to comply with reasonable terms or conditions expressed in the permit.

6. Constitutional law 🔑101

If permittee has acquired a vested property right under a permit, the permit cannot be revoked.

7. Constitutional law 🔑101

Holder of building permit or license who actually commences work upon building and incurs liabilities for work and material acquires a "vested property right" which he is entitled to have protected against arbitrary revocation of permit.

8. Eminent domain 🔑85

The owner of a property right to drill for and extract oil in a proven field acquired under a permit may not constitutionally be deprived thereof without payment of just compensation, except upon a showing that its exercise constitutes a nuisance.

9. Appeal and error 🔑717

The reviewing court could consider trial judge's written opinion for purpose of understanding and interpreting judge's findings. Rules of Appeal, rule 5(a).

10. Constitutional law 🔑101

Holder of permit for drilling of oil well within city limits, by spending $4,500 in preparations to drill well in the fall of 1941 acquired a "vested right" to proceed under permit, and that right was not lost by abandonment where war restrictions and subsequent inability to obtain labor, materials and drilling equipment rendered drilling operations impossible until 1947, but holder sought to resume work when conditions permitted.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Right".

11. Municipal corporations ⚷621

Where permit for drilling oil well within city limits fixed no time within which well was to be drilled, permit holder had a reasonable time within which to drill well.

12. Municipal corporations ⚷621

Where a permit has been regularly issued and rights have vested thereunder, adoption of zoning ordinance prohibiting permitted use of property does not ipso facto revoke the permit.

13. Municipal corporations ⚷621

Where zoning ordinance permitted continued non-conforming use of land, amendments changing zone from one in which oil drilling was permitted to one in which it was prohibited did not revoke prior permit granting right to drill oil well in that area.

14. Constitutional law ⚷287
Municipal corporations ⚷621

Governing body of municipality acts in a quasi judicial capacity in determining that validly issued permit should be revoked, and due process requires that it act only upon notice to permittee upon a hearing and upon evidence substantially supporting finding of revocation.

15. Municipal corporations ⚷621

The resolution of city council revoking a permit to drill oil well within the city limits was inoperative where adopted without notice or hearing or reception of competent evidence.

16. Constitutional law ⚷287

Where holder of permit to drill oil well within city limits had acquired vested right to drill well by virtue of expenditures made in preparation for drilling, city's attempted revocation of permit without notice or hearing constituted a deprivation of permit holder's property in contravention of state and federal constitutions. U.S.C.A.Const. Amend. 14; Const.Cal. art. 1, § 13.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Proceeding by the Trans-Oceanic Oil Corporation against the City of Santa Barbara and others for a writ of mandate to compel the City, its Mayor and members of its City Council to rescind their action in revoking a permit for the drilling of an oil well within the City of Santa Barbara previously issued to the petitioner. Judgment for the defendants and the petitioner appeals.

Judgment reversed with directions.

Griffith & Thornburgh, Yale B. Griffith and C. Douglas Smith, all of Santa Barbara, and O'Melveny & Myers, Louis W. Myers, Jackson W. Chance, Sidney H. Wall and Rodney K. Potter, all of Los Angeles, for appellant.

Henry T. Bailey, City Atty., of Santa Barbara, for respondents.

VALLÉE, Justice pro tem.

Trans-Oceanic Oil Corporation petitioned the Superior Court of Santa Barbara County for a writ of mandate to compel the City of Santa Barbara, and its Mayor and the members of its City Council to annul and rescind their action in revoking a permit for the drilling of an oil well within the city of Santa Barbara, previously issued to it, and to reinstate such permit. A trial was had before the court sitting without a jury. Findings were in favor of defendants. From a judgment entered thereon, Trans-Oceanic Oil Corporation appeals.

The facts are not in dispute. On July 8, 1938, appellant's predecessor acquired an oil lease of what is known as the "Low Tract" for a period of ten years "and so long thereafter as oil and gas is produced in the leased premises in paying quantities." That portion of the "Low Tract" covered by the lease is a rectangular shaped plot or tract of approximately 80 acres. A reference to the maps, introduced as exhibits, indicates that it is located in the southwest section of the city of Santa Barbara. It is bounded on the east by Punta Verde, a small tract subdivided into five short blocks, on the west by a large tract of unsubdivided land, on the south by the Pacific Ocean, and on the north by Cliff Drive. The property immediately north of the leased premises abutting Cliff Drive consists of a large area more than a mile in length, which has never been subdivided, excepting two small subdivided areas—the La Vista Del Oceana and Rogers Tracts. The unsubdivided area is used exclusively for farming and oil drilling. At the time the original lease was made, there were two oil wells located on the "Low Tract," oil operations having been commenced by others in 1934. After the lease was assigned to it, appellant proceeded to drill and complete seven wells in the tract, four of which produced oil. Three wells were producing oil at the time of the trial.

Thereafter, appellant applied to the City Council for a permit to drill an additional well to be known as No. 8. With its application appellant deposited a cash "spud-in" fee of $500 and a surety bond in the sum of $500 to assure the removal of the derrick in the event of abandonment of the well.

Ordinance No. 1613 of the city of Santa Barbara, which governed the issuance of drilling permits then in force, provided for a hearing by the council on each application for such a permit, and provided further: "If the City Council shall find that the granting of such permit will not materially affect the health or safety of persons residing or working in the neighborhood thereof or elsewhere in the City and will not be materially detrimental to the public welfare or injurious to property or improvements in the neighborhood thereof or elsewhere in the City in which the property of the applicant is situated, it shall grant such permit; otherwise it shall deny the same. The action of the Council in granting or denying such permit shall be final and conclusive." The ordinance contained no provision for the revocation of such permit.

On July 9, 1941, permit No. 1218 was granted and issued by the council to appellant to drill well No. 8 for oil or gas. It fixed no time as to when the work was to be commenced or as to when the work was to be finished, its concluding sentence reading: "This license terminates * * *." The blank space was never filled in.

At the time the permit for the drilling of well No. 8 was issued, Ordinance No. 1493 (the Comprehensive Zoning Ordinance of Santa Barbara) divided the city into six districts. One of these districts was designated "R-OD" or "One Family Residence and Oil Drilling," and drilling for and production of oil was permitted in that district. (Ord. 1493, sec. 17.) The "Low Tract," except the northeast 250 feet thereof, was a part of and included in Zone "R-OD." The exhibits show that the "R-OD" zone projects outward from the rest of the city like a triangular peninsula.

Promptly upon receipt of the permit, appellant commenced preparatory work for drilling a deep well. At a cost of approximately $4,500 it constructed substantial concrete foundations for a derrick, erected an oil derrick, dug a sump hole, erected a power house, moved boilers into place, and laid necessary pipe lines to the site. Before actual drilling of the well was commenced, war was declared by the United States on December 8, 1941. About February 24, 1942, the United States Army took possession of the entire coastal area of the "Low Tract," including the site of well No. 8 and all of the land in its immediate vicinity. Thereafter, no further drilling operations were permitted. Long range artillery was installed on the premises by the Army. Subsequently, the Army removed the guy wires and certain other supports from the derrick, as a result of which, in an unusual wind storm about December 9, 1943, the derrick was blown down and destroyed. There remained, however, the concrete foundations, the power house, the timbers from the derrick, the pipe lines, the boilers and the sump hole. The Army retained exclusive possession of the premises until January 18, 1945, when they were turned over by the Government to the owner and to appellant as lessee.

On March 7, 1946, the City Council of Santa Barbara adopted Ordinances Nos. 2069 and 2070, amending sections 2 and 17, respectively, of Ordinance No. 1493 (the Comprehensive Zoning Ordinance) making unlawful oil drilling throughout the entire city of Santa Barbara except in industrial zones. Ordinance No. 2069 amended section 2 of Ordinance No. 1493 by dividing the city into five districts instead of the former six districts, and converting what was formerly the "R-OD" district into "R-1" or "One Family Residence District." Ordinance No. 2070 repealed section 17 of Ordinance No. 1493 which had created district "R-OD" or "One Family Residence and Oil Drilling." After the passage of these amendments to the zoning ordinance, the City took no action to revoke appellant's permit until April 9, 1947. Appellant continued to operate its wells on the "Low Tract," and other wells on adjacent property continued "to operate and to be maintained and produced as a non-conforming use and still so continue."

At the time the property was turned over to appellant by the Government on January 18, 1945, appellant was unable to proceed with drilling operations on well No. 8 due to the shortage of labor, materials and drilling equipment; and it was not until 1947 that resumption of drilling activities became possible. In March, 1947, appellant contracted for the drilling of well No. 8 and work was resumed on March 31, 1947. It consisted of the laying of a 2½ inch water pipe line a distance of 2,600 feet to the well site and the redigging and enlarging of the sump. On April 7, 1947, the contractors moved about 300 tons of drilling machinery and equipment to the location, set up a 126-foot portable steel drilling mast, and had a large crew of men at work for the purpose of "spudding" in well No. 8. The agreed contract price for the moving of this equipment to and from the property was $5,600 and the agreed "standby" cost for maintaining the equipment and crew was $360 a day, which was reduced to $193 a day after the purported revocation of appellant's permit.

On April 9, 1947, the City Council, at a special meeting, without any notice to appellant and without a hearing, by resolution revoked appellant's permit to drill well No. 8 on the ground that appellant had not proceeded "to drill said well in accordance with the time element provision of its application, and for the reason that the drilling of a new oil well within the City of Santa Barbara, California, is now in violation of City Zoning Ordinance 1493." On the same day, appellant was notified of the council's action and informed that the $500 "spud-in" fee paid for the permit would be returned to it upon presentation of a claim. Thereafter the building inpector refused to issue the usual and ordinary permits in connection with the work to be done on well No. 8 and work was stopped. The bond which appellant filed is still in force and the $500 "spud-in" fee is still retained by the city.

Well No. 8 is located near the southwest corner of the "Low Tract," and it is conceded, and found by the court that "there are no residences or structures of any kind upon * * * or within 1400 feet of the location of the well on any other property except for several oil wells to the north and east and west of said well * * * and said well * * * is located in an area used exclusively for farming and oil drilling."

In addition to the foregoing facts, the court also found that the revocation of the permit issued to appellant in 1941, did not deprive appellant of its property without due process of law; that the City Council had not acted "arbitrarily"; that appellant had no vested right in the permit; that it was barred from drilling well No. 8 because (a) it had not drilled prior to the enactment of Ordinances No. 2069 and 2070 amending Zoning Ordinance No. 1493, (b) the permit was lawfully revoked "pursuant to the Resolution of April 9, 1947," (c) the drilling of the well would be violative of Ordinance No. 1493, as amended by Ordinances No. 2069 and 2070, and (d) "under the terms and provisions of said Zoning Ordinance, as amended, the drilling of said well would not be an enlarged and extended use of the premises belonging to petitioner and therefore in violation of said Zoning Ordinance as amended."

In a written "Memorandum of Opinion," the trial judge stated that he could find neither the act nor the intent necessary to effect an abandonment of the well in view of the fact that appellant had no access to the property for drilling purposes during the Army's occupation thereof and in view of the fact that after the return of the property to appellant there was an acute shortage of labor, materials and drilling equipment. He also stated that since the permit was silent upon the question of how soon appellant was required to commence drilling operations, it had a reasonable period of time within which to proceed and that under "all of the attending facts and circumstances, the Court finds that the Petitioner did proceed within a reasonable time."

The question involved is stated by appellant as follows: "May a city council lawfully revoke a permit for the drilling of an oil well, which was regularly and validly issued and was accepted and paid for by the permittee, in a case where (a) the attempt to revoke is not made until after the permittee has made substantial expenditures, done substantial work and incurred large additional liabilities in preparing to drill pursuant to the permit and in good faith reliance thereon; (b) where the purported revocation is based upon a subsequently enacted zoning ordinance restricting to residential uses property which is in the midst of a producing oil field and entirely surrounded by commercial uses, and (c) where the permit is purportedly revoked without any notice or hearing and without any finding that conditions have so changed as to make the drilling of the well detrimental to public health, safety or morals?"

Appellant contends that when a valid permit has been duly and regularly issued and the permittee, relying thereon in good faith, has made substantial expenditures or incurred liability in substantial amounts in commencing to proceed pursuant to its terms, such permit ripens into a vested property right which may not be taken from him against his will other than by proceedings in eminent domain with the payment of just compensation (unless that which he does or proposes to do under the permit amounts to a nuisance, which has not been claimed by the City in the instant case). It was stipulated at the trial that there was no issue in the case as to well No. 8 constituting a nuisance.

[1-3] It is fundamental in the law of real property situated within the limits of cities that the owner thereof may erect any structure thereon or use the same for any lawful purpose that he may see fit, subject only to such restrictions and regulations as the municipality may, in the exercise of the police power, by proper enactment, reasonably impose. (9 Am. Jur., sec. 3, p. 199; 3 McQuillin, Municipal Corporations, Rev.Ed., sec 1016, p. 350.) Confined within the proper limits of the police power such restrictions and regulations do not violate the rights of the individual. (12 Cal.Jur. Ten Year Supp. 139; 9 Am.Jur. sec. 3, p. 199; 3 McQuillin, Municipal Corporations, Rev.Ed., sec. 1017, p. 354; 9 Cal.L.Rev. 164, 12 Cal.L.Rev. 428, 13 Cal.L.Rev. 417.) Legislation requiring that a permit be issued by a municipality as a condition precedent to the erection of a structure on property privately owned, or to the use that may be made of such property, if reasonable, is a valid exercise of the police power. City of Yuba City v. Cherniavsky, 117 Cal.App. 568, 572, 4 P.2d 299; 43 C.J. 345, sec. 373.

[4-7] It is not, nor could it be, claimed that a city council exercises unlimited discretion in the matter of revoking permits. A permit having issued, the power of a municipality to revoke it is limited. If the permittee does nothing beyond obtaining the permit or fails to comply with reasonable terms or conditions expressed in the permit granted, the proper authorities may revoke it. Vincent Petroleum Corporation v. Culver City, 43 Cal.App.2d 511, 111 P.2d 433; In re New York Electric Lines Co., 201 N.Y. 321, 334, 94 N.E. 1056; Godson v. Town of Surfside, 150 Fla. 615, 8 So.2d 497; People v. Bales, 224 App.Div. 87, 88, 229 N.Y.S. 550, 551, aff'd 250 N.Y. 598, 166 N.E. 339. If a permittee has acquired a vested property right under a permit, the permit cannot be revoked. The principle is stated in 9 Am.Jur., sec. 8, p. 204: "By the weight of authority, a municipal building permit or license may not arbitrarily be revoked by municipal authorities, particularly where, on the faith of it, the owner has incurred material expense. Such a permit has been declared to be more than a mere license revocable at the will of the licensor. When, in

reliance thereon, work upon the building is actually commenced and liabilities are incurred for work and material, the owner acquires a vested property right to the protection of which he is entitled."

Pelham View Apartments v. Switzer, 130 Misc. 545, 224 N.Y. 56, is a leading case where the principle was applied. There a building permit had been issued for the erection of an apartment house and the petitioner had borrowed money, bought property, prepared plans and began construction by excavating a cellar in reliance on the permit. Thereafter, a new zoning law was enacted, and the permit was revoked. In a proceeding in mandamus, it was held in 224 N.Y.S. at page 58: "It was beyond the power of the common council to enact an ordinance to invalidate the permit issued and acted upon. It was likewise beyond the jurisdiction of the building inspector to revoke such permit, basing his revocation upon a subsequently enacted ordinance.

"Where a permit to build a building has been acted upon, and where the owner has, as in this instance, proceeded to incur obligations and to in good faith proceed to erect the building, such rights are then vested property rights, protected by the federal and state Constitutions. City of Buffalo v. Chadeayne, 134 N.Y. 163, 31 N.E. 443. The courts in such cases have uniformly applied the remedy of mandamus to cancel the revocation and to reinstate the permit. [Citations.] * * * It would be nothing short of confiscation, and a complete disregard of constitutional rights, if a municipality could revoke a building permit issued under the conditions as presented in this case."

City of Buffalo v. Chadeayne, 134 N.Y. 163, 31 N.E. 443, cited in the Pelham case, was an action to recover a penalty for violation of an ordinance. The council had granted the defendant a permit to erect seven frame houses. The defendant then entered into a contract for the materials, made excavations for the cellars and laid a portion of the walls. Without notice to him the council rescinded the permit. Defendant continued construction. Hence the suit. The court held in 31 N.E. at page 443: "The defendant's buildings are within the fire limits, as prescribed by the ordinance. He therefore had no right to construct them without the permission of the common council. Such permission, as we have seen, was granted on the 11th day of July, 1887, and thereby he acquired the right to proceed with the construction of his buildings, and to possess and enjoy the comforts they might afford. As soon as he had entered upon the construction of the buildings, and incurred liabilities for the work and material, he had a property interest in them. In this right he was entitled to protection. [Citations.] * * * If the common council could interfere and rescind its permit after a building is partially constructed, it could also rescind after it was fully completed. It would consequently follow that every person who in the past has constructed wooden buildings with the permission of the common council is now liable to have his permit revoked, and his buildings declared a nuisance, and abated as such."

In Village of Attica v. Day, 134 Misc. 882, 236 N.Y.S. 607, a permit was issued authorizing the erection and maintenance of gasoline storage tanks with a capacity of 20,000 gallons. The permittees then obtained the right to erect a switch track along the side of their property, expended $800 for a tank and $200 for concrete foundations. The track was laid. The permittee contributed to the expense. Upon authority of City of Buffalo v. Chadeayne, supra, it was held that an attempted revocation of the permit was void.

The court, in City of Little Falls v. Fisk, Sup., 24 N.Y.S.2d 460, at page 470 stated the principle thus: "If the owner of real property, having obtained a permit to construct a certain building, has entered upon the actual construction of the building and incurred liabilities for work and material prior to the adoption of a zoning ordinance, he cannot be restrained from continuing and completing the work. The adoption of the ordinance does not ipso facto revoke his permit. Furthermore, if he has received such a permit and has actually begun building operations, the revocation of his permit because of some amendment to the zoning ordinance or a change of mind of the official who issued it will not prevent the completion of the work. The courts readily grant such a person a peremptory mandamus order commanding the official to cancel his revocation of the permit and directing the reissuance thereof. In either case such a person, after entering in good faith upon the construction of a building, acquires a vested right of which he cannot be deprived. [Citations.]" See, also, People v. Kleinert, 201 App.Div. 751, 195 N.Y.S. 711, 714.

The Supreme Court of Pennsylvania in Herskovits v. Irwin, 299 Pa. 155, 149 A. 195, at page 197, quoted with approval from Pelham View Apartments v. Switzer, supra, 130 Misc. 545, 224 N.Y.S. 56, 58, and stated: "* * * we follow the rule stated in City of Buffalo v. Chadeayne, 134 N.Y. 163, 165, 31 N.E. 443, that a property interest arises where, after permit granted, a landowner begins construction of a building and incurs liability for future work. See, also, Fuller v. Schwab, 124 Misc. 659, 208 N.Y.S. 289, 290; State v. Wisconsin Tel. Co., 181 Wis. 519, 195 N.W. 544."

The permittee in Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N.W. 707, on May 25, 1928, was granted a permit to construct a gasoline filling station. He immediately removed the concrete steps of a dwelling house on the property, took up a private walk and started excavation of the building walls. The next day, May 26, 1928, at noon, the permit was revoked. Two months later the City Council of Ann Arbor, by a zoning ordinance, placed the premises in a residential district. The Supreme Court of Michigan held the revocation ineffective, saying in 228 N.W. at page 708: "The permit was issued in true accord with the zoning ordinance then in force, and, if substantial work was commenced and performed thereunder, the city was precluded from revoking the permit and later amending the ordinance with reference solely to this property and have it accorded retroactive effect. We think the work commenced toward the construction of the building, the purchase of material and accessories, and the sums expended for labor brings the case within the exception noted in City of Lansing v. Dawley, 247 Mich. 394, 225 N.W. 500. * * * Under the zoning ordinance and the regular permit issued, defendant did not proceed and expend money at the peril of revocation of the permit and change of right by subsequent amendment to the zoning ordinance."

The facts in State v. Wisconsin Tel. Co., 181 Wis. 519, 195 N.W. 544, 549, were these: Prior to 1917 the Wisconsin Telephone Company acquired lands in Milwaukee for the purpose of housing its central office and such additional units as might from time to time become necessary in its business, and with a view to erecting a building thereon. It caused to be designed a building 225 feet in height, consisting of sixteen stories and a basement. It obtained a building permit from the City of Milwaukee. It proceeded to erect eight stories of the building, placing a temporary roof above the ninth floor and postponing completion until the extension of its business required it. In 1923 the company decided to complete the building to a height of thirteen stories, or 185 feet, and expended large amounts for engineering and architect fees, and contracted for materials. After these expenditues and the incurring of these liabilities, and in 1923, the Legislature of Wisconsin enacted a statute limiting the height of buildings in cities of the first class, which included Milwaukee, to 125 feet. In an action to test the validity of the statute as applied to the telephone company building, it was held that the statute should not be given retroactive effect, that to do so would work "a serious invasion of vested rights" and that it did not apply to that building. See, also, Wasilewski v. Biedrzycki, 180 Wis. 633, 192 N.W. 989.

In Dobbins v. Los Angeles, 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169, the facts were these: In August, 1901, the City Council of Los Angeles adopted an ordinance fixing the limits within which gas works might be erected. On November 22, 1901, plaintiff was granted a permit to erect a gas works in an area not covered by the ordinance. She then, by contract, constructed foundations at a cost of upwards of $2,500. On November 25, 1901, the City Council amended the ordinance to include the location of plaintiff's works within the prohibited territory. The court said that (195 U.S. at page 239, 25 S.Ct. at page 21, 49 L.Ed. at page 176) "[b]eing the owner of the land, and having partially erected the works, the plaintiff in error had acquired property rights, and was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law."

Other decisions applying the principle are: City of Evansville, Ind., v. Gaseteria, 7 Cir., 51 F.2d 232, 237; District of Columbia v. Cahill, 60 App.D.C. 342, 54 F.2d 453; Pratt v. Denver, 72 Colo. 51, 209 P. 508, 509; Williams v. Smith, 77 Colo. 572, 238 P. 40; Crow v. Board of Adjustment of Iowa City, 227 Iowa 324, 288 N.W. 145, 147; Incorporated Town of Spencer v. Andrew, 82 Iowa 14, 47 N.W. 1007, 1008, 12 L.R.A. 115; Inspector of Buildings v. Nelson, 257 Mass. 346, 153 N.E. 798, 800; General Baking Co. v. Board of Street Commissioners, 242 Mass. 194, 197, 136 N.E. 245; Lerch v. City of Duluth, 88 Minn. 295, 92 N.W. 1116, 1117; Atlantic Broadcasting Co. v. Wayne Tp., 109 N.J.L. 422, 162 A. 631, 632; Willis v. Town of Woodruff, 200 S.C. 266, 272, 20 S.E.2d 699, 701; Brown v. Grant, Tex.Civ.App., 2 SW.2d 285, 287; Gulf Refining Co. v. City of Dallas, Tex.Civ.App., 10 S.W.2d 151, 155, 156; State v. City of Spokane, 64 Wash. 388, 394, 116 P. 878; Wigstrom v. Laramie, 37 Wyo. 389, 262 P. 22, 23. See, 43 C.J., sec. 380, p. 349.

The underlying principle of the cases from other jurisdictions to which we have referred, was applied in Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14. In that case the facts were these: In March, 1927, Los Angeles annexed the territory known as the Mar Vista District. At the time of annexation there were already in operation in the district four sanitariums for the treatment of nervous diseases. On August 11, 1927, some months after the annexation of the Mar Vista District, the City Council of Los Angeles adopted a zoning ordinance by which the Mar Vista District was excluded from the area in which the establishment and maintenance of such sanitariums was permitted. This ordinance was enacted independently of the general zoning plan of the city and its restrictive provisions were directed toward only one type of business. The action was brought by the owners of the institutions seeking to enjoin enforcement of the ordinance. The Supreme Court held that the ordinance was valid insofar as it prohibited the further establishment of businesses of this type in the restricted districts and that it was invalid in its application to the plaintiffs. The court quoted at length with approval from Pelham View Apartments, Inc. v. Switzer, supra, 130 Misc. 545, 224 N.Y.S. 56. In the course of the opinion it was said in 211 Cal. at page 321, 295 P. at page 22: "Our conclusion is that where, as here, a retroactive ordinance causes substantial injury and the prohibited business is not a nuisance, the ordinance is to that extent an unreasonable and unjustifiable exercise of police power." (See, also, People v. Bales, supra, 224 App.Div. 87, 229 N.Y.S. 550, affirmed 250 N.Y. 598, 166 N.E. 339; Smith v. City Council of Marlborough, 302 Mass. 571, 20 N.E.2d 408; Rosenberg v. Whitefish Bay, 199 Wis. 214, 225 N.W. 838; Hauser v. State, 113 Ohio St. 662, 150 N.E. 42; Bassett, Zoning, 112–116; 39 Yale L.J. 735, where the cases are collected.)

The instant case is not to be confused with cases dealing with the power of a municipality to prohibit or regulate the conduct of activities or businesses which are in the nature of nuisances. Jones v. City of Los Angeles, 211 Cal. 304, 316, 295 P. 14; People v. Hawley, 207 Cal. 395, 279 P. 136; Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225, 48 A.L.R. 509; Curtis v. City of Los Angeles, 172 Cal. 230, 156 P. 462; In re Throop, 169 Cal. 93, 149 P. 1029; In re Smith, 143 Cal. 368, 77 P. 180. The trial court, in its opinion, stated that since the respondent had not urged this ground, it was not "at issue" before the court. Respondent does not urge that ground here on appeal. There is no element of nuisance involved.

[8] In issuing the permit, respondents determined that the drilling of well No. 8 would not be materially detrimental to the health or safety of persons residing or working in the immediate vicinity of the well, or injurious to property or improvements in the neighborhood thereof, or else-

where in the city. The revocation of a permit to drill for and extract oil in a proven oil field affects the inherent value of the natural resource which can be utilized only from the land itself. Ordinarily, action of municipal bodies against the conduct of a certain line of business within a defined area does not destroy the business for it may be carried on within a district designated for that purpose. Land values in the restricted area may thus be affected, but generally such values are not inherent but in the nature of unearned increments. The owner of a property right to drill for and extract oil in a proven field acquired under a permit, may not constitutionally be deprived thereof without payment of just compensation except upon a showing that its exercise constitutes a nuisance.

[9-11] In reliance upon the permit, appellant in good faith, promptly commenced preparatory work for drilling, constructed concrete foundations, erected a power house, dug a sump hole, laid pipe lines, moved boilers into place and erected a derrick at a cost of approximately $4,500. In so doing, appellant acquired a vested property right to proceed under the permit to drill well No. 8, and if oil were found to extract it. Was that right lost because the war and subsequent inability to obtain labor, materials, and drilling equipment, consequent upon the war, intervened to make it impossible to conduct drilling operations until 1947? We think not. There is no express finding as to whether appellant did or did not proceed under the permit within a reasonable time. However, the court found: that appellant's operations were interrupted by the war; consequent disruption of all business and financing plans; occupation of the area by the Army; installation of artillery; destruction of the derrick during the Army's occupation without fault on appellant's part. The trial judge, in his written opinion, which is a part of the clerk's transcript, said: "Whether this [abandonment] has taken place must be determined from the evidence, that is to say, do the acts and intent of the Petitioner indicate abandonment? This question must be answered, in the Court's opinion, in the negative. Petitioner prepared to drill in October, 1941, by erecting a derrick and shortly thereafter the Government took over the premises for war purposes, and the Petitioner had no access to the property for drilling purposes. The premises were not returned to the Petitioner herein until January 18th, 1945, and the Court finds that because of the shortage of labor, materials and drilling equipment, the *Petitioner was unable to proceed on M'divani No. 8 at any substantial time sooner than it did.* From these facts, the Court can find neither the act nor the intent necessary to effect an abandonment. * * * The license or permit * * * is itself the permission and contains the conditions with which the Petitioner must comply in order to lawfully drill. As set forth above, the permit is silent upon the question of how soon the Petitioner must act and under these circumstances, the Petitioner then had a reasonable period of time within which to proceed. *Under all of the attending facts and circumstances, the Court finds that the petitioner did proceed within a reasonable time."* (Italics added.) The Rules on Appeal provide for incorporation of the written opinion of the trial judge in the record. Rules on Appeal, Rule 5(a), 22 Cal.2d 4. We may consider the opinion of the trial judge for the purpose of understanding and interpreting the findings. Noble v. Kertz & Sons Feed Etc. Co., 72 Cal.App.2d 153, 158, 164 P.2d 257. Obviously, that is one of the purposes of the provision enabling a party to an appeal to place the written opinion of the trial judge before the reviewing court, a practice which was merely tolerated prior to the adoption of the Rules on Appeal in 1943. Interpreting the findings in the light of the opinion, it appears that appellant did not at any time intend to abandon and did not, in fact, abandon its rights under the permit, and that it proceeded within a reasonable time. The uncontradicted evidence is to that effect. Respondent has not referred us to any law, and we have found none, which says that a vested right is divested because the owner of the right is prevented from exercising it by circumstances over which he has no control. The permit was a warrant to do something not forbidden by law. (2 Bouv.Law Dict.,

Rawle's Third Revision, page 2569.) It was a warrant to appellant to drill well No. 8 and to produce oil therefrom. It did not fix the time within which the well should be drilled or placed on production. Appellant had a reasonable time within which to do so. (43 C.J. sec. 381, p. 350.) As appellant proceeded within a reasonable time its right was not lost by abandonment.

The next question for determination is the effect of the amendments to the zoning ordinance adopted in 1946, on the right which had vested in appellant prior to their enactment. The amendments purported to change the area in which a number of producing oil wells existed and in which well No. 8 was to be drilled, from "One Family Residence and Oil Drilling" district to "One Family Residence" district.

[12] The authorities, to which reference has been made, hold that where a permit has been duly and regularly issued and rights have vested thereunder, the adoption of a zoning ordinance prohibiting the permitted use of the property does not ipso facto revoke the permit. The amendments may not be given retroactive effect. The trial judge in his memorandum opinion said that "there is nothing in the City Ordinance as amended attempting to give it any retroactive effect." In London v. Robinson, 94 Cal.App. 774, 271 P. 921, 922, a permit was issued to erect a building under an ordinance permitting the erection of the building contemplated on a particular site in an area designated "second residential district." After a contract was entered into for erection of the building, but before construction was begun, the ordinance was amended to make the area in which the site was located a "first residential district," thus prohibiting construction of the building in the district. In holding that the permittee was within his rights in proceeding to erect the building after the amendment and that his rights had not been lost, the court quoted from 43 C.J. 344, as follows in 94 Cal.App. at page 777, 271 P. at page 922: "'Zoning regulations ordinarily have no retroactive effect unless the authorizing legislation specifically so states. By force of statute or ordinance zoning regulations may not have the effect of revoking permits for buildings granted prior to their adoption.'" Jones v. City of Los Angeles, supra, 211 Cal. 304, 295 P. 14, definitely held that ordinarily a zoning ordinance "operates to limit the future use of property" and that (211 Cal. at page 319, 295 P. at page 21) "If the city desires to abolish the nonconforming use, this may be a legitimate object of the police power, but the means of its exercise must not include the destruction of the property interest without compensation." (To the same effect: Wilkins v. City of San Bernardino, 29 Cal.2d 332, 340, 175 P.2d 542; Acker v. Baldwin, 18 Cal.2d 341, 346, 115 P. 2d 455, 458, in which it was stated that: "Zoning regulations look to the future, not to the past, and cannot be made retroactive." Biscay v. City of Burlingame, 127 Cal.App. 213, 220, 15 P.2d 784. See, 26 Cal.L.Rev. 204; Annotation 117 A.L.R. 1119, 1136.) The rule to be applied in determining the effect of the amendments is stated in McCann v. Jordan, 218 Cal. 577, 580, 24 P.2d 457, 459: "It is well settled that the new ordinance may operate retroactively to require a denial of the application, or the nullification of a permit already issued, provided that the applicant has not already engaged in substantial building *or* incurred expenses in connection therewith. Brougher v. Board of Public Works, 205 Cal. 426, 271 P. 487; Wheat v. Barrett, 210 Cal. 193, 290 P. 1033; Brett v. Building Com'r of Brookline, 250 Mass. 73, 145 N.E. 269.)" (Italics added.)

[13] The zoning ordinance at the time the permit was issued provided: Section 22: "The lawful use of land existing at the time this ordinance takes effect, although such use does not conform to the provisions hereof, may be continued, but if such nonconforming use is abandoned any future use of said land shall be in conformity with the provisions of this ordinance. * * *" Section 25: "(a) Nothing herein contained shall require any change in the plans, construction or designated use of a building for which a building permit has heretofore been issued and upon which actual construction has begun." (Ord.1493, secs. 22, 25.) These provisions were a part of the ordinance as amended in 1946. The ordinance, as amended, did not affect existing non-

conforming uses although such uses did not conform to the amendments. It appears that it was the clear intent of the ordinance, as amended, not to affect or divest rights which had vested prior thereto and not to affect or revoke previously existing permits when actual construction had begun. The amendments did not revoke appellant's permit or affect its right thereunder.

Respondents assert that Marblehead Land Co. v. City of Los Angeles, 9 Cir., 47 F.2d 528, Vincent Petroleum Corporation v. Culver City, 43 Cal.App.2d 511, 111 P.2d 433, and Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 33 P.2d 672, compel affirmance of the judgment. Neither one of these decisions is analogous in its facts to the factual situation presented here.

In the Marblehead case, at a time when vacant land situate seven miles from the heart of Los Angeles was not restricted as to use, Standard Oil Company acquired a lease of the land to drill for oil and, at considerable expense, erected a derrick. An ordinance was then enacted placing the land in a residence zone. Suit was brought to enjoin enforcement of the ordinance. An injunction was denied. No permit of any kind had been granted or acted upon. In that case the appellant was about to drill in an area of vacant land where the possibility of finding oil was purely speculative. Three wells had been drilled in the neighborhood, each to a depth of 4,000 feet, without finding oil. In the present case the permit gave appellant a right to drill for and extract oil in a proven producing oil field. The area in which the well was to be drilled in the Marblehead case was partially surrounded by residential developments. Here the site where the well was to be drilled was surrounded by producing oil wells with no structures other than oil derricks and oil producing equipment within more than a quarter of a mile of the site. It was definitely determined in that case that the drilling of the well would constitute a nuisance. In the case at bar it is conceded that the drilling of the well and the extraction of oil will not constitute a nuisance. The following statement in Brougher v. Board of Public Works, 205 Cal. 426, 434, 271 P. 487, 491, is expressive of the distinction between the Marblehead case and the instant case: "The exception noted in the foregoing authorities, that a permit would not be revoked in those cases where the licensee 'had done something under the license from which the mere privilege would ripen into a vested right,' does not exist in those cases like the one before us, *where no permit has ever been issued.* In such cases there is no opportunity for any privilege to ripen into a vested right, for the reason that *no privilege, in the sense used in the authorities cited, is acquired until a permit has been issued.*" (Italics added.) As to the action of the city in including the leased land in a residence zone, the writer of the Marblehead opinion, without the citation of any authority therefor whatsoever, said in 47 F.2d at page 534: "It has uniformly been held that there is no vested right in a permit or an ordinance of the nature of that involved here, by which the boundaries of the residential zone were changed to exclude appellants' property therefrom." This statement clearly means that there is no vested right in a permit which has not been acted upon. No permit had been granted, issued, or acted upon in that case. If the statement means that it has been uniformly held that a permittee cannot acquire vested rights in a permit which will be protected against a later change in zoning, it is an incorrect statement of the law. As we have seen, the great weight of authority is to the effect that when rights have vested under a permit they cannot be constitutionally divested by a mere change of zone. As there was no permit involved in the Marblehead case, the quoted statement is obiter dictum and cannot have any application in a case where the permittee has "engaged in substantial building or incurred expenses in connection therewith" in reliance upon a permit duly and regularly issued. McCann v. Jordan, 218 Cal. 577, 580, 24 P.2d 457.

Sunny Slope Water Co. v. City of Pasadena, supra, 1 Cal.2d 87, 33 P.2d 672, is not remotely in point on the question of whether rights have vested under a regularly issued permit, or on the question of whether a permit may be revoked where rights have vested under it. In that case, application had been made for a permit to drill a water well with a steam engine, boiler and well rig. The request for the permit was denied. An ordinance in force at the time prohibited the installation or operation of a steam boiler without a permit. No permit was ever issued. There is no analogy between a case where a permit is applied for but not granted prior to a zoning restriction and the present case where a permit was granted and acted upon before zoning restrictions.

Vincent Petroleum Corporation v. Culver City, supra, 43 Cal.App.2d 511, 111 P.2d 433, was an action for an injunction. The lower court had granted a motion for judgment on the pleadings. The judgment was affirmed. The sole question presented was whether the complaint stated a cause of action. The complaint alleged that the plaintiff on November 3, 1930, obtained a permit to drill an oil well in an area where drilling for oil was permitted. Apparently the permit limited the time within which the well should be placed on commercial production. The city granted various extensions of the permit, the last one up to May 30, 1937, subject to the condition that the well be placed on commercial production before that date. About May 24, 1937, the City Council, after notice and hearing, adopted a resolution revoking the permit. The resolution, attached to the complaint as an exhibit, recited that drilling operations had been suspended for long periods of time without excuse, that the promoters had many times definitely agreed with the city that operations would be completed within a time certain and had not complied with their agreements, and that the promoters had not shown whether or not oil could be produced in paying quantities. These recitations were not denied in the complaint. It was held that the complaint did not state a cause of action because (1) an "injunction lies to prevent threatened injury and has no application to wrongs which have been completed"; (2) the action "of the council was at least quasi judicial. The sole method of review would be by certiorari or mandamus"; (3) there was no allegation that the findings of fact of the council set forth in the revocatory resolution were not supported by the evidence; (4) there was no allegation that the revocatory ordinance was invalid or void, nor any facts alleged showing that the city acted unreasonably, illegally, arbitrarily or fraudulently. The permit, unlike that in the present case, was limited as to time and contained an express condition which had been breached by the permittee. The permittee was not doing any work on the well at the time of revocation and was relying upon a further extension. The court held that "under the permit secured by the plaintiff, it secured no right of property or of contract in a constitutional sense." There is broad language in the opinion relative to the power of a city to revoke a permit which was not necessary to the decision of the case. That language must be construed as it applied to the facts in that case, i. e., a permit issued upon a condition and failure to comply with the condition. It cannot be given the broad application which respondent seeks to give it. People v. McAllister, 15 Cal.2d 519, 523, 102 P.2d 1072; Hills v. Superior Court, 207 Cal. 666, 670, 279 P. 805, 65 A.L.R. 266.

[14] A permit may not be revoked arbitrarily "without cause." 53 C.J.S., Licenses § 44 page 651. It is conceded that in revoking the permit granted to appellant, the City Council of Santa Barbara did so without prior notice to appellant, without a hearing, and without evidence. In determining that a permit, validly issued, should be revoked, the governing body of a municipality acts in a quasi judicial capacity. In revoking a permit lawfully granted, due process requires that it act only upon notice to the permittee, upon a hearing, and upon evidence substantially supporting a finding of revocation. In Angelopulos v. Bottorff, 76 Cal.App. 621, 245 P. 447, the plaintiff had been granted a license by the City of Sacramento to conduct a restaurant business at a designated location. Without notice to the licensee or opportunity for him to be heard, the city council revoked the license. The court held in 76 Cal.App. at page 625, 245 P. at page 248: "There appears to be some conflict in the authorities relating to the power of the city council to revoke a license without notice, apparently due to the fact that the distinction has

not been kept clearly in mind between a right to do business and a privilege to engage in certain occupations, usually attended by acts inimical to the public welfare, such as the keeping of saloons. But whatever the rule is in other states, it is now well settled in California that the fundamental right to engage in a business or occupation otherwise lawful and not inimical to the public welfare is different from occupations considered as a mere privilege, and is surrounded with certain constitutional safeguards, among which is the right to be heard, and the further fact that this right cannot be taken away except by due process of law. These matters are clearly set forth in the case of Abrams v. Daugherty, 60 Cal.App. 297, 212 P. 942: ' "The Fourteenth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty, or property, without due process of law. Article I, section 1, of the Constitution of California, provides that all men have certain inalienable rights, among them being those of enjoying liberty and possessing and protecting property, and section 13 thereof provides that no person shall be deprived of life, liberty, or property, without due process of law. The deprivation of such right without due process of law would be a violation of these provisions. The meaning of this is that no one can be deprived thereof without notice and an opportunity for a hearing before some tribunal authorized to determine the question." * * *' We do not think it necessary to cite authorities that the right to conduct a restaurant business is a property right, as contradistinguished from occupations or businesses permitted to be conducted or engaged in as a mere privilege, and that the deprivation or interference or prevention of one's engaging in the business of conducting a restaurant is a deprivation of a property right, and that all the cases of this state holding that such property rights cannot be taken away except by due process of law are applicable." In Walker v. City of San Gabriel, 20 Cal.2d 879, at page 881, 129 P.2d 349, at page 351, 142 A.L.R. 1383, the Supreme Court said: "It is well settled that a board commits an abuse of discretion when it revokes a license to conduct a legitimate business without competent evidence establishing just cause for revocation, and that hearsay evidence alone is insufficient to support the revocation of such a license. * * * There must be substantial evidence to support such a board's ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end. [Citations.]" The petitioner in Irvine v. State Board of Equalization, 40 Cal.App.2d 280, 104 P.2d 847, had been granted a license by the board authorizing him to sell alcoholic beverages at a restaurant. Without notice or hearing, the license was revoked. The court held in 40 Cal.App. at page 284, 104 P.2d at page 850: "We are not unmindful of the rule that there is no inherent right in a citizen to sell intoxicants; that a license so to do is not a proprietary right within the meaning of the due process clause of the Constitution (Const., art. I, sec. 13); that such license is not a contract, but as characterized in State Board of Equalization v. Superior Court, 5 Cal.App.2d 374, 377, 42 P.2d 1076, 1077, is 'but a permit to do what would otherwise be unlawful.' Nevertheless, we cannot forget that the law contemplates justice, whether the license is granted as a privilege or recognized as a vested right; that under the American system of justice it is the policy of our law that a person should not be deprived even of a 'permit' to engage in a legitimate business without a fair and impartial hearing and without an opportunity to present competent evidence for consideration by the licensing authority in opposition to the proposed revocation of his permit. Martin v. Board of Supervisors, 135 Cal.App. 96, 26 P.2d 843; Smith v. Foster, D.C., 15 F.2d 115."

[15] The resolution of revocation in the instant case, adopted without notice or hearing or reception of competent evidence, was inoperative and of no legal force. Cf. Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545; La Prade v. Department of Water & Power, 27 Cal.2d 47, 162 P.2d 13; Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 723, 160 P.2d 816. Carroll v. California Horse Racing Board, 16 Cal.2d 164, 167, 105 P.2d

110; General Baking Co. v. Street Com'rs, supra, 242 Mass. 194, 136 N.E. 245, 246.

[16] The attempted revocation of the permit after appellant had acquired a vested right to drill well No. 8 and, if oil was found, to extract it, constituted a deprivation of appellant's property in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, section 13, of the Constitution of California.

The conclusions we have reached make it unnecessary to consider appellant's further contention that the 1946 amendments to the zoning ordinance are arbitrary and unreasonable and violative of constitutional inhibitions, and hence invalid in their application to appellant's property in that they restrict such property to residential uses when all the surrounding area is used for oil drilling purposes.

The judgment is reversed with directions to grant the writ as prayed.

SHINN, Acting P. J., and WOOD, J., concur.

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86 Cal.App.2d Supp. 927

PETERSEN v. MARINE TRANSPORT LINES, Inc.

Civ. 1826.

Superior Court, Appellate Department, City and County of San Francisco, California.

Feb. 20, 1948.

1. Seamen 🔑11(1)

The statutes designed to secure the comfort or health of seamen aboard ships, hospitalization at home, and care abroad were not intended to relieve the ship owner of duty but were intended to make sure that seamen would have care if employer failed to give it, and in the rarer cases to which his obligation did not extend, and such legislation gives no ground for making inference adverse to the seaman or restrictive of his rights.

2. Seamen 🔑11(1)

The obligation imposed upon the ship owner for maintenance and care of seamen ill or injured during the period of their service is not based on fault or negligence of shipowner, who is liable for the expense of curing injury or sickness as an incident of the marine employer-employee relationship, whether by traditional standards, the ship owner was or was not responsible for such injury or sickness.

3. Seamen 🔑11(5)

Negligence or acts short of probable misconduct on seaman's part will not relieve ship owner of liability for maintenance and cure of seaman ill or injured during period of service.

4. Seamen 🔑11(5)

Only wilful misbehavior or a deliberate indiscreet act, suffices to deprive seaman of right to maintenance and cure.

5. Seamen 🔑11(1)

Ship owner's responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in the activities required by his employment.

6. Seamen 🔑18, 20

A seaman who was set upon and injured through no fault of his own while on shore leave was entitled to wages and bonus covering the period following the injuries sustained by him.

GRIFFIN, P. J., dissenting.

◆

Appeal from Municipal Court, City and County of San Francisco.

Action by Isaac Petersen against Marine Transport Lines, Inc., for wages and bonus covering period of time following shore ride injuries sustained by him. From a judgment for plaintiff, the defendant appeals.

Judgment affirmed.

Gladstein, Andersen, Resner & Sawyer, of San Francisco, for plaintiff and respondent.

Lillick, Geary, Olson, Adams & Charles, of San Francisco, for defendant and appellant.

MURPHY, Judge.

The pertinent facts upon this appeal are as follows: The respondent joined the S. S. "Clifford D. Mallory" at the port of Batangas, Philippine Islands, as a fireman-water tender. At that time the vessel was anchored awaiting the discharge of its cargo. The ship remained in port during the entire period of the respondent's service.

One afternoon, April 12th, 1946, the respondent, with permission, went ashore. He obtained a ride on an Army truck and proceeded to travel in the outlying district of the port. The record fails to reveal with any degree of accuracy how far the plaintiff went from the ship. However, the respondent finally left the truck sometime later at an Army camp. There is no evidence of any misconduct on the part of the plaintiff.

The afternoon or evening of the same day the respondent was set upon by assailants unknown to him, sustaining injuries which are the subject matter of this litigation. He returned to the ship and worked thereon for six days before he was sent to a hospital by the captain of the vessel.

We are called upon to determine whether a seaman, injured under such circumstances, may be properly compensated for wages and bonus covering the period of time following the shoreride injuries sustained by him.

It is urged by the defendant and appellant that there is no evidence to support a finding that plaintiff and respondent was acting in the service of his ship, or pursuant to some duty attached to his job of fireman-water tender at the time of his injury or at any time immediately preceding it.

It is argued further that plaintiff and respondent sustained the injury while upon "a frolic of his own."

If this were a case of first impression it would appear that such arguments of appellant are patently sound.

But we are confronted with a philosophy of law which has found its way into the decisions of our United States Supreme Court. This philosophy of law finds its most articulate expression in the case of Aguilar v. Standard Oil, 318, U.S. 724, 63 S.Ct. 930, 935, 87 L.Ed. 1107.

The decision therein was broad in its scope and was founded, among other things, upon considerations peculiarly applicable to seamen. Thus it was held in the Court's opinion that:

"To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seamen hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seamen than for the landsman, therefore, 'the superfluous is the necessary * * * to make life livable' and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion.

"The voyage creates not only the need for relaxation ashore, but the necessity that it be satisfied in distant and unfamiliar ports. If in those surroundings a seaman, without disqualifying misconduct, contracts disease or incurs injuries, it is because of the voyage, the shipowner's business. That business has separated him from his usual places of association. By adding this separation to the restrictions of living as well as working aboard, it forges dual and unique compulsions for seeking relief wherever it may be found. In some, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly, it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment."

From the foregoing language we glean the philosophy underlying the law as it stands today in cases of this character.

This philosophy is further expressed in Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431, 59 S.Ct. 262, 266, 83 L.Ed. 265, wherein Chief Justice Stone expressed his views as follows:

"Seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. * * * It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end."

In its memorandum of Points and Authorities the appellant relies upon Meyer v. Dollar S. S. Line, 9 Cir., 49 F.2d 1002. This case was reviewed by the Supreme Court and its philosophy was expressly rejected by the Supreme Court in the Aguilar case. Jackson v. Pittsburgh S. S. Co., 6 Cir., 131 F.2d 668 and decided in 1942, is also relied upon by the appellants. An examination of it reveals that the plaintiff seaman, while a member of the crew of a steamship, desired to go ashore after going off watch. Proceeding to the forward part of the main deck to descend the ladder to the dock, he found none available and requested a fellow member of the crew to place a ladder over the side of the vessel so that he might go ashore. His request was refused and the plaintiff jumped from the vessel to the dock, a distance of about six feet, sustaining painful and serious injuries.

The Court, in affirming an order dismissing the complaint, held that assuming a breach of duty on the part of the owners in their failure to provide a ladder, nevertheless such negligence bore no causal relation to the injuries of the plaintiff which followed.

In other words, in this case the Court held that in order to recover, an injured seaman must have acted without gross negligence or misconduct, and his own wilful wrongdoing gave him no right against the vessel or her owners.

The seaman was not compelled to jump. The only injury that he might have anticipated in the circumstances would have been inconvenience or delay in leaving the vessel. He acted upon his own volition in jumping, and by so doing brought about an intervening cause for which his own wilful misconduct is responsible.

Collins v. Dollar S. S. Lines, Inc., Ltd., D. C., 23 F.Supp., 395, 397, decided in 1938, is also relied upon by the appellants.

Certain crew members of the vessel involved, engaged in a game of baseball for recreation and Collins sustained serious and permanent injuries. The game occurred ashore. Again the question was: Whether the injuries were sustained "in the service of the ship?"

Citing Meyer v. Dollar S. S. Lines, Inc., Ltd., 9 Cir., 49 F.2d 1002, 1004, wherein it is stated that:

"An injury suffered or a disease contracted by a sailor is considered to have been 'in the line of duty' 'unless it is actually caused by something for which he is responsible which intervenes between his service or performance of duty and the injury or disease. He will be responsible for an intervening cause if (1) it consists of his own wilful misconduct, or (2) it is something which he is doing in pursuance of some private avocation or business, or (3) it is something which grows out of relations unconnected with the service or is not the logical incident or (of) (sic) provable effect of duty in the service.' "

Obviously the injuries sustained in the baseball game constituted an intervening cause. The injury grew out of that which the seaman was doing deliberately and in pursuance of a private avocation born out of his own volition.

Certainly this case is not analogous to the case before us. Petersen was not playing baseball, nor did he jump from the deck of his ship. He was guilty of no misconduct or negligence nor can his shore leave conduct in any way be construed as setting in motion any intervening cause which, as in the Jackson case and the Collins case, would prevent recovery.

Kyriakos v. Goulandris et al., 2 Cir., 151 F.2d 132, 138, decided in 1945.

George Kyriakos, a Greek citizen, and fireman aboard the S. S. Theomitor, libeled against Goulandris Bros., Ltd., for injuries sustained as a result of an assault by a fellow seaman, asserting causes of action for cure, maintenance and wages to the end of the voyage and under the Jones Act, 46 U.S.C.A. § 688. Leaving a coffee shop ashore, in Fernandina, Florida, and setting out for the ship, libellant was set upon by his fellow seaman who stabbed him repeatedly in the body inflicting extensive wounds. The attack occurred about a mile from the ship. Much of the opinion is devoted to matters not pertinent to the situation which confronts us.

In its decision the Court took occasion to consider the Aguilar case and to observe that:

"The reasoning and intimations of the opinion indicate a liability for maintenance and cure in the case of injuries received while the seaman is on shore leave that are not due to any misconduct on his part." Nowery v. Smith, D.C., 69 F.Supp. 755, decided in 1946.

In this case, the plaintiff, a former seaman, sued for personal injuries under the Jones Act and for maintenance and cure. The injuries complained of were suffered in a fist fight with the Chief Engineer of the vessel involved. The altercation took place in a saloon at Antilla, Cuba. A jury found for the plaintiff. A motion notwithstanding the verdict was denied. The Court rejected the first theory of liability urged by the plaintiff, namely, that the Chief Engineer was acting "as an officer of the ship" when he entered the bar-room, but accepted the second theory which was that the Engineer was a person of cruel, brutal and inhuman nature, one known to give vent to a wicked disposition by violent and uncalled for assaults upon others, and that his disposition was known or should have been known to the Master of the vessel. It has been held that tolerance of such an individual among the crew constitutes negligence on the part of the vessel's owners.

The Court also took occasion to observe that logic compels the conclusion that the seaman should also be considered on the ship owner's business while he is actually enjoying his shore leave, citing Moss v. Alaska Packers' Association, 70 Cal.App. 2d Supp. at page 857, 160 P.2d 224.

The case of Meyer v. Dollar S. S. Lines, 9 Cir., 49 F.2d 1002, 1003, is also relied upon by appellant. Therein the libellant engaged in a friendly scuffle aboard ship with a shipmate the day before the vessel's arrival in Honolulu. His leg was injured. At the time libellant was off watch and had not been drinking. Had the libellant been sitting quietly on the deck, and had something fallen upon his leg through circumstances entirely beyond his control, the injury might have been held as incurred in "the service of the ship." But the facts are quite different. Hence, the Court properly applied the rule of intervening cause for which the appellant alone was responsible. Thus the Court distinguishes between the act of the seaman in engaging in the scuffle and the seaman who might be injured through an agency not placed in operation by himself. When he began the good natured scuffling the seaman created, by his own volition, an extraneous circumstance; he brought about an intervening cause that directly affected his relation to his employers and to the ship.

The peculiar character of a sailor's occupation necessarily calls for a liberal interpretation of the phrase "in the service of the ship."

Unlike other workmen, a sailor cannot shed his responsibilities to his vesseel when his day's work is done. It is for that reason that Courts, called upon to determine what constitutes "in the service of the ship" have given it a wide range.

"Courts of admiralty have always considered seamen as peculiarly entitled to their protection." The A. Heaton, C.C., 43 F. 592, 595.

Similarly it has been held that a seaman who "falls sick" or is wounded, in the service of the ship, if such misfortune attacks him while he is attached to the ship as part of her crew, it is enough that he was, when incapacitated, subject to the call of duty as a seaman and earning wages as such. The Bouker, No. 2, 2 Cir., 241 F. 831, Aguilar v. Standard Oil Co. of New Jersey, 318 U.S., 724, 63 S.Ct. 930, 87 L.Ed. 1107.

In this case, plaintiff, a mess-man, left his ship on shore leave at about six P. M. As he proceeded through the pier toward the street all lights were extinguished. In the darkness he fell into an open ditch at a railroad siding, and was injured to the extent that he was prevented from resuming his normal duties. He sued for maintenance and cure and wages. The District Court dismissed the complaint, and on appeal, the Circuit Court of Appeals affirmed. Both Courts held that in going ashore on personal business the plaintiff left the service of the ship and therefore no liability for maintenance and cure attached.

Admittedly a ship owner is liable if the injury occurs while the seaman is "in the service of the ship."

Plaintiff contended "in the service of the ship" includes the whole period of service covered by the Seamen's Articles; and if he is injured during this time his right to recovery exists unless it is shown by way of defense that he has forfeited the right by his own misconduct causing the injury. Plaintiff urged that since the injuries were received during the period of his service there being no misconduct, the claims are established.

The shipowners took a more narrow view of the phrase. Their position is that if ashore, the seaman must be injured while he is "on duty" or at work doing some task connected with the vessel's business. They argued that "to go ashore" simply for diversion and relief from discipline, or for any matter personal to the seaman takes him out of the service of the ship. In this view it is of no moment whether the injury results from the seaman's fault or from causes entirely beyond his control.

"From the earliest times maritime nations have recognized that unique hazards, emphasized by unusual tenure and control, attend the work of seamen. The physical risks created by natural elements and the limitations of human adaptability to work at sea, enlarge the narrower and more strictly occupational hazards of sailing and operating vessels. And the restrictions which accompany living aboard ship for long periods at a time combine with the constant shuttling between unfamiliar ports to deprive the seamen of the comforts and opportunities for leisure, essential for living and working, that accompany most land occupations. Furthermore, the seaman's unusual subjection to authority adds the weight of what would be involuntary servitude, for others, to these extraordinary hazards and limitations of ship life.

"Accordingly, with the combined object of encouraging marine commerce and assuring the well-being of seamen, maritime nations uniformally have imposed broad responsibilities for their health and safety upon the owners of ships."

In this country these notions were reflected early and have since been expanded in legislation, designed to secure the comfort or health of seamen aboard ships, hospitalization at home and care aboard.

The statutes are uniform in evincing solicitude that seamen shall have at hand the barest essentials for existence. They do this in two ways. One is by recognizing the ship owners' duty to supply them, the other by providing for care at public expense. The former do not create the duty. That existed long before the statutes were adopted. They merely recognize the pre-existing obligation and put specific legal sanctions, generally criminal, behind it.

[1] The provisions for public assistance were not intended to relieve the ship owner of his duty. On the contrary, their purpose was to make sure the seamen would have care if the employer failed to give it and in the rarer cases to which his obligation does not extend. The legislation, therefore, gives no ground for making inferences adverse to the seamen or restrictive of his rights. See Reed v. Canfield, C.C., 20 Fed. Cas. pages 426, 427 No. 11641.

Rather it furnishes the strongest basis for regarding them broadly, when an issue concerning their scope arises and particularly when it relates to the general character of relief the legislation was intended to secure.

The obligation imposed upon the ship owner for maintenance and care of seamen, ill or injured during the period of their service, has been consistently recognized in the United States as an implied provision in contracts of marine employment.

[2] This obligation, or liability, is in no sense predicated on the fault or negligence of the employer. Whether by traditional standards he is or is not responsible for the injury or sickness, he is liable for the expense of curing it as an incident of the marine employer-employee relationship. The City of Alexandria, D. C., 17 F. at page 390.

[3] So broad is the ship owner's obligation that negligence or acts short of probable misconduct on the seaman's part will not relieve him of the responsibility. See Peterson v. The Chandos, D. C., 4 F. 645.

[4] Considerations of contributory negligence, the fellow servant rule, and assumption of risk, do not enter into the picture at all. Only wilful misbehavior or a deliberate indiscreet act, suffices to deprive the seaman of protection. Classic examples of such instances are venereal disease and injuries received as a result of intoxication. It is noteworthy to observe that upon occasion even the latter has been qualified in recognition of the predisposition of sailors ashore. The Quaker City, D. C., 1 F.Supp. 840.

[5] The employer's responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in activities required by his employment.

[6] For the reasons stated herein it is my considered opinion that we should not depart from the conclusions we reached in Moss v. Alaska Packers', supra, and that the judgment appealed from be affirmed.

KAUFMAN, J., concurs.

GRIFFIN, Presiding Judge.

I dissent. The evidence in the instant case conclusively shows that at the time of the injury complained of and for which he asks damages, plaintiff and respondent was not, and by no stretch of the imagination could he be considered as being, "in the service of the ship", but was upon his own business and pleasure remote from the vicinity of the ship. In such circumstances I believe we are bound by the decisions of the Federal Courts cited by respondent in which, without presently analyzing them, it is held, under facts much more favorable to the claimants in those cases than the facts shown in the present case that there was no liability.

It is not my understanding of our decision in Moss v. Alaska Packers' Association, Number 1665 of our record, that it stands as authority for the recovery of damages in every case where a seaman, whatever his capacity, is injured without fault on his part, while on shore leave. The Aguilar case, upon which we mainly relied in our decision in the Moss case, and cited now in the main opinion, does not so hold and is careful in its language to limit its holding to the particular facts of the case before the Court. The liability of the ship owner for injury and damage is confined to such injury and damage as is suffered by the seaman while in the service of the ship.

In the instant case there is not, in my opinion, shown the remotest connection in that respect and for that reason I believe the judgment appealed from should be reversed.

SIMMONS v. CALIFORNIA INSTITUTE OF TECHNOLOGY et al.*

L. A. 19484.

Supreme Court of California, in Bank.
June 11, 1948.

Rehearing Granted July 8, 1948.

1. Contracts 🔑40, 164

An agreement may consist of several writings, substantially part of one transaction, which are to be taken together. Civ. Code, § 1642.

2. Contracts 🔑164
Patents 🔑211(1)

An agreement by research assistant with technological institute for payment of royalties to institute in consideration of employment and license agreement with producer containing provision for payment of royalties to institute must be considered together, and validity of provision in license agreement depends upon validity of prior agreement. Civ.Code, § 1642.

3. Master and servant 🔑62

"Employment" within agreement by research assistant with technological institute for payment of royalties to institute in consideration of "employment" admitted of more than one interpretation, thus presenting a case for examination and discovery of the sense to be ascribed to it. Civ. Code, §§ 1642, 1647, 1649; Code Civ.Proc. § 1860.

4. Evidence 🔑419(11)

The true consideration of a contract may be shown by extrinsic evidence.

5. Evidence 🔑455, 461(1), 462

In action to set aside agreements by research assistant with technological institute for payment of royalties on inventions of assistant to institute in consideration of employment, extrinsic evidence concerning assistant's inventions, situation of parties in relation thereto, their conversations regarding their object and intent, and their subsequent conduct was admissible, not to establish a promise at variance with agreement, but to ascertain meaning of word "employment" as used in agreement.

6. Master and servant 🔑62

An agreement by research assistant with technological institute for payment of royalties on inventions of assistant to institute in consideration of "employment" contemplated permanent employment.

See Words and Phrases, Permanent Edition, for all other definitions of "Employment".

7. Master and servant 🔑20

Receipt of consideration by employer under a contract for permanent employment prevents termination of employment except for good cause.

8. Master and servant 🔑62

In action to set aside agreements by research assistant with technological institute for payment of royalties on inventions of assistant to institute in consideration of employment, evidence warranted finding of failure of consideration for agreements in that assistant did not receive the permanent employment contemplated by the agreements.

9. Appeal and error 🔑996, 1012(1)

Weight of evidence and inferences to be drawn therefrom were for trial court, whose findings would not be disturbed by reviewing court if supported by substantial evidence.

10. Master and servant 🔑62

Agreement by research assistant with technological institute for payment of royalties on inventions of assistant to institute in consideration of employment, and license agreement by assistant with producer containing provision for payment of royalties to institute, construed together, did not contemplate that receipt of royalties by institute should be without consideration of permanent employment running to assistant from institute.

11. Master and servant 🔑62

Evidence was sufficient to show that permanent employment and not moral obligation was the intended consideration for agreements by research assistant with technological institute for payment of royalties on assistant's invention to institute in consideration of institute's employment of assistant. Civ.Code, §1606.

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* Subsequent opinion 209 P.2d 581.

12. Master and servant ⚿62

Settlement of controversy between research assistant and technological institute concerning ownership of invention was merged in written agreements between assistant and institute for payment of royalties on assistant's inventions to institute in consideration of institute's employment of assistant.

13. Master and servant ⚿62

Where technological institute failed to provide continued employment for research assistant, assistant could rescind agreement with institute for payment of royalties on assistant's inventions to institute in consideration of employment, without offering to return compensation received for services rendered.

14. Contracts ⚿265

Where both parties cannot be restored to their status existing prior to contract, element of restoration is not legal requirement of rescission of contract.

15. Master and servant ⚿62

In action to set aside agreements by research assistant with technological institute for payment of royalties on inventions of assistant to institute in consideration of employment, evidence warranted finding that inducement for agreements were promises made to assistant without intention of performing them.

16. Estoppel ⚿92(2)

A party to understanding and agreements cannot accept the benefits and avoid the obligations imposed thereby.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Edward E. Simmons, Jr., against the California Institute of Technology, a corporation and another, to have certain royalty agreements declared void. From a judgment for the plaintiff, the defendants appeal.

Affirmed.

Prior opinion, 188 P.2d 1.

O'Melveny & Myers, Pierce Works, John Whyte, Louis W. Myers and Lyon & Lyon, all of Los Angeles, for appellants.

Samuel L. Kurland and A. Arnold Klein, both of Los Angeles, for respondent.

PER CURIAM.

The plaintiff commenced an action to have certain agreements whereby royalties under a patent license were to be paid to the defendant California Institute of Technology (hereinafter referred to as the defendant) declared void. Two grounds of invalidity were charged. A first cause of action alleged lack of consideration for the assignment of royalties to the defendant. A second cause of action alleged that the inducement for the agreements were certain promises made by the defendant Dr. Donald S. Clark without the intention of performing them. The trial court found for the plaintiff on both grounds. This appeal by the defendants followed.

The following facts are undisputed:

Prior to 1934 the plaintiff attended the Institute as a student, was graduated in 1934 and received his Master's degree in 1936. He assisted himself financially by working for various departments and persons. In 1936 Dr. Clark was a member of the faculty in the mechanical engineering department, was the department's personnel director, and had charge of Impact Research—a project organized to study and determine the performance of materials under rapidly applied loads. The project was in part sustained by contributions to the Institute from commercial firms who were interested in the results of the experiments. A paid assistant in the department was Dr. Datwyler who, with Dr. Clark, was working at the time on the problem of devising a method of measuring and determining the force of time relations which occurred to metals during impact loading. For this purpose they utilized a known device—an impact dynamometer—for translating instantaneous forces into electrical impulses to be recorded by means of an oscillograph. Their problem was the procurement of some strain sensitive element which would make the device workable in the measurement of impacts.

In the latter part of August, 1936, they took their problem to the plaintiff, who by this time had acquired a reputation for ingenuity, was frequently consulted by both teachers and students, and gave freely of his advice without charge or pay. Some time before September 10th the plaintiff went to Dr. Datwyler with his suggestion for a strain sensitive element and instructions for use of a particular bonding material and process of construction which he believed would transmit the strain from the dynamic bar to the strain sensitive element. Dr. Datwyler constructed a machine embodying the plaintiff's suggestions and instructions for the dynamometer, starting from a crude and progressing to a suggested improved type, with the desired success in high speed impact testing. The plaintiff was not in the employ of the defendant at the time and his services in this connection were given without compensation.

The department continued the use of the plaintiff's ideas in Impact Research. Beginning December 11, 1936, the plaintiff was employed by the defendant as a part-time paid worker in Impact Research at 75 cents an hour. His duties were to construct equipment according to specifications furnished by Dr. Datwyler. In June, 1938, he received appointment by the defendant to an "assistantship" for the academic year 1938–39 at $1 per hour, forty hours per month, with the same duties. He was reappointed to perform the same duties in the academic year 1939–40 for sixty hours per month at $1 per hour.

In the autumn of 1939 a representative of Baldwin Locomotive Works went to the defendant's Impact Research Laboratory to negotiate for the issuance of a patent and the procurement of an exclusive license to utilize the plaintiff's invention. Baldwin's representative had observed the invention in use at Massachusetts Institute of Technology and had traced its origin to California and the plaintiff. He expressed the opinion that the little gauge, hardly larger than a postage stamp, would "be stuck to practically everything" in order to know what was going on; that it was the "safety pin" in its field insofar as invention was concerned. Aircraft companies were already applying the gauge to airframes and structures to discover distribution of pressures, thus leading to improvements in strength and lightness, and it appeared that the use of the gauge would spread to every form of industry where dynamic application of forces was involved.

By this time the plaintiff had become interested in the work conducted in Impact Research, in continuing to have an active part therein, and in having possible income from the invention devoted thereto. After some weeks of negotiation with Dr. Clark and with Baldwin, whose attorney prepared and prosecuted the application for the issuance of the patent to the plaintiff, the plaintiff on February 21, 1940, signed an instrument designated as Exhibit A, which reads in part: "In consideration of my employment by the California Institute of Technology I agree that as to my inventions involving an electrical strain gauge wire secured throughout its length to the surface of a member adapted to be subject to strain, and also my inventions relating to the measurements and indications of various conditions including impact testing, * * * I will not grant any license to make, use or sell apparatus or methods embodying any of said inventions unless such licenses are approved by" the defendant. "The royalty on said inventions shall be paid to" the defendant "unless at my option I shall request in writing * * * that up to and including forty per cent (40%) of the total royalty paid by any licensee shall be paid to me * * *" (This option was added at the plaintiff's request to apply in the event income from royalties exceeded the needs of Impact Research.) Dr. Clark's signature appears on this instrument under the word "Witness".

On March 3, 1940, the plaintiff and Baldwin Locomotive Works executed an agreement (Exhibit B) whereby the plaintiff (in consideration of $1 and other good and valuable consideration), granted an exclusive license to Baldwin Locomotive Works with specified reservations, to make for use, rental and sale the inventions covered by the patent for a royalty of five percent of the sales price or income from rentals of that portion of apparatus embodying the inventions. The entire royalty was provided to be paid to the defendant unless the plaintiff exercised the stated option. The defendant's president signed an approval of the license "in accordance with an agreement [Exhibit A] between Edward E. Simmons, Jr., and the California Institute of Technology dated February 21, 1940." By action of the executive council of the defendant, Exhibit B was approved; but there was no action by the executive council ratifying the president's approval of Exhibit A.

About July 1, 1940, the plaintiff was reappointed to the assistantship on the same terms for the ensuing academic year. Toward the close of that year, in June, 1941, he was informed by Dr. Clark that his employment would not be renewed because Impact's funds were running low. The plaintiff for the first time learned that royalties received by the defendant pursuant to Exhibit B were not turned over to Impact Research. He was not thereafter re-employed by the Institute, although there is testimony that the work in Impact Research continued and evidence that royalties under the license would support the plaintiff's employment. The plaintiff did not exercise the contract option nor did he receive any royalties. He sought from but was denied relief by the defendant and in January, 1942, served notices of rescission, notifying Baldwin Locomotive Works thereof which thereupon withheld further payments of royalties pending the outcome of the controversy. This action was commenced on August 17, 1943, to have it declared that the plaintiff was entitled to recover some $2,000 theretofore received as royalties by the defendant, and to obtain a declaration of the invalidity of any claim of the defendant to future royalties.

The trial court found that the instrument Exhibit A, and the instrument Exhibit B insofar as it purported to confer rights upon the defendant, were unsupported by any consideration (the basis of the first cause of action), and were to that extent invalid. The court also made a general finding that the allegations of the second cause of action (relating to the representations of Dr. Clark) were true. It was concluded that the Instrument Exhibit A, and that part of Exhibit B conferring rights upon the defendant, were void. The judgment provided that the plaintiff recover from the defendant royalties paid in the sum of $2,004.94, and that the defendant had no right, title or interest in the accrued and unpaid royalties or any future royalties under Exhibit B.

The defendant asserts that the evidence is insufficient to support the findings and the judgment on either ground; and that the court erroneously admitted evidence over objection the effect of which was to vary the terms of a written contract.

The invalidity asserted in the first cause of action was alleged in general terms, that is, that Exhibit A was "without any consideration", and that Exhibit B, insofar as it purported to confer rights upon the defendant was "without consideration" on the part of the defendant. Likewise the findings as to this cause of action were in general terms, that is, that there was no consideration for Exhibit A, and that the plaintiff received no consideration for the licensing agreement Exhibit B insofar as it purported to confer rights upon the defendant.

[1, 2] An agreement may consist of several writings, substantially part of one transaction, which are to be taken together. (Section 1642, Civil Code; Daniels v. Daniels, 3 Cal.App. 294, 297; Patterson-Ballagh Corp. v. Byron Jackson Co., 145 F.2d 786.) That Exhibits A and B must be so considered may not be gainsaid. Obviously Exhibit B, insofar as it provided for payment of royalties to the defendant, depended upon Exhibit A to show the consideration moving to the plaintiff. Therefore if for any reason Exhibit A falls, Exhibit B in its relation to the defendant falls with it.

[3, 4] "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Section 1647, Civil Code.) "If

the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." (Section 1649, Civil Code.) The word "employment" in Exhibit A admits of more than one interpretation, according to the subject matter and the belief and understanding of the parties in relation thereto. The appearance of the word in Exhibit A presents a case for examination and discovery of the sense to be ascribed to it. Wachs v. Wachs, 11 Cal.2d 322 and authorities cited at page 326, 79 P.2d 1085. Therefore the circumstances under which the agreement was made, including the situation of the subject matter and the parties, may be shown in order that the court be placed in the position of those whose language is to be interpreted. (Section 1860, Code of Civil Procedure; Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P.2d 785; Patterson-Ballagh Corporation v. Byron Jackson Co., 9 Cir., 145 F.2d 786, at page 790. The true consideration of a contract may be shown by extrinsic evidence. Shiver v. Liberty Building-Loan Ass'n, 16 Cal.2d 296, 106 P.2d 4; Johnston v. Courtial, 216 Cal. 506, 14 P.2d 771.

[5, 6] The purpose of the admission of extrinsic evidence in this case was not to establish a consideration at variance with that expressed in the instrument Exhibit A. Regardless of any other issue in the case, testimony concerning the plaintiff's inventions, the situation of the parties in relation thereto, their conversations regarding their object and intent, and their subsequent conduct, was eminently proper for the purpose of ascertaining the meaning of the word "employment" as used in that instrument. The court made but one finding regarding the meaning of that word. That finding is implicit in the general finding of the truth of the allegations of the second cause of action and is that the plaintiff expected and intended permanent employment. The conclusion followed that since permanent employment was the consideration contemplated in the execution of Exhibit A, and since the plaintiff did not receive that employment, there was a failure of consideration for both Exhibits A and B. The record supports the finding that by "employment" permanent employment was meant, and that both parties so understood the expression. The plaintiff was in the employ of the defendant at the time. After execution of the instruments his employment continued and was renewed for an additional year. That he did not receive permanent employment is not disputed. But it is contended by the defendant that a provision for permanent employment means a hiring at will or for a reasonable time.

[7] Cases holding that a contract between employer and employee for permanent employment, in the absence of anything further, means a hiring at will or for a reasonable time (see 135 A.L.R. p. 646 et seq. and cases cited; Davidson v. Laughlin, 6 Cal.Unrep. 865, 68 P. 101), furnish no obstacle to recognizing the contract actually made by the parties. Those cases do not indicate that where the intent is discoverable pursuant to applicable rules it will not be given effect accordingly. Furthermore receipt of consideration by the employer under such a contract is deemed to prevent the termination of the employment except for good cause. Brown v. National Electric Works, 168 Cal. 336, 143 P. 606; Seifert v. Arnold Bros., Inc., 138 Cal.App. 324, 31 P.2d 1059; Carnig v. Carr, 167 Mass. 544, 46 N.E. 117, 35 L.R.A. 512, 57 Am.St. Rep. 488; Evans v. Cincinnati, S. & M. R. Co., 78 Ala. 341; Mt. Pleasant Coal Co. v. Watts, 91 Ind.App. 501, 151 N.E. 7. In Lord v. Goldberg, 81 Cal. 596, 22 P. 1126, 15 Am.St.Rep. 82, the employee did not bring in the promised consideration for the promised employment and it was held to be terminable at will; but in Davidson v. Laughlin, 138 Cal. 320, 71 P. 345, 5 L.R.A.,N.S., 579, it was held that failure to furnish the promised permanent employment released the employee from the promised consideration. The rule is stated in 135 A.L.R. at page 654, as follows: "[W]here the employee has given consideration additional to the services incident to the employment, or, as it is sometimes stated, where the employee purchases the employment, in the absence of statute, other terms in the contract, or circumstances to the contrary, a contract for permanent employ-

ment, for life employment, or for other terms purporting permanent employment * * * continues to operate as long as the employer remains in the business and has work for the employee, and the employee is able and willing to do his work satisfactorily * * *"

[8] The foregoing discussion establishes that the judgment is supported by the findings and the evidence that there was a failure of consideration for the plaintiff's agreements Exhibits A and B insofar as the defendant was concerned.

[9] The parties argue the import of various conversations between the plaintiff and Dr. Clark, and of the conduct of the parties. But the weight of the evidence and the inferences to be drawn therefrom were for the trial court, and so long as there is, as here, substantial evidence which supports the findings, there is no further question before this court in that respect. Noll v. Baida, 202 Cal. 98, 259 P. 433; Divani v. Donovan, 214 Cal. 447, 6 P.2d 247.

[10] There is no merit in the contention that the licensing agreement, Exhibit B, was one for the benefit of a third party (defendant), supported by the consideration running between the parties thereto, which may be enforced by the defendant at any time before rescission. Taking the instruments together, as we must, it was not contemplated that the defendant's receipt of royalties thereunder should be without consideration running to the plaintiff from the defendant, and the evidence supports the finding that that consideration was permanent employment.

[11, 12] The defendant also argues other matters relating to a possible legal consideration for Exhibit B, such as moral obligation (section 1606, Civil Code), and settlement of a claimed existing controversy as to ownership of the invention. The appropriate answer to these contentions is that there was no evidence that a moral obligation, if any existed, was the intended consideration. Assuming a dispute, its settlement must be considered to be merged in the written agreements, and the findings of the trial court on the subject of the consideration intended thereby and that the same was not received, being supported by sufficient evidence, are conclusive on appeal.

[13, 14] The contention that the plaintiff's rescission was ineffectual because of his failure to return or offer to return everything of value received under the contract cannot be sustained. The contention refers to employment and other claimed incidental benefits received by the plaintiff. Obviously the plaintiff was entitled, independently of the agreements, to retain compensation received for services rendered. It is also obvious that the defendant could not return the services received, and that both parties could not be restored to their status existing prior to the contracts. Under such circumstances the element of restoration is not a legal requirement. Watson v. Poore, 18 Cal.2d 302, 316, 115 P.2d 478; Walsh v. Majors, 4 Cal.2d 384, 396, 49 P.2d 598; Steele v. Scott, 192 Cal. 521, 526, 221 P. 342; California Farm & Fruit Co., Ltd., v. Schiappa-Pietra, 151 Cal. 732, 740, 91 P. 593.

[15, 16] It becomes unnecessary to dwell at length upon the ground of rescission alleged in the second cause of action, and the evidence and findings thereon. The evidence supports the implied findings of the following facts: That the plaintiff was promised permanent employment, which he did not receive; that there was also a promise that the receipts from Exhibit B would be used by the defendant to support Impact Research and the plaintiff's employment therein; that they were not so used but were devoted by the defendant to other purposes; that Dr. Clark who made the promises was in a position of responsibility and authority to make them; that the plaintiff relied upon those promises; that his agreement Exhibit A, approved both by Dr. Clark and the president of the Institute, expressed that understanding and reliance, and that both agreements were executed pursuant thereto; that the defendant, by expressly approving the agreement Exhibit B and accepting benefits thereunder, ratified and adopted Dr. Clark's conduct and promises in respect thereto; but that the defendant's omission, after Dr. Clark's and the president's recognition and approval of Exhibit A, expressly to ratify and approve

that agreement, and its subsequent failure to keep the promises to the plaintiff, justified the trial court in inferring the defendant's formulation of an intent not to perform them at least as of the time when they were adopted by acceptance of Exhibit B. Furthermore it is axiomatic that the defendant may not accept the benefits and avoid the obligations imposed by the understanding and agreements to which it was a party. To permit that result would be to condone a fraud upon the plaintiff.

The judgment is affirmed.

SHENK, J., did not participate on rehearing.

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32 Cal.2d 68

EMPRESA SIDERURGICA, S. A., et al. v. MERCED COUNTY et al.

Sac. 5893.

Supreme Court of California, in Bank.
June 15, 1948.

Rehearing Denied July 8, 1948.

1. Commerce 🔑72, 77

Goods do not cease to be a part of the general mass of property in a state subject as such to its jurisdiction and to taxation in the usual way until they have been shipped or entered with a common carrier for transportation to another state or have been started upon such transportation on a continuous route or journey, and such rule applies to the exportation of goods to a foreign country. U.S.C.A.Const. art. 1, § 8, cl. 3; § 9, cl. 5; § 10, cl. 2.

2. Commerce 🔑77

The certainity that goods are headed to sea and that the process of exportation has started so that goods may cease to be a part of the general mass of property in the state subject to its jurisdiction and to taxation in the usual way may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose, though the same degree of certainty may exist though no common carrier was involved. U.S.C.A.Const. art. 1, § 8, cl. 3; § 9, cl. 5; § 10, cl. 2.

3. Commerce 🔑77

The determining factor as to whether goods have ceased to be a part of the general mass of property in a state subject as such to its jurisdiction and to taxation in the usual way is not the owner's intention to export, but whether or not exportation has commenced. U.S.C.A.Const. art. 1, § 8, cl. 3; § 9, cl. 5; § 10, cl. 2.

4. Commerce 🔑77

Machinery owned and purchased by a foreign corporation but situated in California on tax day was not exempt from local state personal property taxation under the federal Constitution on the ground that it was an "export" because it had been delivered to a forwarding agent which was a licensed carrier in interstate and foreign commerce, where agent was employed only to dismantle and prepare the property for shipment, negotiate for shipping space by rail and sea and prepare foreign documents and bills of lading. U.S.C.A.Const. art. 1, § 10, cl. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Export".

5. Commerce 🔑77

Fact that 12 per cent of cement plant purchased by foreign corporation had been shipped out of the country, though 88 per cent remained situated in California on tax day in various conditions of packaging for shipment, did not establish the remaining 88 per cent as an "export" exempting it from local state personal property tax under the clause of the federal Constitution prohibiting every state from laying any tax on exports without consent of Congress. U.S.C.A.Const. art. 1, § 10, cl. 2.

◆

Appeal from Superior Court, Merced County; Peter J. Shields, Judge Assigned.

Action by Empresa Siderurgica, S. A., a corporation of Colombia, South America, and Vanderburgh & Co., Inc., a California corporation, against the County of Merced, a municipal corporation, J. Emmett McNamara, Assessor of County of Merced, and others, to recover taxes paid on personal property sold to a foreign purchaser but within the state on tax day. From the judgment, defendants appeal.

Judgment reversed.

Fred N. Howser, Atty. Gen., James E. Sabine, Deputy Atty. Gen., and Frank C. Hale, Dist. Atty., of Merced, for appellants.

Scott D. Kellogg, Raymond Salisbury, and Betsy FitzGerald Rahn, all of Oakland, for respondents.

EDMONDS, Justice.

The status of personal property sold to a foreign purchaser but in this state on tax day is the question presented for decision by the County of Merced upon its appeal from an adverse judgment in an action to recover taxes. Although part of the property had been prepared for export, the greater portion of it was not in that condition and all of it was located at the plant of the seller in Merced county.

The following facts were presented by stipulation. In November, 1944, Empresa Siderurgica, S. A., a corporation organized under the laws of Columbia, South America, agreed to buy from Henry J. Kaiser Company the machinery and equipment of a cement plant. The contract of sale provided that title to the property should be transferred to the purchaser whenever it had furnished a letter of credit and an export license issued by the appropriate governmental agency.

Early in January, 1945, the required license had been obtained and a satisfactory letter of credit covering the unpaid balance of the purchase price deposited with a bank. The work of dismantling the plant and packaging it for shipment was then commenced by Bigge Drayage Company, pursuant to a contract made by it with the purchaser's forwarding agent. The Bigge company conducts a general trucking business and is a common carrier by motor vehicle, licensed by the Interstate Commerce Commission to engage in interstate and foreign commerce.

The dismantling and packaging operations continued expeditiously, with due regard for war-time shipping conditions, throughout the succeeding months, the packages being labeled at the plant site with the name of Empresa, as consignee. The specified place of delivery was Medellin, Colombia, South America. By March 5, 1945, the statutory date for the assessment of property for the tax year 1945-46 12% of the plant had been shipped out of the county; 10% had been dismantled and crated or prepared for shipment; 34% had been dismantled but not crated or prepared for shipment; and 44% had not been dismantled. Not later than January 18, 1946, all of the machinery had been shipped out of the County of Merced on cars of the Atchison, Topeka, and Santa Fe Railway Company, and before the end of that month was en route to South America by ocean carrier.

The original assessment, made upon the basis of the value of the entire plant, was reduced by the board of supervisors to require payment of taxes only upon the 88% of the plant which was in the county on tax day. Empresa paid under protest the amount of the tax computed accordingly.

The position of the county is that, on tax day, none of the property assessed had begun its journey to a foreign destination and, therefore, had not acquired the status of an export. Until the goods have been delivered to a common carrier for transportation, they say, such property is not an export and may be taxed. Empresa maintains that, at the time of the assessment, the plant was an export because by the agreement for the sale of the property the parties intended foreign shipment and neither party could prevent its exportation without breaching the contract. It is also argued that because of Bigge's license as a common carrier, the delivery of possession to that company was the same as delivery to a railroad or a ship; the foreign destination was fixed and if on tax day any part of the plant was an export, all of it came within that category.

Article I, section 10, clause 2, of the Constitution of the United States provides: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports * * *." The trial judge determined, as a matter of law, that when the goods have been committed to exportation, a tax imposed upon them amounts to taxation of an export. Another basis for the decision was that "proceeding to change * * * [the plant] from parts in place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had 'been started upon such transportation' with the degree of certainty demanded by Coe v. Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715, and the many cases which have endorsed it."

[1] Although the Coe case was based upon the commerce clause of the Constitution, art. 1, § 8, cl. 3, the United States Supreme Court has declared that the same rule applies to the export clause. Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 79, 67 S.Ct. 156, 91 L.Ed. 80; Turpin v. Burgess, 117 U.S. 504, 506, 6 S.Ct. 835, 29 L.Ed. 988; Brown v. Maryland, 12 Wheat. 419, 6 L.Ed. 678. Logs had been floated down a river to the town of Errol, where they were to be shipped in interstate commerce. The town's assessment of them was attacked upon the ground that, at the time of the levy, they were in such commerce and not subject to taxation. The court, in deciding against the property owner, stated that "no definite rule has been adopted with regard to the point of time at which the taxing power of the state ceases as to goods exported to a foreign country or to another state". 116 U.S. at page 527, 6 S.Ct. at page 478, 29 L.Ed. 715. But it declared "that such goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation, to another state, or have been started upon such transportation in a continuous route or journey. * * * It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many states there would be nothing but the lands and real estate to bear the taxes. Some of the Western states produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern states. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. * * * But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain". 116 U.S. at pages 527, 528, 6 S.Ct. at page 478. These principles have been stated and followed in the few cases which have applied either Article I, section 10, clause 2, or Article I, section 9, clause 5 of the Constitution. See Richfield Oil Corp. v. State Bd. of Equalization, supra, 329 U.S. at page 79, 67 S.Ct. 156.

In Von Hamm-Young Co. v. City and County of San Francisco, 29 Cal.2d 798, 178 P.2d 745, 171 A.L.R. 274, relied upon by Empresa, goods purchased in San Francisco and moved from the place of purchase to warehouses to await shipping space were held to be exempt from tax because of the commerce clause. It was there said that "the movement of the goods from the place of purchase to the warehouses must be considered a movement in interstate commerce * * *." 29 Cal. 2d at page 807, 178 P.2d at page 750. In the present case, there was no movement of the goods from the place of purchase. The Bigge company, which had the contract for dismantling and packaging, performed this function at the plant site. Eventually, the packaged goods were delivered to the railroad company, whose tracks ran alongside the plant site, for transportation to the port of embarkation. But except for the 12% of the machinery which was not in the county on tax day, none of the packages had been delivered to the railroad carrier.

[2, 3] In the Richfield Oil Corporation case, supra, the court said: "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved." 329 U.S. at page 82, 67 S.Ct. at page 163. In that case the plaintiff corporation sold oil to the New Zealand government f. o. b. its tanker at Los Angeles for export to that country. Although title passed upon delivery to the tanker, sales tax was levied against the gross amount of the sale. After payment, plaintiff sued for refund, invoking the exemption of section 10, Article I of the Constitution. The tax was held invalid because delivery to the purchaser's carrier constituted the commencement of exportation to the same extent as would delivery to a common carrier in the usual situation. The court stated, "Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad." 329 U.S. at page 83, 67 S.Ct. at page 163. As in Coe v. Errol, supra, the determining factor was not the owner's intention to export but whether or not exportation had commenced.

[4] On tax day, the machinery which is the subject of the assessment here under attack had been deliverd into the possession of the forwarding agent for the purpose of packing and shipping it. But the preparations for shipment, including the preparation of foreign documents and bills of lading, negotiations for shipping space by rail and sea and incidental activities in readying the machinery for shipment out of the country are not the equivalent of delivery to a common carrier for transportation. The fact that the Bigge company was licensed as a common carrier in interstate and foreign commerce is not material, for it was not employed to perform the functions of such a carrier; it undertook only to dismantle and prepare the property for shipment. It cannot, therefore, be seriously contended that delivery of possession to Bigge was equivalent to delivery to a common carrier for transportation.

[5] The property owner's argument that because 12% of the plant had been shipped out of the country and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained. This contention assumes that intention to export rather than the commencement of exportation is the determining factor. The fact that a portion of the plant had actually been shipped is not controlling as to that portion which was in the process of preparation for exportation, although there can be no question concerning the owner's intention to take it out of the country. "The exemption attaches to the export, and not to the article before its exportation. * * *" Cornell v. Coyne, 192 U.S. 418, 427, 24 S.Ct. 383, 384, 48 L.Ed. 504.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE JJ., concur.

32 Cal.2d 73

Ex parte McCOY.

Cr. 4819.

Supreme Court of California.

June 15, 1948.

1. Habeas corpus 🔑85(1)

In habeas corpus proceeding, affidavits established that, prior to arraignment and plea of guilty, petitioner made several requests for counsel which were refused by officers who had him in custody. Pen.Code, § 686; Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 14.

2. Constitutional law 🔑268

Under state statute and Constitution, and in accordance with due process clause of 14th Amendment, defendant in criminal action is entitled to counsel. Pen.Code, § 686; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

3. Constitutional law 🔑253

Conduct of an officer of a state court consititues "state action" within meaning of due process clause, even where the act violates special command of state law. U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "State Action".

4. Constitutional law 🔑264

Where defendant was charged in police court with a misdemeanor, refusal to grant defendant's request for counsel denied fundamental civil rights. Pen.Code, § 686; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

5. Habeas corpus 🔑4

Habeas corpus may not be used as substitute for appeal.

6. Habeas corpus 🔑29

Violation of defendant's constitutional rights during trial leading to his conviction is ground for attack on judgment by habeas corpus if defendant has no other adequate remedy to test constitutionality of proceeding.

7. Habeas corpus 🔑111(1)

In habeas corpus proceeding by petitioner who had been sentenced to county jail on plea of guilty of misdemeanor, petitioner would not necessarily be discharged merely because judgment and commitment were void, if there was valid process under which he might be held.

8. Criminal law 🔑251

Where defendant was arrested for misdemeanor, subsequent action of court officers in refusing to grant request for counsel, thus depriving trial court of jurisdiction to convict and sentence defendant, did not acquit him of offense, but left him subject to be tried upon any valid charge made against him. Pen.Code, § 1484.

9. Habeas corpus 🔑109

In habeas corpus proceeding wherein it appeared that petitioner, who had pleaded guilty to a misdemeanor charge and had been sentenced by police court, was wrongfully imprisoned because he had been deprived of his right to counsel, petitioner would not be released but would be remanded to custody of sheriff, as for the correction of a procedural error or irregularity, for further proceedings in police court in conformity with constitutional right to counsel. Pen.Code, § 686; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

◆

Proceeding in the matter of the application of Albert Willie McCoy for a writ of habeas corpus.

Writ discharged and petitioner remanded to custody.

John C. Henderson, of Oakland, for petitioner.

Fred N. Howser, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., and Ralph E. Hoyt, Dist. Atty., and Thomas J. Buckley, Deputy Dist. Atty., both of Oakland, for respondent.

EDMONDS, Justice.

Albert Willie McCoy pleaded guilty to a misdemeanor charge and was sentenced to a term in the county jail. This court granted a writ of habeas corpus upon his petition which alleged that he was denied counsel and not advised of his legal rights. The state concedes that the judge of the police court by whom he was sentenced did not inform McCoy as to his right to counsel. By stipulation, the other issues have been submitted for decision upon affidavits and the prior testimony of McCoy and certain other persons.

In an affidavit, McCoy states that after his arrest upon a Saturday night, he asked the officer, who was operating the elevator in the Oakland city jail, if he could "get in touch with his people." The officer said "No." He noticed some of the prisoners using the telephone, and asked one of the jailors if he could "call some of his people, so they could get him a lawyer." The jailor refused to let him do so. Between the time he was placed in jail and the following Monday morning when he was taken before a police judge for arraignment, he asked "at least three different jailors could he call out or write a letter to his folks, so they could get him a lawyer." In each instance, permission was refused and the last jailor to whom he spoke told him he could not telephone or write a letter until after he appeared in court.

On Monday morning, en route to the court, he asked the officer in charge of him for an attorney and was told that he could not get one "until he went back upstairs [to the jail]."

In court, the clerk read the complaint to him and "he again said in a soft voice to the officer, couldn't he get a lawyer; the officer motioned him to keep quiet, and said 'answer the Clerk'; the Clerk in the meantime had asked affiant, was he guilty or not guilty; the Clerk again repeated the question, and affiant answered in the affirmative; the officer motioned affiant to return to the prisoner's dock, and as affiant started to same, he again asked the officer, could he get a lawyer, and said officer, as he nudged affiant to speed him back in the stock, replied that affiant could get a lawyer when he got out."

After these proceedings, the affidavit concludes, in the city jail, before he was taken to the county jail, he asked the officer, who later took him there, if he could get a lawyer. This officer took him to a desk and he was shown a yellow sheet with the names of a number of lawyers on it, and he "was told to sign a slip for the lawyer he wanted." He picked the name of one of them "at random" and immediately after signing the request he was taken to the county jail. He never heard from nor saw the lawyer whose name he selected. He had never been arrested before and knew nothing about jail rules.

By affidavit the chief jailor explained the general custom of the institution. He declared that during the time when McCoy was in custody "no prisoner who requested an attorney was denied an opportunity to obtain the services of an attorney; that all prisoners are informed that those desiring the services of an attorney may request the same by signing a book maintained for such purpose" and such record shows the request made by McCoy after he was returned to the jail following his appearance in the police court. The bailiff and clerk of the police court who were on duty at the time of McCoy's arraignment and sentence each deny that any defendant who requested counsel was told by an officer of the court "that he would have to answer guilty or not guilty to the charge or that he could see a lawyer when he got out."

[1-4] From these affidavits, it reasonably may be concluded that, prior to his arraignment and plea of guilty, the petitioner made several requests for counsel which were refused by the officers who had him in custody. By Penal Code section 686, the California Constitution (Art. I, sec. 13), and in accordance with the due process clause of the Fourteenth Amendment of the United States Constitution, a defendant in a criminal action is entitled to counsel. House v. Mayo, 324 U.S. 42, 46, 65 S.Ct. 517, 89 L.Ed. 739; Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; People v. Lanigan, 22 Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176; People v. McGarvy, 61 Cal.App.2d 557, 142 P.2d 92. The conduct of an officer of a state court constitutes state action within the meaning of the due process clause, even where the act violates a special command of state law such as the requirement of the Penal Code (Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265);

therefore, the refusal to grant petitioner's request for counsel clearly constituted a denial of fundamental civil rights.

[5, 6] A writ of habeas corpus may not be used as a substitute for an appeal (in re Byrnes, 26 Cal.2d 824, 827, 161 P.2d 376; In re Bell, 19 Cal.2d 488, 492, 122 P. 2d 22), but a "violation of the defendant's constitutional rights during the trial leading to his conviction is ground for attack on the judgment in a habeas corpus proceeding if the petitioner has no other adequate remedy to test the constitutionality of the proceeding resulting in his conviction." In re Wallace, 24 Cal.2d 933, 938, 152 P.2d 3. In the present case, the time for appeal had expired before petitioner finally was able to obtain legal aid and the record upon an appeal would not show the violation of his right to counsel.

The state contends that if this court determines that McCoy should be discharged from custody of the sheriff of Alameda County "he should be sent back to the Police Court, be permitted to withdraw his plea, given the right to engage counsel and proceed with his defense." This presents the question as to whether or not a petitioner who is wrongfully imprisoned may be remanded to the trial court for correction of procedural errors.

[7, 8] Section 1484 of the Penal Code provides that in a proceedings on habeas corpus " * * * The court or judge must * * * dispose of such party as the justice of the case may require * * *." So a petitioner will not necessarily be discharged merely because the judgment and commitment are void, if there is valid process under which he may be held. In re Dal Porte, 198 Cal. 216, 244 P. 355; Matter of Smith, 152 Cal. 566, 93 P. 191; and see In re Mize, 11 Cal.2d 22, 77 P.2d 472; 13 Cal.Jur. 281. The petition of McCoy shows that he was arrested upon the charge of the commission of a misdemeanor. Subsequent action of the court officers, depriving the trial court of jurisdiction to convict and sentence McCoy, did not acquit him of the offense, and he is still subject to be tried upon any valid charge made against him in the complaint.

In the case of In re Bouchard, 38 Cal. App. 441, 176 P. 692, the court did not hold the judgment and sentence to be void, but the petitioner was discharged because he had already served over twelve months, and "the 'justice of the case' does not require that the prisoner be remanded." At page 444 of 38 Cal.App., at page 693 of 176 P. However, in both Matter of Smith, supra, and In re Dal Porte, supra, although the court held that the judgments of conviction were void and the imprisonments illegal, the prisoners were remanded to the custody of the sheriff to await further action of the trial court.

[9] No reason appears for treating a case where the defendant is deprived of his right to counsel differently from one in which other procedural error or irregularity has occurred. Accordingly, the writ is discharged and the petitioner is remanded to the custody of the sheriff for further proceedings in the police court of the city of Oakland, in conformity with his constitutional right to counsel.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

86 Cal.App.2d 225

RIVERO v. THOMAS et al.

Civ. 13542.

District Court of Appeal, First District,
Division 1, California.
June 16, 1948.

1. Appeal and error 🔑1012(1)

A reviewing court has no authority to reverse a case merely because evidence as read in cold type on appeal preponderates in favor of losing litigant.

2. Appeal and error 🔑1010(1)

Power of reviewing court ends when substantial evidence appears in record to support judgment.

3. Trusts ⚷325

On an accounting, trustee has burden to establish correctness of his accounts but is not required to anticipate charges of dereliction of duty.

4. Trusts ⚷295

Where evidence established payments which reached control of defendants as trustees, defendants were required to account for property and money with which they were primarily chargeable. Civ.Code, §§ *2223*, *2224*.

5. Trusts ⚷375(1)

Where evidence in action to establish a trust disclosed that defendant husband did not receive plaintiff's money directly but did receive it from defendant wife and in turn purchased realty, and a reasonable inference was authorized that defendant husband knew that all money he received from wife, did not come from wife's aunt and included part of sum wife had received as agent in fact and trustee of plaintiff, inclusion of husband in judgment for plaintiff was proper. Civ.Code §§ *2223*, *2224*.

6. Trusts ⚷95

One who has wrongfully acquired legal title to property holds the property as a trustee under an involuntary or constructive trust. Civ.Code, §§ *2223*, *2224*.

7. Trusts ⚷340, 352, 358(1)

Where evidence indicated that all funds defendant wife was delegated to collect for plaintiff and arising from property she was authorized to handle were invested in purchase of or improvement to a second parcel or that money was co-mingled with defendant husband's personal funds, money was sufficiently traced to investment in second parcel of property to authorize the imposition of a lien thereon to secure trust in plaintiff's favor. Civ.Code, §§ *2223*, *2224*; Code Civ.Proc. § 1180.

8. Trusts ⚷352

Except in cases involving rights of creditors or where parties have agreed to mingle funds, when money may be traced to a particular fund or when it is comingled with other funds, beneficiary may enforce the trust. Civ.Code, §§ *2223*, *2224*.

9. Trusts ⚷340, 358(1)

In proceedings to trace trust funds and impose a lien in favor of beneficiary, degree of identification of trust funds depends upon circumstances so that, if evidence preponderates in a demonstration of unfaithfulness of trustee, strict rule of identification may be relaxed. Code Civ. Proc. § 1180.

10. Trusts ⚷358(1)

A trustee may not admit receipt of money and deny liability because trustor does not know where each penny was placed.

11. Trusts ⚷374

The matter of determining appropriate equitable relief to be granted to a beneficiary in enforcement of a trust is generally left to good judgment of trial court which will prevail if method selected is in accordance with applicable law.

12. Judgment ⚷204

From the nature of equity, a wide play is left to conscience of chancellor in formulating his decrees that justice may be effectually carried out.

13. Trusts ⚷340

Where trust funds in hands of defendants were traced to an investment in certain realty, trial court properly imposed a lien upon property in favor of plaintiff beneficiary rather than to determine that defendant held title to property in trust for plaintiff. Civ.Code, §§ *2223*, *2224*; Code Civ.Proc. § 1180.

14. Trusts ⚷340

In action to declare a constructive trust, lien on realty into which trust funds were traced was proper to secure in addition to amount of trust, the interest and costs of suit, but not to secure award of exemplary damages. Civ.Code, §§ *2223*, *2224*; Code Civ.Proc. § 1180.

15. Damages ⚷87(1)

Generally equity will not award exemplary damages, the recovery of which is not a matter of right but is discretionary with trier of fact when there is some evidence of fraud, malice, express or implied, or oppression.

16. Trusts ⚷374

In action to establish a constructive trust, where there was some evidence of fraud, award of $500 exemplary damages was not unjust or unreasonable. Civ.Code, §§ *2223*, *2224*.

17. Trusts ⚷340, 374

While a lien is imposed upon property to insure performance of a designated act such as payment of trust funds, "exemplary damages" are awarded as an example to others to refrain from fraud in performance of a trust and the imposition is distinct from basis of action for enforcement of trust, consequently such award cannot be secured by lien without special statutory provision. Code Civ.Proc. § 1180; Civ.Code, §§ *2223*, *2224*.

See Words and Phrases, Permanent Edition, for all other definitions of "Exemplary Damages".

◆

Appeal from Superior Court, City & County of San Francisco; Ben R. Ragain, Judge.

Action by Joseph Rivero, and incompetent person, by Guy Rivero, the guardian of his estate, against Birdie A. Thomas and Charles E. Thomas to establish a trust and for money had and received. Judgment for plaintiff and defendants appeal.

Affirmed as modified.

Wayne R. Millington and John F. O'Sullivan, both of San Francisco, for appellants.

Karl Brooks, of Petaluma, for respondent.

WARD, Justice.

This is an appeal from a judgment ordering that plaintiff recover judgment against defendants in the sum of $5,968.40, plus interest and cost; that defendants hold title to property on Hampshire Street in trust for plaintiff "and the plaintiff has and holds a lien against said property to secure the payment of the indebtedness existing between said plaintiff and the said defendants * * * and the plaintiff's said lien is hereby fully established and confirmed for the full amount adjudged to be due to him by reason of the aforesaid indebtedness * * *" and that the homestead declared by defendants on said property is "inferior to the lien against said property in favor of the plaintiff to secure * * * said judgment * * * and that upon the sale of said real property to satisfy said judgment or any part thereof the purchaser of said property shall acquire the same free and clear of said homestead or any claim of the defendants under or by virtue of said homestead."

Three causes of action are set forth in the "Complaint to Establish Trust and for Money Had and Received" filed by the guardian of the estate of Joseph Rivero. All allege that plaintiff, Joseph Rivero "is likely to be deceived and imposed upon by artful and designing persons"; that on November 25, 1942, plaintiff delivered a written power of attorney to defendant Birdie A. Thomas, which was recorded on the 24th of May, 1944, authorizing said defendant "to sell and dispose of any property belonging to the plaintiff and to collect and receive, for and on behalf and for the use and benefit of the plaintiff, any money, property or thing of value belonging to the plaintiff"; that at all times the defendant Charles E. Thomas knew of the execution by plaintiff and the acceptance by the defendant Birdie A. Thomas of said power of attorney, and that said defendant Birdie A. Thomas was the attorney in fact of plaintiff, and that said defendants have been and are now husband and wife.

In addition the first cause of action alleges that at all times defendants had a relation of personal confidence with plaintiff; that March 8, 1944, Birdie A. Thomas received as attorney in fact $4,478.40, and at another time in 1944, $600, belonging to plaintiff; that none of this $5,078.40 belonged to defendants; that (upon information and belief) on March 29, 1945, defendants wrongfully paid approximately $4,000 to one Andrew Troy, in consideration for the conveyance to said defendants of real property known as 1335 Hampshire Street, which was duly recorded, and that on April 26, 1945, defendants declared and recorded a homestead on said property. The existence of a trust in said real property is alleged, as is defendants' wrongful detention of said property in violation of said trust. Exemplary and punitive damages of $2,000 are claimed in addition to actual damages.

The second cause of action sets forth that defendants have concealed the location of said $5,078.40; that demand has been made by plaintiff to deliver said monies or the converted res thereof, but that defendants have not made such delivery or accounted for said monies or property; that (upon information and belief) defendants have appropriated $5,078.40 for their own uses and have mingled said sum with their own funds, and that upon the wrongful retention of $5,078.40 by defendants, or the converted res wrongfully acquired with said monies, "a trust was created for the benefit of plaintiff, Joseph Rivero, as beneficiary, and thereupon the said defendants, Birdie Thomas and Charles E. Thomas, and each of them became * * * trustees of said monies, or converted res, for the benefit of the said plaintiff."

Defendants' indebtedness to plaintiff in the amount of $5,078.40 for money received by them for the use of plaintiff, which they promised to pay on request, but although requested have not paid, is set forth in the third cause of action.

The answer admits the appointment of Guy Rivero as plaintiff's guardian and the execution by plaintiff of a power of attorney to, and accepted by, defendant Birdie A. Thomas. Simplifying the problem of determining the facts of the case is the admission of the allegations of paragraph V—that Birdie A. Thomas received as plaintiff's attorney in fact $4,478.40 and $600, totaling $5,078.40—and of paragraph VI—that none of said monies belonged to defendants. As to the allegations that plaintiff reposed the greatest personal trust in defendants and that defendants had a relation of personal confidence with plaintiff, these allegations are admitted as to Birdie Thomas but denied with respect to Charles Thomas. It is alleged that all monies received by Birdie Thomas on account of plaintiff "have been, prior to the declaration to the incompetency upon the said Joseph Rivero paid to him and that these defendants nor either of them have any money or things of value belonging to the said Joseph Rivero." The other allegations of the first two causes of action are denied. As to the cause of action sounding in debt, defendants admit that they have paid no sum to plaintiff "and in that respect aver that they are not indebted to nor are they holding any money or things of value belonging to" plaintiff.

Defendants present the questions involved: "1. Whether or not there is sufficient evidence to justify the findings of the Court and its judgment whereby the Court found that the defendants herein had misappropriated the aforesaid sums realized from the real property in Alameda County and San Mateo County and had misappropriated the rents collected from the Alameda County property. 2. Whether or not the plaintiff in the case has assumed the burden of and has traced the alleged money into the property upon which the lien has been imposed. 3. Whether or not the amount imposed as a lien upon said property has been disclosed to have been placed in said property from the alleged proceeds of the said sales of the Alameda County and San Mateo County properties and the rents collected from the Alameda County property."

Plaintiff reframes the first question in the following form: "Whether or not the defendants proved by a preponderance of the evidence that the defendant, Birdie A. Thomas, as a fiduciary of the incompetent plaintiff had accounted for the aforesaid sums of the plaintiff in the total amount of $5,468.40 which she admittedly received."

Plaintiff, the incompetent, testified that he is sixty-five years old and the brother of Guy Rivero, the guardian of his estate. He stated that he lived at 1335 Hampshire Street in San Francisco until "two or three years ago" when he moved to Santa Rosa, and that while he lived in San Francisco he worked as a hod carrier and as a stevedore on the waterfront. He testified that he could write his own name and the address of his former home in San Francisco but nothing else, and that he could not read, although he was able to read off "A-l-a-m-e-d-a" and "13712" from a check constituting plaintiff's Exhibit 1, it appears that he did not know their meaning and he could not determine the amount of said check, nor did he know the value of a thousand dollar bill. At the court's suggestion it was brought out that, unlike defendants, plaintiff's parents were both Mexican. He testified that his wife, of whom Birdie A. Thomas was the daughter by a prior marriage, handled the household affairs and financial matters up until her death in November of 1942. At her death he owned two unimproved lots in South San Francisco and a house in Alameda which they rented. After his wife's death, Birdie Thomas handled the affairs of the house at 1335 Hampshire Street—he paid $10 a week board—until he went to Santa Rosa. When plaintiff testified in rebuttal it was brought out that when he put in his application in Santa Rosa for the old age pension he first learned that the property in Alameda had been sold. It was stipulated that plaintiff's Exhibit 1, a check drawn by the Alameda County-East Bay Title Insurance Co., No. 13712, dated Oakland, California, March 8, 1944, in the sum of $4,478.40, made payable to the order of Joseph M. Rivero, was received at the home of Mrs. Birdie Thomas in payment of the purchase price of the Alameda property owned by Mr. Joseph M. Rivero. It was also stipulated that plaintiff did not sign his name on the back of the check, but that it was done by Mrs. Thomas. Plaintiff could not recollect getting more than $150 from the sale of the Alameda and South San Francisco properties. He testified that Mrs. Thomas did not make an accounting of the money she received and did not pay him any of the rentals received from the Alameda property.

On cross-examination it was brought out that in March, 1944, he opened a safe deposit box at the Bank of America on Powell Street. He testified he did so "To have it convenient so that I could put my checks in there when I worked as a stevedore. She told me that I could put them in there and I wouldn't have to be bothered with the bank." Although he couldn't remember when he quit working as a stevedore he testified that he was working when he rented the safe deposit box. Subsequently he testified that he worked up to at least March 11, 1944, and by stipulation his withholding receipt issued by the Waterfront Employers Association, showing total wages paid in 1944 in the amount of $422, and the income tax withheld, $40.40, was admitted in evidence. He stated that when he opened the box he put in his wallet—around $75, $80; he closed the box when he went to Santa Rosa to live with his mother. In rebuttal he subsequently testified that when he closed the box there was about $180 in it, and that he never opened the box between the time it was rented and when it was closed. Defendants' counsel asked if he remembered meeting Mrs. Houlohan when he came out of the bank after renting the box. He said, "Yes" and that she said, "Hello, Joe." He denied telling her what he had done. He denied telling Mrs. Sheerin not to speak to his relatives about having money. He testified that he had a savings account at Twenty-fourth and Bryant Streets of $300 which he closed when he went to Santa Rosa. On redirect examination it was brought out that the safe deposit box was rented at Birdie's suggestion. She was with him when the box was rented.

On recross examination an attempt was made to show that plaintiff wanted to keep from his relatives knowledge that he had any money. He denied stating that he did not want his daughter—by his former marriage—Josie, to know of his money because she wanted to borrow money to buy a place in the Fillmore district. He again denied telling Mrs. Houlohan, Mrs. Thomas, Mrs. Sheerin and Mrs. Johnson not to talk about his having gotten money from the sale of his house.

The depositions of the defendants were introduced by plaintiff. Mrs. Thomas testified that on the day her mother died she secured a power of attorney from plaintiff. At her death, her mother owed her about $2,000 constituting a loan of Mr. Thomas' earnings to enable her mother to meet expenses of an accident to plaintiff. Neither she nor Mr. Thomas owned any real property at Mrs. Rivero's death. She arranged for the sale of plaintiff's property in South San Francisco for which she received $600, and his property in Alameda for which a check for $4,478.40 was received. She stated that the purpose of the power of attorney was not for the selling of property and stated that she did not exhibit it either in the administration proceedings for her mother or at any time other than in connection with the sale of the properties. On March 29, 1945, she purchased the property at 1335 Hampshire Street from Troy for $4,000, and on April 26, 1945, a declaration of homestead was placed on the property by defendants; the declaration was prepared by "the real estate man." She described the improvements made on said property—plastering, new brick steps, archways installed, hardwood floors. As to the rentals from the Alameda property—prior to its sale—the book showing the rents received was burned; $60 was collected in a law suit against the Alameda tenant.

Lending support to some of Mrs. Thomas' testimony given while testifying in her own behalf, are the following exhibits: the signature card for the safe deposit box at the Bank of America, 1 Powell Street showing that Joseph M. Rivero opened the box March 11, 1944; the tag showing that the box was closed December 7, 1944; the record of the account of Bertha Dehne, an aunt of Mrs. Thomas, with the San Francisco Bank, opened March 17, 1936, showing that on September 8, 1944, a power of attorney was executed giving Birdie A. Thomas the right to withdraw therefrom, and that the account was closed January 2, 1945. It also showed that on September 13, 1944, the account was credited with the proceeds of 100 shares of Pacific Gas & Electric Company stock which stood in the name of Bertha Dehne, in the amount of $3,689.14.

When testifying in her own behalf Mrs. Thomas stated that the check for $4,478.40 came through the mail. At dinner, in the presence of plaintiff, her husband, and her sister-in-law Mrs. Johnson, she handed the envelope to plaintiff who opened it, "read it," and handed it to Mrs. Johnson. In her deposition she stated that plaintiff asked Mrs. Johnson to read the contents to him, which she did. Plaintiff asked her to cash the check. The next day she cashed it in the presence of Mrs. Johnson who carried the money—including four $1,000 bills—in her purse. In her deposition she stated that she did not remember who had written the "Joseph M. Rivero" on the back of the check, or at which bank the check was cashed. At the trial she testified that she wrote "Joseph M. Rivero" under which she wrote her name and address, and that she cashed the check at the Bank of America; the court noted the fact that the "Joseph M. Rivero" might be a different "or a disguised handwriting" from Mrs. Thomas' name and address. About four months after the matter was submitted the court reopened the case for more testimony on the circumstances surrounding the cashing of the check and at that time Mrs. Thomas stated that after showing the check to the teller she went to the manager of the bank who O.K.'d it; the Bank of America had no record of the "O.K."

In conflict with plaintiff's testimony that he received only $150 from the sale of his property is Mrs. Thomas' testimony that around dinner time of the day when the check was cashed—Friday night—in the presence of Mrs. Johnson and her husband, she gave plaintiff the cash—"four $1,000 currencies and then the rest in small denominations." He wanted her to go with him and open a safe deposit box because "he didn't want his people to know it when he applied for the old age pension, they wouldn't know how much he had." He took the money into his bedroom. In her deposition she stated that immediately after she handed him the money "He took it in his room and put it in a book. * * * He had a habit of doing things like that."

She testified that the next day she met plaintiff by appointment and he opened a safe deposit box at the Bank of America and she saw him sign the signature card. He put in $4,478.40. When they left the bank they met Mrs. Houlohan. Mrs. Thomas testified that plaintiff said, "I have just put all my money in the safe deposit box" and Mrs. Houlohan replied, "That is fine, Joe."

As to the $600 proceeds from the South San Francisco property, in her deposition Mrs. Thomas stated that it was paid to her in currency, and that she paid it all at one time to plaintiff. She testified that when she gave the money to plaintiff "He said he was going to deposit it in the bank on 24th Street * * * and he then went and bought himself an $82 suit, tailor-made suit * * * $15 pair of shoes and a $12.50 hat" and that the money "all went."

In order to answer plaintiff's contention that the proceeds of the sale of his property went into the purchase by defendants of the property at 1335 Hampshire Street, defendants introduced evidence of the receipt of considerable amounts of money from Mrs. Thomas' aunt, Mrs. Bertha Dehne. Under the power of attorney giving Mrs. Thomas power to withdraw from Mrs. Dehne's account, $3,500 was withdrawn between September 13, and November 14, 1944. On September 8 (13th) 1944, 100 shares of Pacific Gas & Electric Company stock were sold and $3,689 deposited to Mrs. Dehne's account. Mrs. Dehne was a patient at the Franklin Hospital, San Francisco, for about four months prior to her death on December 31, 1944. Mrs. Thomas paid her expenses, but she produced no records regarding the amounts paid. She did, however, produce the hospital bill amounting to $817.85 and the funeral bill for $471.20. There is therefore no dispute that of the $3,500 withdrawn, at least $1,289.05 was paid out, leaving only $2,210.95. Mrs. Thomas also testified that her aunt gave her for the aunt's expenses two $1,000 currencies which she had in her handbag at the hospital—"I had them at home, and I paid just what the amount was at the hospital." When questioned concerning her aunt's expenses at the hospital, all of which were paid by Mrs. Thomas, she stated that $112 was paid to the nurse and that she gave "her as high as $10 a day for tips to the nurses; that went on and on and on." The following is illustrative of Mrs. Thomas' testimony throughout the trial: "[Cross Examination]

"Q. You were the administratrix of her estate, too, were you not? A. Yes.

"Q. And in the inventory that you filed in that estate, you made no mention of that $2,000, did you? A. Well, I had paid out my own money.

"Q. I know, but you made no report of the fact that you held those two thousand dollars at that time, did you? A. No, because I had been spending my money.

"Q. You filed no account—I mean, you filed no claim against her estate for that $2,000, did you, or any monies that you paid out—you didn't file any claim against that estate, did you? A. Well, I paid it out of my own money. * * *

"Q. How much money did you pay out of your own money during that time? A. I just don't know. My aunt was a liberal woman. I would give her as high as $10 a day for tips to nurses; that went on and on and on.

"Q. And where did you get the money to pay these bills? A. I would give it to her from my money.

"Q. And where did you get your money? A. My husband's salary.

"Q. And how much—did you say you paid out, all of the bills out or money that he earned from the time she was in the hospital? A. Yes.

"Q. How much money did your husband earn from the time that Mrs. Dehne went to the hospital until her death? A. About $75 a week.

"Q. About $75 a week. For the period from the time Mrs. Dehne went to the hospital until her death, is that correct? A. Yes.

"Q. And during that time you had your living expenses, did you? A. Yes.

"Q. And how much living expenses during that time? A. Very little.

"Q. About how much? A. Maybe $6.

"Q. $6 a week? A. Yes.

"Q. Were you paying rent for the house? A. Yes.

"Q. How much was the rent? A. $18 a month. * * *

"Q. And what were your grocery bills a month? A. My husband brought all that home.

"Q. He brought it home. He must have bought it—he didn't steal it? A. No, sir.

"Q. How much did he pay for his groceries? A. I don't know. * * *

"Q. How much did you spend a month for bills? A. Well, there was the gas and the lights and telephone.

"Q. And how much did that amount to? A. Oh, the telephone was about $3.25 a month and the gas and light, that was about four-something. * * *

"Q. * * * Did you have an automobile? A. Yes.

"Q. How much did you spend operating that automobile? A. That I don't know."

From the foregoing it appears that the court could reasonably reach the conclusion that whatever money Mrs. Thomas received from her aunt was used to cover the aunt's expenses.

The deposition of Charles E. Thomas supports the statements of his wife. He stated that at Mrs. Rivero's death, he owned no real property and that he earns—and earned November 25, 1942—$75 a week. At her death Mrs. Rivero owed defendants $2,000 which had been borrowed to cover plaintiff's expenses. He stated that he was present when the check was delivered; that he did not know who wrote on the back thereof, and that both he and his wife told plaintiff it would be good for him to have a safe deposit box. With respect to the purchase of the home on Hampshire Street he stated that he used funds received from his wife; that he didn't know why the homestead was put thereon and that his friends made improvements to the property. There was also evidence that Mrs. Thomas had received $390 in rentals on the Alameda property.

At the conclusion of plaintiff's case in chief, motion for nonsuit was made. In denying the motion the court pointed out that plaintiff testified that he had received $150 from the sale of the property.

Defendants' case consisted primarily in Mrs. Thomas' testimony, set forth above, supplemented by the testimony of other witnesses, part of which was corroborative and part inconsistent with the testimony of Mrs. Thomas.

The court found that Joseph Rivero, by reason of old age and weakness of mind was unable to manage his property and was likely to be deceived by designing persons; that on or about November, 1942, and thereafter, plaintiff reposed trust in defendants and that a relation of personal confidence existed between them; that Mrs. Thomas received $5,468.40, including rental income, which she held in trust for plaintiff, which was known by Charles E. Thomas. It was further found "That on or about the 29th day of March, 1945, the defendants, without the authorization or consent of plaintiff, wrongfully paid and delivered the sum of Four Thousand and no/100 Dollars from said monies of the plaintiff to one Andrew Troy in consideration for the wrongful transfer and conveyance to said defendants, Birdie A. Thomas and Charles E. Thomas, of that certain real property known as 1335 Hampshire Street in the City and County of San Francisco, California. * * * That the title and ownership of said property transferred and conveyed by said Andrew Troy, and all thereof, is held by the defendants as trustees of and in trust for the plaintiff, and as security for and to secure the payment to the plaintiff of said total sum of Five Thousand Four Hundred Sixty-Eight and 40/100 ($5,468.40) Dollars received by the defendants and said interest thereon."

[1, 2] A reviewing court has no authority to reverse a case merely because the evidence as read in cold type on appeal "preponderates" in favor of the losing litigant. Cox v. Cox, 82 Cal.App.2d 867, 187 P.2d 23. The power of this court ends when substantial evidence appears in the record to support the judgment. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P. 2d 183.

[3, 4] Defendants contend that the burden is not upon Mrs. Thomas to show that she actually delivered the money to plaintiff. The trustee has the burden of establishing the correctness of trust accounts, but is not required to anticipate charges of dereliction of duty. Neel v. Barnard, 24 Cal.2d 406, 150 P.2d 177; Purdy v. Johnson, 174 Cal. 521, 163 P. 893. In the present case the evidence established payments which reached the control of Mrs. Thomas with the knowledge of her husband, which under the circumstances surrounding the facts of the present case required an accounting by defendants of the property and

monies with which they were primarily chargeable. San Pedro Lumber Co. v. Reynolds, 121 Cal. 74, 89, 53 P. 410.

[5] At this point it may be well to consider whether the inclusion of Charles E. Thomas in the judgment is proper. The evidence shows that the husband did not receive the money directly but he received it from his wife and in turn purchased the Hampshire Street property. Mrs. Thomas claimed that she received some funds from her aunt, but this amount would be insufficient to cover the $4,000. A reasonable inference may be drawn that the only money she could have given her husband was the money received from plaintiff's property. Mr. Thomas admitted that the money came from Mrs. Thomas. It is reasonable to infer that he knew it did not come from the aunt. Defendants do not contend that the particular finding that Mr. Thomas knew that Mrs. Thomas had received $5,468.40 as agent in fact and trustee of plaintiff is erroneous. At the time of Mrs. Dehne's death it was the duty of Mrs. Thomas to account to Mrs. Dehne's estate for any money belonging to Mrs. Dehne held by Mrs. Thomas. It is true Mr. Thomas testified that Mrs. Thomas told him the money used in the purchase of the property had been received from Mrs. Dehne. Mrs. Dehne's estate would not be distributable for six months after her death. Considering the date of her death, to hold that Mrs. Thomas used Mrs. Dehne's money would require Mr. Thomas to infer that Mrs. Thomas embezzled part of Mrs. Dehne's estate.

$5,968.40 is the total amount of the judgment. $500 represents an exemplary and punitive award. The balance—$4,478.40, $600 and $390—has been previously mentioned. The trial court imposed a lien on the Hampshire Street property for the full amount of the judgment.

[6] Defendants contend that part of the money obtained from the disposition of plaintiff's property was not traced to the investment in the Hampshire Street property and that therefore the imposition of the lien is improper. The law deems that one who has wrongfully acquired the legal title to property holds the property as trustee. Such a trust is sometimes referred to as an involuntary trust. (Civil Code, secs. 2223, 2224.) Courts often use the term "constructive trust" as indicative of cases where there is no intention to create a trust. (25 Cal.Jur., 146, sec. 19.)

[7-9] In the present case there is evidence indicating that all of the funds Mrs. Thomas was delegated to collect, and arising from the property she was authorized to handle, were invested in the purchase of or improvement to the Hampshire Street property, or that the money was commingled with the Thomas' personal funds. Mrs. Thomas claimed the purchase money for the Hampshire Street property was obtained from her aunt, but the trial court has made it plain that this evidence was not believed. Except in cases involving the rights of creditors, or where the parties have agreed to mingle funds, when money may be traced to a particular fund, or when it is commingled with other funds, the beneficiary may enforce the trust. In Noble v. Noble, 198 Cal. 129, 243 P. 439, 43 A.L.R. 1235 and in Mitchell v. Dunn, 211 Cal. 129, 294 P. 386, it was held that it was not necessary to trace definitely the property. The degree of identification of trust funds depends upon the circumstances surrounding each case. If the evidence preponderates in a demonstration of the unfaithfulness of the trustee, there the strict rule of identification may be relaxed. In Garrison v. Edward Brown & Sons, 25 Cal.2d 473, at page 480, 154 P.2d 377, it was held that an ascertainable interest in a bank account of the trustee in which funds of the trustee and of the beneficiary are deposited constitutes an asset definite enough to be the subject matter of a trust.

[10] In the present case the reply brief contains the following: "He [plaintiff] shows that she [Mrs. Thomas] collected the rents and the proceeds of the two sales." Defendants claim that no evidence was offered as to the disposition of the money. No equitable rule approves of a trustee's admission of the receipt of money and a denial of liability because the trustor does not know where each penny was placed.

[11-13] In the present case the trial court did not determine that defendants

held title to the property on Hampshire Street in trust for plaintiff. Instead a lien was imposed upon the property. The matter of determining the appropriate equitable relief to be granted to a beneficiary is generally left to the good judgment of the trial court. If the method is in accordance with an applicable law, the trial court's judgment should prevail. "From the very nature of equity, a wide play is left to the conscience of the chancellor in formulating his decrees, that justice may be effectually carried out." (10 Cal.Jur., p. 462, sec. 5.) That the imposition of a lien may be a fair course to pursue in certain cases has been approved in Mitchell v. Dunn, supra.

[14] It was ordered on December 21, 1946 that plaintiff recover judgment in the sum of $5,968.40. Interest on $4,868.40 was fixed at seven percent from March 9, 1944, and interest on $600 from May 1, 1944 at seven percent; plaintiff's costs and disbursements were also awarded. It was ordered that a lien was established and confirmed for the full amount adjudged. Plaintiff is entitled to judgment for the respective amounts of $4,868.40 and $600 as the amount of the trust. The interest and costs of suit are mere incidents to be protected by the established lien on the amount of the trust, but that does not cover the full amount of the lien as adjudged.

[15-17] The extra $500 was awarded as punitive or exemplary damages. "As a general rule, courts of equity will not award exemplary damages, although this rule is not without exception." (15 Am. Jur., p. 704.) "Exemplary or punitive damages are not recoverable as matter of right. Their allowance rests entirely in the discretion of the jury, and they may be awarded only where there is some evidence of fraud, malice, express or implied, or oppression." Clark v. McClurg, 215 Cal. 279, 282, 9 P.2d 505, 506, 81 A.L.R. 908. In the present case evidence of fraud appears. This court is not in a position to say that the award or assessment of exemplary damages, under all of the circumstances of this case, is unjust and unreasonable. A lien is imposed upon property to insure the performance of a designated act (Code of Civil Procedure, sec. 1180), such as the payment of trust funds. Exemplary damages are not awarded to secure the performance of the payment of trust funds, but as an example to others to refrain from fraud in the performance of a trust. Its imposition is distinct and separate from the basis of the action, namely the enforcement of a trust. Punitive damages may not be secured by a lien without special statutory provision. None has been called to the attention of this court.

The judgment is affirmed with the lien securing the items enumerated therein except the $500 exemplary damage judgment. In the latter respect the judgment and conclusions are modified by striking therefrom all references to the lien securing the judgment of $500 for punitive damages. The means of collection of the $500 is left to the ordinary channels of the collection of a judgment awarding damages. The plaintiff is to recover his costs.

PETERS, P. J., and BRAY, J., concur.

TELEFILM, Inc. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

Civ. 16465.

District Court of Appeal, Second District, Division 2, California.

June 10, 1948.

Hearing Granted Aug. 5, 1948.

1. New trial 🔑163(2)

An order granting a new trial suspends the right of the successful party to enforce the judgment. Code Civ.Proc. § 661.

2. New trial 🔑163(2)

The rule relative to suspension of right of successful party to enforce judgment upon the granting of a new trial presupposes a valid order which court had jurisdiction to make and is not applicable when order is void. Code Civ.Proc. § 661.

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* Subsequent opinion 201 P.2d 811.

3. New trial 🔑163(2)

Where court acted beyond its jurisdiction in granting a new trial, order was void and the judgment could be enforced. Code Civ.Proc. § 661.

4. Execution 🔑60

Where an order had been entered granting a new trial, even though order was void for want of jurisdiction, clerk of superior court was justified in refusal to issue writ of execution, since he, a ministerial officer, was without right to question validity of order granting new trial. Code Civ.Proc. § 661.

5. Mandamus 🔑53, 55

A writ of mandate, which will issue where there is not a plain, speedy, and adequate remedy in ordinary course of law, is appropriate remedy to compel superior court and its clerk to perform legal duty to expunge from record a purported order granting motion for a new trial, which was beyond jurisdiction of court to make, and to issue a writ of execution as demanded. Code Civ.Proc. §§ 661, 1086.

6. New trial 🔑½

The right to move for, and power of court to grant, a new trial is statutory, and proceedings therefor must be strictly pursued in manner provided by law in order that litigants may not lose their rights. Code Civ.Proc. § 661.

7. New trial 🔑114

Under strict construction of the statute pertaining to new trials, inability and absence of judge who presided at trial are only grounds for hearing of motion for new trial by another judge. Code Civ.Proc. § 661.

8. Statutes 🔑228

Where a statute contains general language followed by an exception or a proviso, it is presumed that Legislature left its work complete and intended no exception other than that expressly stated.

9. Statutes 🔑228

A proviso following general language in a statute is construed strictly and takes no case out of enacting clause which does not fall fairly within its terms, and it is construed as carving special exceptions only out of enacting clause.

10. New trial 🔑114

The "inability" and "absence of trial judge" which under the proviso to the statute respecting the granting of motions for new trial authorizes the hearing of a motion by another judge do not include death of the trial judge, since the term "judge" contemplates a living person, a public officer invested with authority to determine litigated questions, one who gives a judgment, and since, where a trial judge dies, a vacancy exists in his official position. Code Civ. Proc. § 661; Government Code, § 1770.

See Words and Phrases, Permanent Edition, for all other definitions of "Absence of Trial Judge", "Inability of Trial Judge" and "Judge".

11. Judges 🔑4

The term "person", within rule that a judge must be a person, does not mean merely the physical body, which meaning would also embrace a corpse, but contemplates a living human being composed of body and soul; and that which constitutes a person is separated from the body by death.

See Words and Phrases, Permanent Edition, for all other definitions of "Person".

12. Dead bodies 🔑1

After death one is no longer a "person"; he ceases to be a human being and becomes a corpse, "death" being the cessation of all vital functions without capability of resuscitation.

See Words and Phrases, Permanent Edition, for all other definitions of "Death".

13. New trial 🔑114

The word "inability", as used in statute requiring the hearing of motion for new trial by the judge who presided except for "inability" or "absence", implies lack of power to perform and may suggest mental deficiency or temperamental unfitness, but more often suggests lack of means, lack of health or of training, while "disability" implies a loss or the deprivation of such power as by accident, illness, disqualification, or the like, and each word refers to living persons. Code Civ.Proc. § 661.

See Words and Phrases, Permanent Edition, for all other definitions of "Disability" and "Inability".

14. Constitutional law ⚷70(1)

Where a right is statutory and may be withdrawn or altered at will of Legislature, the fact that a litigant, through no fault of his own, may be unable to obtain relief because his situation is one not contemplated by the statute, does not permit court to extend law to cases not provided for therein.

15. New trial ⚷114

Under the statute requiring motion for new trial to be heard by the judge who presided at trial except in case of inability or absence of the presiding judge, legislative intent was that death of the judge should not be grounds for another judge to hear the motion. Code Civ.Proc. § 661.

16. New trial ⚷114

Section 653, declaring that a judge may settle and sign a bill of exception after, as well as before, he ceases to be such judge, discloses legislative intent that a judge who tried a case and who ceased to be a judge but was still living when a bill of exception was ready for settlement might settle and sign it, and does not indicate, by reference to a former judge as if he were a judge after he ceased to be such, that language of section 661 should be liberally extended to include in the judiciary, one who is deceased, so that a motion for new trial could be heard by another judge, where judge who presided over trial died. Code Civ. Proc. §§ 653, 661.

17. New trial ⚷114

The word "shall" as used in statute providing that motion for a new trial shall be heard and determined by judge who presided at trial with specified exceptions indicates legislative intent that statute be given mandatory effect hence litigants cannot stipulate to disregard its provisions. Code Civ.Proc. § 661.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall".

18. New trial ⚷114

The general provisions of sections 184 and 187 that no proceeding shall be affected by a vacancy in office of judge and that, when jurisdiction is given, all means necessary to carry it into effect are also given, do not modify the specific language of section 661 requiring motion for new trial to be heard and determined by judge who presided at trial except in the case of his inability or absence, and hence cannot be relied upon to permit another judge to hear motion for new trial after death of trial judge. Code Civ.Proc. §§ 184, 187, 661.

19. Courts ⚷90(4)
Statutes ⚷188

In construing a statute, better practice is to follow terms used in statute and to accord to them their ordinary definitions as found in lexicons and in the decisions of the courts, rather than to attempt, by judicial legislation, to add words not used nor intended by legislature or to supply meanings that are unsupported by any authority.

20. Mandamus ⚷53, 55

Since the demise of trial judge did not vest jurisdiction in another judge to hear and determine motion for new trial, order purporting to grant motion was beyond jurisdiction of court, judgment was in full force and effect, and judgment creditor was entitled to have purported order expunged from records of court and to have a writ of execution issued for enforcement of judgment. Code Civ.Proc. § 661.

◆

Original proceeding in mandamus by Telefilm, Inc., against the Superior Court of the State of California in and for the County of Los Angeles and others to compel such court and the clerk thereof to expunge from its records an order granting a new trial and to issue an execution in enforcement of the judgment.

Writ of mandamus granted.

Lewinson & Armstrong, of Los Angeles, for petitioner.

Harold W. Kennedy, Co. Counsel, and Douglas De Coster, Deputy Co. Counsel, both of Los Angeles, for respondents judge, court, and clerk.

Freston & Files, of Los Angeles, for all other respondents.

WILSON, Justice.

In an action entitled Telefilm, Inc., v. Harry M. Warner and others, which was tried to a jury before the Honorable Roy V. Rhodes, judge of the superior court, a verdict was rendered in favor of the plaintiff for $300,000. Judgment was entered on the verdict on December 11, 1947. Notice of entry of judgment was served and filed. The defendants served and filed their notice of intention to move for a new trial on December 24. Judge Rhodes died on January 10, 1948. Notice of the hearing of the motion for a new trial was given on January 12, and the motion was assigned for hearing before the Honorable Charles S. Burnell, a judge of the same court. On January 23, 1948, the plaintiff filed objections to the jurisdiction of the court or of any judge thereof to hear and determine the motion for a new trial. The ground of the objections was the same as that presented to this court and which will be hereinafter discussed. The plaintiff's objections were overruled, the motion was argued, and on February 5, 1948, the following minute order was made by Judge Burnell: "Motion for new trial granted on following grounds: (1) Insufficiency of the evidence to justify the verdict (2) The verdict is against law (3) Errors of law occurring at the trial, etc."

On March 30, 1948, the plaintiff, still contending that the court was without jurisdiction to hear the motion for a new trial, that the order purporting to grant the motion was void because it was beyond the court's jurisdiction, and that the judgment was in full force and effect, demanded of respondent Earl Lippold, clerk of the court, that he issue forthwith a writ of execution for the enforcement of the judgment. He refused to do so.

Thereupon the plaintiff in the superior court action filed in this court its petition for a writ of mandate requiring the superior court and its clerk to issue an execution on the judgment and to expunge from the files and records of the court the order purporting to grant a new trial.

Respondents superior court, Judge Burnell, the clerk of the court, and the defendants in the superior court action have filed a joint demurrer and answer to the petition for a writ of mandate. The demurrer is on the ground that the petition does not state facts sufficient to warrant the issuance of a peremptory writ of mandate or any relief. The answer admits some of the allegations contained in the petition and denies others. The denials do not render it necessary that we take evidence since they do not controvert any of the facts relating to the sole question of law which we deem to be determinative of the proceeding.

[1, 2] 1. *Petitioner's remedy is by mandamus.* An order granting a new trial suspends the right of the successful party to enforce the judgment. Bishop v. Superior Court, 59 Cal.App. 46, 49, 209 P. 1012; Etchas v. Orena, 121 Cal. 270, 272, 53 P. 798. This rule presupposes a valid order which the court has jurisdiction to make and is not applicable when the order is void.

[3] Respondents contend that mandamus cannot be invoked because if the court was wrong in holding that it had jurisdiction to hear the motion it committed error which may be corrected on appeal. We have concluded that the lower court erred in overruling petitioner's objections to the hearing of the motion and in making the order purporting to grant a new trial, but the question before us is not one of mere error that can be corrected in no other manner than by an appeal from the order. Since the court acted beyond its jurisdiction the order is void, is no order at all, and the judgment may be enforced.

[4] Respondent clerk was justified in his refusal to issue the writ since he, a ministerial officer, was without right to question the validity of the order granting a new trial. We have determined that the order is void for the reason that the death of the judge who tried the case deprived the court of jurisdiction to consider the motion and that the judgment is therefore in full force and effect; hence when petitioner made demand therefor it was and now is

the duty of the clerk to issue a writ of execution to enforce it. Petitioner is entitled to the fruits of its judgment and is not required to await the result of an appeal from a void order.

[5] A writ of mandate will be issued "in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." Code Civ.Proc., sec. 1086. Such writ is the appropriate remedy to compel respondent superior court and its clerk to perform the duty which the law imposes upon them to expunge from the files and records of the court the purported order granting the motion for a new trial and to issue a writ of execution as demanded. Kahn v. Smith, 23 Cal.2d 12, 14, 142 P.2d 13; Holquin v. Allison, 97 Cal.App. 126, 130, 274 P. 1037; Christ v. Superior Court, 211 Cal. 593, 595, 296 P. 612. See also Payne v. Hunt, 214 Cal. 605, 7 P.2d 302; Kraft v. Lampton, 13 Cal.App.2d 596, 57 P.2d 171; Diamond v. Superior Court, 189 Cal. 732, 739, 210 P. 36; Evans v. Superior Court, 14 Cal.2d 563, 580, 196 P.2d 107.

[6] 2. *Jurisdiction of the court to grant a new trial.* At the outset and throughout our discussion the established rule must be borne in mind that the right to move for and the power of the court to grant a new trial is statutory and proceedings therefor must be strictly pursued in the manner provided by law in order that litigants may not lose their rights. Smith v. Ibos, 22 Cal.App.2d 551, 553, 71 P.2d 847; Frye v. Pacific Freight Lines, 27 Cal.App.2d 748, 750, 81 P.2d 1027; California Imp. Co. v. Baroteau, 116 Cal. 136, 138, 47 P. 1018; Diamond v. Superior Court, 189 Cal. 732, 736, 737, 210 P. 36.

[7] That portion of section 661 of the Code of Civil Procedure applicable to this proceeding reads as follows: "The motion for a new trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge of the same court." *Inability* and *absence* of the judge who presided at the trial are the only grounds stated in the code section for the hearing of the motion by another judge.

[8, 9] An additional reason to that above mentioned for strict construction of section 661 is this: Where a statute contains general language followed by an exception or a proviso, it will be presumed that the framers of the law left their work complete and that they intended no exception other than that expressly stated. Trout v. Ogilvie, 41 Cal.App. 167, 174, 182 P. 333; Forbes v. City of Los Angeles, 101 Cal.App. 781, 788, 282 P. 528. It is a rule of law "consecrated almost as a maxim" that where a proviso follows general language it is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms; it carves special exceptions only out of the enacting clause. United States v. Dickson, 15 Pet. 141, 40 U.S. 141, 165, 10 L.Ed. 689, 698.

The first clause of section 661 is a positive direction that a motion for a new trial "shall be heard and determined" by the judge who presided at the trial. Since the proviso expresses only two exceptions to the general language in the first clause—inability and absence—those words must be construed with a view of ascertaining their exact significance and the intent of the legislature in inserting them and no others in the proviso.

[10] The question at issue is whether the *inability* or the *absence* of the trial judge referred to in that section includes the *death* of the judge; or, to put the query in another form, can the term "inability" be applied to a deceased judge or can a deceased judge be deemed to be "absent" within the meaning of section 661.

A judge is "a public officer who is invested with authority to determine litigated questions; one who gives a judgment." Webster's New Int. Dictionary, 1947 Ed., p. 1343; United States v. Clark, 25 Fed.Cas. pages 441, 442, No. 14, 804, 1 Gall. 497, 499. Obviously when a judge dies he is no longer a public officer—a vacancy exists in the official position that he held while living (Govt. Code, sec. 1770); he is no longer vested with authority to determine litigated questions; he is incapable of giving a judgment. A person whose term of office as judge has expired is no longer a judge and a statute providing that a judge shall not act as attorney in an action which has been before him in his official capacity does not prohibit a former surrogate from acting as counsel in a proceeding that had been before him while he occupied that official position. In re Wheelock's Will, 205 App. Div. 654, 200 N.Y.S. 157.

[11] A judge must be a "person." That term is defined as "a being characterized by conscious apprehension, rationality, and a moral sense; a being possessing, or forming the subject of, personality; hence, an individual human being; a particular individual." Webster, p. 1827. A person is a living human being. Madden v. Board of Election Com'rs, 251 Mass. 95, 146 N.E. 280, 281. "In law the word 'person' does not simply mean the physical body, for, if it did, it would apply equally to a corpse. It means a living person, composed of body and soul." Morton v. Western Union Tel. Co., 130 N.Car. 299, 41 S.E. 484, 485.

[12] After death one is no longer a person; he possesses no consciousness, no ability of apprehension or rationality; he ceases to be a human being and becomes a corpse. "Death" is "The cessation of all vital functions without capability of resuscitation." Webster, p. 676. "It is axiomatic that a corpse is not a person. That which constitutes a person is separated from the body by death and that which remains is 'dust and ashes.'" Brooks v. Boston & N. St. Ry. Co., 211 Mass. 277, 97 N.E. 760. A "person" is a living human being. A dead man is not a person. When statutes refer to a person who has died they use the term "deceased person." State v. Frear, 144 Wis. 79, 128 N.W. 1068, 1072, 140 Am. St.Rep. 992; Sawyer v. Mackie, 149 Mass. 269, 21 N.E. 307. A law requiring property to be assessed to the "person" appearing of record as owner does not authorize the assessment in the name of the record owner who has died, and a tax sale made pursuant to such an assessment is void. Sawyer v. Mackie, supra; Morrill v. Lovett, 95 Me. 165, 49 A. 666, 56 L.R.A. 634.

One who does not exist cannot be said to be unable to act or to be absent. A person who while living has been a judge is not a person and therefore not a judge after death. Such person is not, after death, in the category of a "judge" who is unable to act or who is absent. Euphemistically a deceased person is referred to as an absent member of the family. Since we are now considering a reality there is no occasion for euphemizing.

The terms "inability," "disability" and "absent" can be deemed to apply only to a person in being. Since such words cannot be employed concerning something that has never had an earthly existence how can they be used in reference to one who has ceased to have such existence?

[13] Since the terms "inability" and "disability" are found in the statutes and decisions hereinafter referred to the difference in their meanings, which is slight, should be understood. "Inability" is thus defined: "Quality or state of being unable; lack of ability; want of sufficient power, strength, resources, or capacity. * * * Syn.-Incompetence, impotence, incapacity." Webster's New Int. Dic., 1947 Ed., p. 1254. "Disability" is defined as: "1. State of being disabled; deprivation or want of ability; absence of competent physical, intellectual, or moral power, means, fitness, or the like. * * * 2. Want of legal qualification to do a thing; legal incapacity, incompetency, or disqualification." Webster, p. 740. Though the two words are not strictly synonymous both "denote a lack of ability to perform a given act or to follow a given trade or profession. * * * *Inability* implies lack of power (sometimes an inherent lack) to perform; it may suggest mental deficiency or temperamental unfitness, but more often it suggests lack of means, lack of health, lack of training, or the like. * * * *Disability* implies the loss or the deprivation of such power, as by accident, illness, disqualification, or the like; the term, therefore, is applicable not only to the resulting inability, but to the injury, the impediment or whatever it is that makes one unable to do a certain thing, hold a certain office, or the like; * * *"

Webster's Dictionary of Synonyms, 1st Ed., p. 437.

The definitions of the two words betoken reference to living persons; neither one indicates or implies an allusion to one who was, but is not now by reason of his decease, a "person" as that term is hereinabove defined.

In the decisions hereinafter cited, to which we have found no exception, the terms "inability," "disability" and "absence" have been construed according to the definitions found in dictionaries and in no case has any one of the words been so extended in its use as to include "death." Disability assumes a living or animate subject. The term "other disability" must be given its ordinary and legal meaning and cannot be applied to a subject not in being—a deceased person. Cline v. Hammond, 4 Ohio App. 228, 192 N.E. 869, 871. In Biederzycki v. Farrel Foundry & Machine Co., 103 Conn. 701, 131 A. 739, the court held that the term "disability" is manifestly used in the sense of incapacity, and refers to the living, and not to the case of death; "incapacity" is synonymous with "disability." In Bishop v. Morrison-Knudsen Co., 64 Idaho 806, 137 P.2d 963, the court said that the word "disability" does not mean, and was not intended by the legislature to mean, death; if the legislature had so intended it would have added after the word "disability" the words "or death." The "disability" of the trial judge referred to in the statute which will authorize another judge of the court to sign a bill of exceptions, means a physical or mental disability and does not include his "absence" from the jurisdiction. People v. Rosenwald, 266 Ill. 548, 107 N.E. 854, Ann.Cas.1915D, 688.

[14] Where a right is statutory and may be withdrawn or altered at the will of the legislature a litigant, through no failure of his own, may be unable to obtain relief because his situation is one not contemplated by the statute, but such misfortune does not permit the court to extend the law to cases not provided for therein. This is aptly illustrated by the successive decisions and statutes relating to the inability of a party to obtain a stenographic report of his trial. Notwithstanding the manifest hardship and injustice that would be suffered by the unsuccessful party in an action if he were unable to obtain such report for use on a motion for a new trial or on appeal the courts have adhered to the rule of strict construction of proceedings relating to a new trial. In Diamond v. Superior Court, 189 Cal. 732, 210 P. 36, decided in 1922, the trial court granted a new trial on the ground that the court reporter had died and the moving party was thereby deprived of his right to have the stenographic record of the trial. The order was annulled for the reason that the ground upon which the court acted was not one upon which a new trial could be granted. To avoid such unfairness section 953e was added to the Code of Civil Procedure (Stats.1931, ch. 239, p. 410) providing that when it is impossible to obtain the phonographic report of the trial "because of the *death* or other *disability*" of the reporter the court has power to vacate the judgment and order a new trial. In 1936 came the case of Laumann v. Conner, 12 Cal.App.2d 631, 55 P.2d 1225, wherein the stenographic reporter was neither dead nor disabled but his shorthand notes had been lost and were not available for the completion of the record on appeal. For that reason the trial court granted a motion for a new trial. Still adhering to the rule that a new trial cannot be granted except upon statuory grounds and by following the statutory procedure, the court held, 12 Cal.App.2d page 634, 55 P.2d 1225, that the word "disability" in section 953e did not include mere "inability" and that the loss of the shorthand notes was not such a disability of the court reporter as to warrant the granting of a new trial. Thereafter the legislature amended section 953e by adding "the loss or destruction, in whole or in substantial part," of the reporter's notes as a further ground for the granting of a new trial. Stats.1943, ch. 1017, p. 2957. Next and last in the succession of cases on this subject is Rambo v. Rambo, 1948, Cal.App., 191 P.2d 480, wherein a motion for a new trial was made on the grounds (1) that the reporter's whereabouts were unknown and (2) that

his stenographic notes could not be found or transcribed. The court held that the first ground is not included in section 953e and assuming that the second ground comes within the term "loss or destruction" the affidavits were insufficient to prove that the notes could not be found.

Prior to 1929 a motion for a new trial was not required to be heard by the judge who tried the case. Francis v. Superior Court, 3 Cal.2d 19, 28, 43 P.2d 300. In that year, in an act relating to new trials and appeals, section 661 was added to the Code of Civil Procedure requiring a motion for a new trial to be heard by the judge who tried the case, provided that in case of his *inability* the motion might be heard and determined by any other judge. Stats. 1929, ch. 479, pp. 839, 842. In 1931 the section was amended by adding to the proviso the *absence* of the trial judge from the county where the trial was held. Stats. 1931, ch. 768, p. 1608. The section was again amended by adding the words "of the same court" after "any other judge." Stats.1933, ch. 744, pp. 1836, 1881. The lawmakers have limited the circumstances in which a judge other than the trial judge may pass on a motion for a new trial. By the original statute and two amendments they have seen fit to provide only two such circumstances and the court cannot encroach on the prerogatives of the legislature by adding another.

An example of the stringency with which the courts circumscribe the power of a judge who did not hear a case to act on a motion for a new trial is the limitation of the power given by section 662 of the Code of Civil Procedure. That section provides that in ruling on such motion the court may change or add to the findings and modify the judgment. In City of Long Beach v. Wright, 134 Cal.App. 366, 25 P.2d 541, the court held that where a motion for a new trial is heard by a judge other than the one who presided at the trial, although he may grant a new trial, he is without power to modify the findings or the judgment. This is the prerogative exclusively of the judge who heard the case.

[15] Whenever it has been intended that either the death or the disability or the absence of a person should be the cause or basis of the performance of his powers and duties by another, such intent has been plainly expressed by the use of apt language. In case of the *death* or *inability* of the governor to discharge his duties, or his resignation or *absence* from the state, they shall devolve on the lieutenant-governor. Const., Art. V, sec. 16. If an executor or administrator *dies* or becomes *disqualified* or *incapable,* the court shall issue letters of administration with the will annexed to another. Prob.Code, sec. 512. In a specified instance the hiring of a thing may be terminated by notice of the *death* or *incapacity* of one of the parties. Civ.Code, sec. 1934. An agency is terminated by the *death* or *incapacity* of the agent. Civ.Code, sec. 2355. We have referred to the *death* or *disability* of a court reporter as a ground for granting a new trial (Code Civ.Proc., sec. 953e) and to the strict limitation of the language of that section as originally enacted and as amended. Laumann v. Conner and Rambo v. Rambo, supra.

[16] Respondents refer to the following language in former section 653 of the Code of Civil Procedure (repealed, Stats. 1945, ch. 40, p. 356) that "A judge * * * may settle and sign a bill of exceptions after, as well as before he ceases to be such judge, * * *," and contend that because the legislature referred to a former judge as if he were a judge after he ceased to be such and did not limit the use of the word "judge" to one who remained in office, the language of section 661 should be liberally extended to include in the judiciary one who is deceased. No such analogy can be found. While reference to a person as a judge "after * * * he ceases to be such judge" is an inaccurate and inept use of the word, it was the intent of the framers of the code section that a judge who tried a case and who ceased to be a judge *but was still living* when a bill of exceptions was ready for settlement might settle and sign it. The reason for this provision was that he knew what happened at the trial and could act upon his knowledge in settling the bill. It would not be contended that the quoted provision could be

so enlarged as to empower a living former judge to act if he became incompetent.

Respondents have suggested that a comparison of the present rules on appeal with former section 653 of the Code of Civil Procedure presents an analogy to the question under discussion. They contend that the language of the rules is so general as to include all conditions that can possibly occur whereby the judge who tried the case would be unable to settle a bill of exceptions, and that section 661 should be given as broad a construction as can be ascribed to the language of the rules. We do not agree with this theory. Prior to its repeal section 653 contained a provision, following the language quoted in the preceding paragraph, that if a trial judge *died,* was removed from office, became disqualified, *or was absent* from the state a bill of exceptions could be settled in such manner as directed by the rules of the Supreme Court. While this section is no longer in force it illustrates the fact that the legislature has never had any difficulty in declaring that the death of a judge should be a reason for the performance of an act by another judge whenever such was its intent. Rule XXVII of the former rules of the Supreme Court (18 Cal.2d 22) provided for settlement of a bill of exceptions by a judge other than the trial judge for the same reasons found in repealed section 653. Rules 7(d) and 51 of the present rules on appeal (22 Cal.2d 8, 33) do not, as contended by respondents, aid in the construction they would have us place on the statute. The words "unavailable or unable to act" found in the rule do not, by reason of the definitions above set forth, to which we have not found a single exception, furnish a basis for judicial legislation adding something to the statute that was not placed in it by the legislature.

There are many illustrations in other jurisdictions of rigorous adherence to the strict language of the statute in situations similar to that in the instant case. For example, the terms "disability" and "incapable to act" are limited to the lexicographers' definitions and are not extended to include "absence"; "death" is not embraced in the term "disability." One example is a succession of decisions and amendments with reference to a federal statute concerning bills of exceptions. The statute provided for the authentication of the bill of exceptions "by the judge of the court in which the cause was tried." A bill of exceptions which was allowed and signed by the successor in office of the judge who tried the case was disregarded on appeal because it was not authenticated in the manner required by the statute. It was held that the successor judge, although at the time the bill was presented for settlement he had become a "judge of the court in which the cause was tried," was without power to settle the bill since the statute required it to be settled and allowed by the judge who tried the case. It was further held that counsel were not authorized to stipulate to the correctness of the bill which had not been signed by the trial judge. Malony v. Adsit, 175 U.S. 281, 284, 287, 20 S.Ct. 115, 44 L.Ed. 163. The Malony case was decided in 1899. In 1900 the statute was amended (see 28 U.S.C.A. § 776) by adding a provision (now found in substantially the same form in Rule 63 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c) that "in case the [trial] judge * * * is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions" then the successor of such trial judge, or any other judge of the court in which the cause was tried, shall pass upon the motion for a new trial and allow and sign the bill of exceptions. See Ulmer v. United States, 2 Cir., 266 F. 176, 179. In construing the amendment in the Ulmer case and in Western Dredging & Imp. Co. v. Heldmaier, 7 Cir., 111 F. 123, 125, and Norwood v. United States, 4 Cir., 18 F.2d 577, the courts held that the term "other disability" means "disability of like character" to those named in the statute, to wit, death or sickness, and does not mean a disability arising from the temporary absence of the judge from the district. In each case the bill of exceptions was held to be insufficiently authenticated when signed in the absence of the trial judge by another judge who was a resident of the district in which the case was tried. The power in such a case of a judge who was not the trial judge depends strictly upon the language of the statute—"the death, sickness, or disability of the judge who tried the case." Norwood v. United States, supra.

A statute of New York, Code Civ.Proc. § 342, provided that if the county judge "is, for any cause, incapable to act" in an action pending in the county court, the cause should be heard by another county judge or transferred to the supreme court. It was held that the county judge had complete legal capacity to entertain, hear and determine the action and that his voluntary absence from the state did not render him "incapable to act" within the terms of the statute and did not authorize the calling in of another judge to act in his court. In re Munger, 10 App.Div. 347, 41 N.Y.S. 882. A statute authorizing actions against the United States made it the duty of the "court" to file a written opinion setting forth specific findings of fact and conclusions of law, 28 U.S.C.A. § 764, but did not in express terms require the judge who heard the evidence to make the findings. While recognizing the fact that the court is a continuing entity however often the incumbent may change, it was held that the proceedings were fatally defective for the reason that the findings of fact were made by a judge other than the one who had tried the case, the trial judge having resigned without having made findings. United States v. Nugent, 6 Cir., 100 F.2d 215, 217. The constitution of West Virginia provided that "in case of the death * * * or other disability of the Governor" the president of the senate should act as governor. Const. art. 7, § 16. The court held that the term "other disability" did not apply when the legislature failed to declare the result of an election at which a new governor had been elected but that it meant something attaching to the person of "the governor" and disabling him from occupying the office and discharging his official duties as such. Carr v. Wilson, 32 W.Va. 419, 9 S.E. 31, 35, 3 L.R.A. 64.

The courts have had occasion to distinguish between "death" and "disability" in cases of a different character and have held that "disability" is not included in "death" and that a dead person is not deemed to be "disabled." In Hill v. Travelers' Ins. Co., 146 Iowa 133, 124 N.W. 898, 28 L.R.A., N.S., 742, it was held that the word "disability" does not express the same meaning as "death"; nor is it ordinarily used as signifying the same thing. "Disability" is defined as a want of competent power, strength, or physical ability; weakness, incapacity; impotence. In Ferguson v. Penn Mut. Life Ins. Co., 305 Ill.App. 537, 27 N.E.2d 548, 550, the court quoted the Hill case with approval and added: "Disability presupposes life. Death is the antithesis of life." In Hinkley v. Penn Mut. Life Ins. Co., D.C., 37 F.Supp. 1018, 1023, the court rejected the plaintiff's contention that the disability of the insured continued "after his death, that he wasn't able to work, and that his condition was certainly permanent" saying that the best answer to the argument was that the insured was not disabled but dead, and that no one could misunderstand the difference between the two words.

[17] In section 661 there is "a positive requirement that the motion for a new trial shall be heard and determined by the judge who presided at the trial" with the exceptions expressly made in that section and none other. Litigants cannot stipulate to disregard its provisions. The word "shall" as used therein shows that "the clear intent of the Legislature was to use it in its mandatory sense." Francis v. Superior Court, 3 Cal.2d 19, 28, 29, 43 P.2d 300, 305.

[18] Respondents rely on sections 184 and 187 * of the Code of Civil Procedure

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* Sec. 184: "No proceeding in any court of justice, in an action or special proceeding pending therein, shall be affected by a vacancy in the office of all or any of the judges or justices thereof."

Sec. 187: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

to sustain the order. These are general provisions that do not modify the specific language of section 661, especially in view of the decisions construing the latter section and other similar statutory rules as mandatory.

Since (1) the death of the reporter did not authorize the granting of a new trial when that was not a statutory ground (Diamond v. Superior Court, supra), (2) "disability" of the reporter does not mean "inability" because of the loss of his shorthand notes (Laumann v. Conner, supra), and (3) "loss or destruction" of his notes is not applicable in a case where the reporter's whereabouts are unknown (Rambo v. Rambo, supra), it is manifest that only the *inability* or the *absence* of the judge who tries a case will vest jurisdiction in another judge to hear and determine a motion for a new trial.

[19] It is better to follow the terms used in the statute and to accord to them their ordinary definitions as found in lexicons and in the decisions of the courts than to attempt, by judicial legislation, to add words not used nor intended by the legislature or to supply meanings that are unsupported by any authority.

[20] From the foregoing discussion it follows that the demise of Judge Rhodes did not vest jurisdiction in another judge to hear and determine the motion for a new trial. Since the court was without jurisdiction to make the order purporting to grant the motion the order is void, the judgment is in full force and effect, and petitioner is entitled to have the purported order expunged from the records of the court and to have a writ of execution issued for the enforcement of the judgment. This conclusion renders it unnecessary to consider the other questions presented.

Respondents' demurrer to the petition is overruled, and a peremptory writ of mandate is ordered to issue as prayed.

MOORE, P. J., and McCOMB, J., concur.

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86 Cal.App.2d 202

INDUSTRIAL INDEMNITY EXCHANGE v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 13760.

District Court of Appeal, First District, Division 2, California.

June 15, 1948.

1. Workmen's compensation ⚷794

Employer may so limit scope of employee's duties that if he steps outside the scope thereof and undertakes to perform work which he is not employed to do, he is not acting within scope of his employment.

2. Workmen's compensation ⚷795

Where employee asked foreman for use of truck to get his working clothes and was told that no one but foreman could use truck and that foreman would later take employee to procure his clothing, death of employee from injuries sustained in accident which occurred when employee, after foreman's departure, took the truck, went after his clothes and then drove out of his way into town was not compensable, as beyond "scope of employment".

See Words and Phrases, Permanent Edition, for all other definitions of "Scope of Employment".

◆

Proceeding under the Workmen's Compensation Act by the Industrial Indemnity Exchange for review and annulment of a death benefit award by the Industrial Accident Commission in favor of June A. Mullen and others.

Award annulled.

Leonard, Hanna & Brophy, of San Francisco, for petitioner.

T. Groezinger and John A. Rowe, Jr., both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Petitioner, Industrial Indemnity Exchange, seeks review and annulment of a death benefit award to the widow and minor children of Arnold Mullen, deceased. The petition presents the single ground whether the facts support respondent commission's finding that the injury "arose out of" and "occurred in the course of" the employment.

The undisputed evidence is: The Roberts Dairy owned and operated two ranches in Marin County—the K Ranch where dairy operations were conducted, and the Murphy Ranch where Mullen had been employed as a tractor driver for three months prior to March 8, 1947. Vancour, foreman of the K Ranch, learning that Mullen, who was an experienced dairy hand, was not working because of the rain, drove over to the Murphy Ranch Saturday afternoon, March 8, and offered Mullen a job as a milker. It was agreed that Mullen was to start on Sunday evening, March 9 at 7 p. m. at the K Ranch. Vancour drove Mullen back to the K Ranch and told him he could sleep in the K Ranch bunk house. The next morining Mullen asked Vancour if he could borrow one of the trucks, refered to as the weapons carrier, to go to the Murphy Ranch for his working clothes. Vancour told him that no one was allowed to use the weapons carrier but himself, and that he was returning to the ranch at noon and would then take Mullen to the Murphy Ranch to procure his clothing. Vancour on returning to the K Ranch about noon found the weapons carrier overturned on the road about one mile from the ranch. Mullen who had been driving it was pinned underneath and died as a result of his injuries. Vancour learned from Ashbury, who accompanied deceased, that Mullen had taken the weapons carrier after Vancour's departure, had driven to the Murphy Ranch for his clothes and had then gone out of his way into the town of Inverness. Lundgren, part owner of the Roberts Dairy, testified that orders had been given that the weapons carrier was not to leave the ranch, and that the only person allowed to drive it was the foreman, Vancour. The reason for this order was that the vehicle was new, and the owners had had unfortunate experiences with other vehicles being taken off the ranch and damaged. The payroll records showed that Mullen was paid in full for his work at the Murphy Ranch. No account had been opened for him at the K Ranch at the time of his death.

[1] Our decision is controlled by the principle stated in Auto Lite Battery Corporation v. Industrial Accident Comm., 77 Cal.App.2d 629, 631, 176 P.2d 62, 63: "It is well settled in this state that an employer may so limit the scope of an employee's duties that if he steps outside the scope of those duties and undertakes to perform work which he is not employed to do he is not acting within the scope of his employment. San Francisco & S. Co. v. Industrial Acc. Comm., 201 Cal. 597, 258 P. 86; [Robert] Sherer & Co. v. Industrial Acc. Comm., 175 Cal. 615, 166 P. 318; Williamson v. Industrial Acc. Comm., 177 Cal. 715, 171 P. 797; Ruff v. Industrial Acc. Comm., 123 Cal.App. 168, 11 P.2d 17."

[2] In that case this court noted the distinction as to the liability of the employer between cases of injury of an employee while doing an act entirely outside the scope of employment and doing an act within the scope of employment in a forbidden manner.

There is no groundwork for such distinction here because the undisputed evidence shows that the injury occurred while the employee was acting both beyond the scope of his employment and in a forbidden manner. Our case is on a par with San Francisco & S. Railway Co. v. Industrial Accident Comm., 201 Cal. 597, 599, 258 P. 86, 87, where the reason for annulling the award was based on facts similar to what we have here, the Supreme Court saying: "The evidence is without conflict and shows beyond question that the captain was killed while engaged in work entirely beyond the scope of his employment; that it was done without the knowledge or consent of the employer, and was not a case of emergency which called the captain in his employer's interest to go beyond the scope of his employment." And see cases cited page 600 of 201 Cal., page 87 of 258 P.

Award annulled.

GOODELL, and DOOLING, JJ., concur.

86 Cal.App.2d 153

EAST COALINGA OIL FIELDS CORPORATION v. ROBINSON et al.

Civ. 7416.

District Court of Appeal, Third District, California.

June 11, 1948.

1. Corporations 🔑146

A corporation's secretary, having actual knowledge of assignment of interest in share of corporation's stock to one who subsequently transferred certificate therefor to such secretary, before whom instrument of assignment was acknowledged, took interest subject to assignee's superior equities, though no stock certificate was issued to assignee and assignment was never entered on corporation's books.

2. Executors and administrators 🔑167

An executrix, not being apparent owner of shares of corporation's stock, certificates for which stood in testator's name without endorsement, no title thereto passed to one to whom executrix sold shares without prior authorization or subsequent confirmation by court order. Civ.Code, §§ 330.1(c), 330.2; Probate Code, §§ 755, 771.

3. Executors and administrators 🔑167

One purchasing shares of corporation's stock directly from executrix of deceased owner's estate was charged with notice that sale was not authorized by prior court order and that no title would pass until sale was confirmed by probate court and could not plead innocence and good faith in corporation's action for declaration of ownership of its stock, so that any rights subsequently acquired could not rest on assertion of title in such purchaser as against estate or any superior rights to which it was subject. Probate Code, §§ 755, 771.

4. Executors and administrators 🔑167

An executrix being without power to make absolute sale of testator's corporate stock without prior probate court order authorizing sale or subsequent confirmation thereof, her sale thereof clothed purchaser only with indicia of ownership by endorsement of stock certificates and delivery thereof to him, so that no title to stock vested in him as against testator's estate. Civ.Code, § 330.19; Probate Code, §§ 755, 771.

5. Corporations 🔑149

An unimpeachable title to corporation stock may be transferred by one having no title thereto and vested in innocent purchaser thereof for value without notice of invalidity of sale.

6. Executors and administrators 🔑167

One to whom stock certificates, issued in lieu of certificates surrendered to corporation by parties who purchased them from executrix without authority to sell them, were subsequently transferred, acquired good title thereto, in absence of bad faith or actual notice of illegality of executrix's sale or inclusion of stock in assets of testator's estate.

7. Corporations 🔑149

The fact that stock certificate, transferred by purchaser of stock from executrix to one who in turn transferred it to another, indicated that it had been endorsed by executrix as such, did not impart constructive notice to last transferee of any defect in transfer nor impose duty on him to investigate circumstances thereof, where endorsement was regular on its face.

8. Corporations 🔑149

Under provision of Uniform Negotiable Instruments Act that when title of any person negotiating instrument is shown to have been defective, burden is on holder thereof to prove that he or some person under whom he claims acquired title as holder in due course, one to whom stock certificate was transferred by transferee of one purchasing it from executrix of deceased holder's estate, without prior authorization or subsequent confirmation of such sale by probate court, had burden of producing evidence of his good faith and lack of notice of defective title. Civ.Code, § 3140; Probate Code, §§ 755, 771.

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by the East Coalinga Oil Fields Corporation against C. Ray Robinson and others and J. Ben Brown and others for a declaration of the ownership of plaintiff's stock and determination of plaintiff's rights and duties, in which defendants Robinson and others filed cross-complaints to quiet title to shares of such stock issued to them as against other defendants' adverse claims and to enjoin assertion of such claims. Judgment for plaintiff and cross-complainants, and cross-defendants appeal.

Reversed.

N. Lindsay South and James C. Janijigian, both of Fresno, for appellants.

W. Eugene Craven, C. Ray Robinson and Margaret A. Flynn, all of Merced, for respondents.

PEEK, Justice.

Separate appeals by separate defendants have been taken from the single judgment entered in this case, the first of which, designated number 7404, 194 P.2d 561, is that of Jennie A. McArthur, this day decided, infra. The within appeal designated number 7416 is that of defendants J. Ben Brown, Cleone Brown Thompson, and Elsie T. Hawson as executrix of the estate of Henry Hawson, deceased, who claim title to various shares of stock of plaintiff corporation.

By its complaint plaintiff sought to have declared the ownership of its stock and a determination of its rights and duties, alleging that defendants (respondents herein) C. Ray Robinson, Herbert C. O. Clarke, William R. Schwinn, Leona Schwinn, Lottie Kelley and Winfred R. Schwinn are the only stockholders of record of its issued and outstanding stock of five shares; that no other shares had been issued, and that appellants, some of whom were designated by fictitious names, claimed some right, title or interest in or to the stock of plaintiff and demanded additional shares of stock be issued to them, The complaint alleged no defendant other than those designated as stockholders of record on the books of the corporation had any right, title or interest in the stock.

Respondents by their separate answers and cross-complaints admitted the material allegations of the complaint and denied that any controversy existed between them or that they claimed additional shares. Their cross-complaints contained substantially the same material as the allegations of the complaint. They likewise prayed that the other defendants be required to appear and that their adverse claims be determined; that respondents' title be quieted as against all adverse claims of the other defendants, and that such other defendants be enjoined from asserting any adverse claims thereto. All of the appellants answered denying the allegations of the complaint and cross-complaints, affirmatively alleging their title to such shares, and praying that title be quieted in them. At the conclusion of the hearing, the court found in favor of plaintiff corporation and respondents on each issue, and entered judgment accordingly declaring the rights of the respondents Robinson et al., and decreeing that appellants take nothing.

[1] The appellants J. Ben Brown and Cleone Brown Thompson contend that they are the owners of fractional interests in the one share of stock represented by certificate number 8 by reason of an assignment of such fractional interest to Brown by a separate instrument in writing dated September 29, 1921, executed by the then owner thereof, one W. J. Barnhart. The evidence is uncontradicted that no certificate of stock was ever issued to Brown and that the transfer was never entered upon the books of the corporation. Certificate number 8 was subsequently transferred to Henry Hawson on January 29, 1929, and after his death was included in the assets of his estate. Brown testified that when the instrument of assignment to him was acknowledged before Hawson, who was then secretary of the corporation and a notary public, Hawson stated, "'I will see that this is recorded on the books of the company, and that it will be entered on the minutes of the next regular meeting'". The discussion in appeal number 7404, 194 P.2d 561, with respect to passage of title to Hawson of the share represented by certificate number 5 claimed by Jennie McArthur is equally applicable to this transaction, and for the reason therein stated, Hawson, having had actual knowledge of

the prior assignment, took, subject to the superior equities of Brown, a fractional interest in the share represented by certificate number 8. The only questions remaining concern the validity of the sale of the stock by the executrix of Hawson's estate and the rights of subsequent purchasers.

In connection with the shares represented by certificates 5, 8 and 10 standing in the name of Henry Hawson, it appears that on February 28, 1936, Elsie Hawson, as executrix of said estate, by endorsement assigned the same to George Schwinn. It is undisputed that no order was obtained from the Probate Court authorizing such transfer or sale as provided by Probate Code section 771 and that there was no confirmation of said sale under Probate Code section 755.

The question then on this issue in the case is whether title passed to George Schwinn under such circumstances, assuming that he had no knowledge of such defect and made no inquiry concerning the authority of the executrix to make the sale.

Respondents, in support of their contention that the endorsement validly passed title to the purchaser, rely upon Civil Code section 330.1, subd. (c), which at the time of the transfer provided that:

"Title to a certificate and to the shares represented thereby can be transferred * * * (c) By delivery of the certificate with an assignment endorsed thereon or in a separate instrument signed by the * * * executor * * * or other person duly authorized by law to transfer the certificate on behalf of the person appearing by the certificate to be the owner of the shares represented thereby."

There can be no doubt that an executor is authorized to transfer shares by endorsement and delivery, provided that he is otherwise vested with such power. However, in determining whether an executor may so transfer title without prior authorization from the probate court or whether title will pass to the purchaser without a subsequent confirmation, section 330.1 must be read in connection with section 330.2 which provided that:

"Nothing in the transfer act shall be construed as enlarging or diminishing the powers of an * * * executor or administrator * * * to make a valid indorsement, assignment or power of attorney."

It would appear that the last quoted section can only be taken to mean that the power of an executor to transfer a valid title should not be affected by the passage of the act but would remain the same as it previously existed under the statutes and decisions until changed by the legislature.

Probate Code sections 755 and 771 at the time of the transfer herein of certificates numbered 5, 8 and 10 by Elsie Hawson, as executrix, read:

"Sec. 755: Except as provided by sections 770 and 771 of this code, all sales of property must be reported to the court and confirmed by the court before the title to the property passes. * * *"

"Sec. 771: Stocks * * * may be sold and title thereto passed without the necessity for confirmation, upon obtaining an order of the court * * *"

The only case cited by respondents in support of their contention that the transfer was valid, although no prior order of court was obtained or confirmation had, is Aronson v. Bank of America etc. Ass'n, 9 Cal.2d 640, 72 P.2d 548. A reading of that case, however, reveals that it is not in point on the question of passage of title. It arose on a demurrer to the complaint in an action by the sole heirs of an estate against the corporate defendant for damages for conversion of property of the heirs resulting from the acts of the corporation in canceling old certificates standing in the name of deceased on the endorsement of one or both of the administrators of said estate and issuing new certificates therefor, which certificates were then held in the estate as an asset thereof. In passing upon the question so presented the court held that although under the existing code sections title would not pass until the sale was sanctioned by the court and therefore title would remain in the estate, nevertheless there was no statutory provision requiring proof of confirmation of the sale before a transfer could be made on the books of the corporation. Thus as the new certificates were held by the administrators for the use and benefit of the plaintiff heirs the only question was the propriety of the transfer on the books of the corporation, which transfer the court found was not prohibited by any of the existing applicable statutes.

[2] Respondents in their brief further contend that upon the death of Henry Hawson his executrix became the "apparent owner" of the certificates and as such could transfer them to innocent purchasers for value without notice of any defect. In setting forth this argument, respondents apparently have drawn upon the language used in 11-B Cal.Jur. section 722 at page 111, wherein the writer of that text cites as examples of "apparent ownership" situations where the stock stands in the name of the executor or administrator or where the stock has been endorsed in blank by the owner before his death and subsequently comes into the hands of the executor or administrator. Obviously in such cases the executor or administrator being the holder of a bearer instrument could transfer title to an innocent purchaser. Civ.Code, sec. 330.5, 330.6. But such is not the situation here. The certificates stood in the name of Henry Hawson, unendorsed.

The executrix not being the apparent owner of the shares of stock it is clear under the authorities in this state that no title passed to the purchaser thereof without confirmation or prior order of the court. Wickersham v. Johnston, 104 Cal. 407, 38 P. 89, 43 Am.St.Rep. 118; Bovard v. Dickenson, 131 Cal. 162, 63 P. 162; Wells Fargo & Co. v. McCarthy, 5 Cal.App. 301, 90 P. 203. See also Off v. Russell, 16 Cal.App.2d 337, 60 P.2d 331.

[3] George Schwinn having purchased the shares directly from the executrix was charged with notice that the sale was not authorized by a prior order and that no title would pass until confirmed as provided in Probate Code section 755. As a participant in such transaction he cannot now plead innocence and good faith when the slightest investigation would have dispelled any ignorance thereof. Interstate Public Service Co. v. Weiss, 208 Ind. 122, 193 N.E. 226; 12 Fletcher Cyc. Corp. sec. 5548; See Wickersham v. Johnston, supra. Hence any rights subsequently acquired cannot rest upon an assertion of title in George Schwinn as against the estate of Henry Hawson or any superior rights to which the latter is subject. Nothing in the case of Aronson v. Bank of America etc. Ass'n, supra, conflicts with this conclusion but on the contrary the language of that decision supports such a result.

[4, 5] The executrix being without power to make an absolute sale without prior order of court or subsequent confirmation, her acts in such representative capacity could only clothe George Schwinn with the indicia of ownership by an endorsement of the certificates (Civ.Code, sec. 330.19) and delivery to him. Thus no title vested in George Schwinn as against the estate by reason of the invalid sale of the stock by the executrix. Nevertheless due to the peculiar characteristics of negotiable instruments, into which class stock certificates have been placed by the Uniform Stock Transfer Act, an unimpeachable title may be transferred and vested in an innocent purchaser for value and without notice by one having no title himself. Therefore it becomes necessary to determine whether under the facts so far as disclosed by the record herein respondent Robinson, the present record holder of the shares, is shown to be such a holder.

[6] The record shows that certificates numbered 5 and 10 were surrendered to the corporation by the respective parties who purchased them from George Schwinn and that respondent Robinson acquired title thereto by virtue of the subsequent transfer to him of new certificates issued in lieu of numbers 5 and 10. There was thus nothing appearing upon the face of these certificates themselves which would give notice of any prior illegal sale or that the shares had ever been included in the assets of any estate. Under similar circumstances it has been held that such a purchaser, without actual notice, acquires title to the shares as against any rights of the estate even though the executor's sale was illegal and void. Citizens' Street Ry. Co. v. Robbins, 128 Ind. 449, 26 N.E. 116, 12 L.R.A. 498, 25 Am.St. Rep. 445. It would follow that respondent Robinson acquired a good title to those

shares if there is any evidence to support a finding of good faith and lack of actual notice.

[7] As to certificate number 8, this certificate having been endorsed by Elsie T. Hawson, as executrix, to George Schwinn, was not surrendered and a new certificate issued but was transferred to one Charles E. Phillips who in turn transferred it to respondent Robinson. While the certificate indicated the fact that it had been endorsed by the representative of an estate in her capacity as such, this fact would not impart constructive notice of any defect in the transfer or impose upon one not a party to the executrix's sale a duty to investigate the circumstances of the transfer if the endorsement was regular on its face. Aronson v. Bank of America etc. Ass'n, supra. The only question then is whether there was actual notice of the void sale on the part of Robinson or those through whom he claims title.

[8] Respondent Robinson on appeal relies upon an alleged presumption that he acquired the certificate without notice of any defect in title, citing the Uniform Negotiable Instrument Act (Civ.Code, sec. 3140) which reads:

> "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. * * *"

In so contending said respondent rests upon the presumption contained in the first clause of said section, and argues that the title of no person who negotiated the instrument was defective. But by reason of the latter portion of said section, which respondent has failed to consider, and the evidence which shows that Henry Hawson acquired no title as against prior assignees, and that George Schwinn acquired no title on his own behalf as against the estate but was merely vested with apparent indicia of title by the representative, the argument must fail if the rule is at all applicable here as in the case of a negotiable note. Berger v. Steiner, 72 Cal.App.2d 208, 164 P.2d 559.

While no section comparable to said section 3140 is contained in the Stock Transfer Act, no reason appears why the same rule should not be applicable to the case of stock certificates as to negotiable instruments. We conclude that since prior holdings in the chain of title were shown by the evidence to have been defective, under the provisions of said section the burden was placed upon said respondent to go forward and produce evidence of good faith and lack of notice. Although the record herein is otherwise sufficient to support the judgment it discloses no affirmative evidence whatever on the issue of good faith, payment of value, or notice on the part of respondent Robinson concerning the void sale by the executrix or the claims of other parties to the shares of stock. The only evidence offered by respondents consisted of the records of the corporation and a stock certificate. It necessarily follows that the finding of the trial court that the certificates of stock held by respondents were acquired by them in good faith, for value, and without notice is therefore unsupported by any evidence in the record. Evidence cited by appellants to the effect that Robinson did have notice after purchasing the stock is beside the point.

For the foregoing reasons the case must be reversed in order that upon a retrial the cause may be properly determined in accordance with the views herein expressed, and it is so ordered.

ADAMS, P. J., and THOMPSON, J., concur.

86 Cal.App.2d 304

COOPER et al. v. SAN DIEGO ELECTRIC RY. CO. et al.

SAN DIEGO ELECTRIC RY. CO. v. CHAPMAN et al.

Civ. 3668.

District Court of Appeal, Fourth District, California.

June 18, 1948.

Rehearing Denied July 13, 1948.

Hearing Denied Aug. 12, 1948.

1. Automobiles ⚷244(3)

Where, according to bus driver's own testimony, she saw automobile, which was traveling at high rate of speed, about 100 feet away from intersection when bus was 20 or 25 feet from intersection, but she nevertheless drove bus into intersection without again looking in direction from which automobile was approaching until bus was so far into the intersection that a collision was inevitable, evidence sustained finding that bus driver was negligent, rendering bus company liable for damages to house into which bus ran after collision with automobile.

2. Damages ⚷138

In action against bus company, bus driver, and driver of automobile for damages to house which was struck by bus after bus collided at intersection with automobile, evidence established that damage to house was $1,210.45.

3. Trial ⚷397(2)

Where owners of house, struck by bus after bus collided at intersection with automobile, brought action against bus company, bus driver, and driver of automobile, and bus company filed a cross-complaint against owner and driver of automobile, trial court's finding, supported by evidence, that collision between automobile and bus was caused by concurrent negligence of all parties concerned, sufficiently supported judgment against bus company on the cross-complaint, and no separate or additional findings on issues raised by cross-complaint were necessary.

◆

Appeals from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by William J. Cooper and Daisy May Neal against the San Diego Electric Railway Company, a corporation, Rose Helen Tillery, and John Chapman to recover for damages to plaintiffs' house which was struck by a bus owned by the corporation and driven by Rose Helen Tillery, after the bus collided with an automobile driven by John Chapman, wherein the corporation filed a cross-complaint against John Chapman and Theodore M. Chapman, owner of the automobile, to recover for damage to the bus. From a judgment in favor of the plaintiffs against the defendants and in favor of the cross-defendants on the cross-complaint, the corporation appeals.

Judgment affirmed.

Huntington P. Bledsoe, of San Diego, for appellant.

S. G. North, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action for damages arising from a collision between an automobile and a bus. The plaintiffs owned a house at the northeast corner of the intersection of Webster and Thirty-first Streets in San Diego. On the afternoon of June 15, 1945, an automobile driven by the defendant Chapman and a bus owned by the defendant corporation and driven by the defendant Tillery, collided in this intersection. The defendant Tillery was knocked to the floor of the bus, leaving it out of control, and the bus ran over the curb and through a wall of the plaintiffs' house before it came to a stop.

This action was brought against these three defendants, the complaint alleging concurrent negligence on the part of the drivers of the two vehicles. All defendants filed general denials and the railway company and Tillery also alleged that the accident was caused by the sole negligence of Chapman. The railway company also filed a cross-complaint seeking to recover from Chapman, and the owner of the car he was driving, for the damage caused to the bus. The cross-defendants filed a general denial to the cross-complaint.

The court, sitting without a jury, found in favor of the plaintiffs awarding them a judgment against the defendants in the sum of $1210.45, and also found in favor of the cross-defendants awarding nothing to the railway company. The railway company and Tillery have appealed from the portion of the judgment which was in favor of the plaintiffs, and the railway company has appealed from the part which was adverse to it on its cross-complaint.

With respect to the judgment on the original action the appellants first contend that the evidence is insufficient to support the finding of negligence on the part of the operator of the bus. It is argued that the evidence shows that the collision was caused solely by the negligence of the driver of the automobile. His negligence clearly appears as he testified that he entered this intersection at a speed of about 20 miles an hour, that he looked neither to his right nor to his left, and that he did not see this bus until it was within three feet of him. However, there is also evidence which, with the reasonable inferences therefrom, is sufficient to sustain the finding of negligence on the part of the operator of the bus. She testified that she first saw the automobile when the front end of her bus was 20 or 25 feet west of the intersection and when the automobile was from 100 to 125 feet south of the intersection; that she next saw the automobile when she was slightly more than half-way through the intersection, when she saw the automobile coming on into the intersection at a terrific speed; that when she saw it the second time the automobile was coming at 40 to 45 miles an hour; that when she saw it the first time "he wasn't going quite that fast"; and that "I had seen it coming on down but I didn't seem to realize that he was coming so fast until he got right—it seemed to me he picked up speed, when he got to the corner there. He never slowed up any at all."

[1] This testimony supports the finding of negligence on the part of the bus driver and justifies the court's comment, in deciding the case, that according to the bus driver's own testimony she saw the automobile some 100 feet away from the intersection, and when the bus was some 20 or 25 feet therefrom; that the automobile was then going at a good rate of speed; that she proceeded into the intersection without again looking in that direction until she got so far that a collision was inevitable; and that "knowing that he is coming along at a good rate of speed, at least, she heedlessly proceeds right along without paying any more attention to him." There are also two pieces of evidence which would justify an inference that the automobile first entered the intersection, although the bus driver and another witness testified that the bus entered first. The most that can be said is that there is a conflict in the evidence and the usual rule applies.

[2] It is further contended that the evidence is insufficient to support the findings as to the amount of the damage to the house. Argument in this connection is based upon the fact that the building permit taken out for repairs to the house was in the amount of $300, and upon confusing and conflicting testimony given by the plaintiffs and by the contractor who did some of the repair work, with respect to where, how and when the various payments to this contractor were made. The evidence is entirely sufficient, however, to show that $1050 was paid to this contractor for making certain repairs made necessary by this accident, and that these were reasonably worth that amount. The court also allowed $160.45 as the reasonable value of other necessary repairs which had not yet been made. This last item is not directly attacked in the briefs. No insufficiency in the evidence in this regard appears.

[3] On the appeal from the adverse judgment on its cross-complaint the railway company contends that there is no evidence to show negligence on the part of its bus driver; that contributory negligence on its part was not made an issue under the cross-complaint and the answer thereto; and that the court erred in failing to make separate and distinct findings upon the issues raised by the cross-complaint and the answer thereto. The first of these points has heretofore been sufficiently covered. While contributory negligence on the part of the cross-complainant was not raised as an is-

sue by the answer to the cross-complaint, negligence on its part appeared from the testimony of its own witness, the bus driver, who was its agent and employee. As a result, it failed to prove facts which would entitle it to recover. The court's finding, supported by the evidence, that the collision was caused by the concurrent negligence of all parties concerned sufficiently supports the judgment against the railway company with respect to the cross-complaint, and no separate or additional findings were necessary.

The judgment and both portions thereof are affirmed.

GRIFFIN, J., aid MUSSELL, Justice pro tem., concur.

86 Cal.App.2d 161

EAST COALINGA OIL FIELDS CORPORATION v. ROBINSON et al.

Civ. 7404.

District Court of Appeal, Third District, California.

June 11, 1948.

Hearing Denied Aug. 5, 1948.

1. Appeal and error 🔑173(8)

On appeal from judgment for corporate plaintiff and certain defendants and cross-complainants in action to determine ownership of plaintiff's stock, contention, raised for first time by appealing defendant and cross-complainant, that plaintiff was bound by its secretary's acts and liable for damages resulting from his failure to enter assignment of half interest in share of stock to appellant on corporation's books, and respondents' answer that action for such damages would be barred by laches, need not be considered, where appellant did not seek damages, but merely prayed for declaration of her ownership of such interest and issuance of proportionate number of new shares of stock to her.

2. Actions 🔑6

Where damages for corporation's failure to issue new shares of stock, demanded by holder of half interest in one share, were not requested, and record did not show that stock certificates set forth in corporation's complaint, praying declaration of ownership of its stock, were not the only authorized outstanding shares thereof, superior court had no power to compel corporation to issue shares of stock in excess of authorized issue.

3. Corporations 🔑114

A transfer of shares of corporation's stock may be made as between parties thereto, in any lawful manner other than that provided by statute authorizing transfer thereof by indorsement and delivery of certificate and declaring transfer invalid, except as to parties thereto, until entered on corporation's books. Civ.Code 1929, § 324.

4. Corporations 🔑63, 114

Shares of corporation's stock are "personal property" transferable like any other such property as between parties to transfer.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Property".

◆

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by the East Coalinga Oil Fields Corporation against C. Ray Robinson and others, Ben Brown and others, and Jennie A. McArthur for declaration of ownership of plaintiff's stock and determination of its rights and duties, in which defendants Robinson and others filed cross-complaints to quiet their title to the stock as against the other defendants' adverse claims and enjoin assertion of such claims and defendant McArthur filed a cross-complaint to establish her ownership of a one-half share of stock and right to issuance of additional stock. From a judgment for plaintiff and defendants Robinson and others, defendant McArthur appeals.

Affirmed.

Courtney L. Moore, of San Francisco, for appellant.

C. Ray Robinson, Margaret A. Flynn and W. Eugene Craven, all of Merced, for respondents.

PEEK, Justice.

This is a companion appeal by Jennie A. McArthur from the judgment referred to in case Number 7416, supra, 194 P.2d 554, to which reference is made for a statement of the pleadings.

Appellant McArthur by her answers to the complaint and cross-complaint denied generally the allegations of each and affirmatively alleged that one Ira L. Goodrich, for a valuable consideration, sold to her on February 3, 1925, an undivided one-half interest in and to his one share represented by stock certificate No. 5 of said corporation; that the then secretary of said corporation, Henry Hawson, by an instrument in writing for and on behalf of said corporation, certified to the number of shares outstanding, the ownership of Goodrich in certificate No. 5, and that the assignment of an undivided interest to said defendant McArthur would be entered on the books of said corporation. She further alleged that plaintiff corporation was guilty of laches; that the officers of said corporation had knowledge of said assignment; that a large portion if not all of the money paid by her to Goodrich was used by and for the benefit of said corporation, and that it is now estopped to deny this defendant's title. The answer concluded with a prayer that she be decreed to be the owner of a one-half share of stock in said corporation, "and that should authority be obtained for an increase of the stock issue this defendant is entitled to have issued to her from the said corporation such numbers of shares as will equal one-half (½) of one-fifth (⅕) of the total number of shares issued by the corporation."

[1] Appellant's argument in support of her first contention: that the corporation was bound by the acts and liable for any damage resulting from the dereliction of duty by the secretary of plaintiff corporation who through carelessness or through fraudulent intent failed to enter the assignment from Goodrich to McArthur on the books of the corporation, is wholly without pertinence. It completely ignores the fact that appellant has not sued for damages but merely has prayed for a declaration that she is the owner of a one-half interest in one share of stock, and that, should authority be obtained by the respondent corporation for the issuance of further shares, she be issued a proportionate number of shares. It therefore becomes unnecessary to consider this contention, raised by appellant for the first time on appeal, or the answer of respondents thereto, which appears to be sound, that any such action for damages would be barred by laches.

Appellant's second contention is that when the transaction between herself and Goodrich took place it was not necessary to endorse the certificate in order to transfer title, and therefore she became a stockholder in the plaintiff corporation. Here it should be noted that appellant admits that the assignment, by Goodrich to her of a one-half interest in certificate number 5, and upon which she predicates her claim, was never endorsed on the certificate and was never entered on the books of the corporation nor was any certificate ever issued to her.

The circumstances by which said appellant claims title to one-half share of the stock of the corporation are as follows:

In 1925 certificate number 5 for one share of stock in plaintiff corporation stood in the name of and was owned by one Ira L. Goodrich. In February of that year Goodrich assigned and transferred a one-half interest in said share to appellant McArthur by a separate instrument in writing to which was appended a certification by Henry Hawson, then secretary of the corporation, that the assignment was duly entered upon the books and records of the corporation. It is admittedly the fact, however, that the assignment was never entered on the books and that no certificate was ever issued to appellant McArthur. Subsequently in March, 1930, Goodrich transferred this same share to Henry Hawson by an endorsement of the certificate and the transfer was entered on the books of the corporation. On February 28, 1936, certificate number 5 was endorsed by Elsie T. Hawson, as executrix of the estate of Henry Hawson, deceased, to George Schwinn, who endorsed and assigned the share to one Van Duyn. On September 2, 1938, certificate number 11 was issued to Van Duyn replacing certificate number 5. On October 8, 1938, Van Duyn endorsed certificate number 11 and transferred it to C. Ray Robinson, respondent herein, who, on November 15, 1938, surrendered certificate number 11 and was issued certificate number 19.

In this connection it should be noted that this appellant specifically admits that respondent Robinson is an innocent purchaser for value who acquired his stock in good faith and without knowledge of any fraud either by Goodrich or the secretary of respondent corporation.

[2] A corporation might be liable to respond in damages as an alternative for its failure or inability to issue the shares demanded. However, in the present case, damages were not requested, and, so far as is disclosed by the record, no showing was made that the certificates set forth and described in plaintiff's complaint are not the only authorized and outstanding shares of stock of plaintiff corporation. Under such circumstances the court would have no power to compel plaintiff to issue shares of stock in excess of the authorized issue. See Fletcher's Cyc. Corp. Sec. 5165.

Regarding the validity of the assignment in 1925 by Goodrich to McArthur, section 324 of the Civil Code then provided in part:

"* * * shares of stock * * * may be transferred by indorsement * * * and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation * * *."

At that time the by-laws of respondent corporation also provided in part:

"* * * no transfer [of stock] shall be valid until the surrender of the certificate and the acknowledgment of such transfer on the books of the company."

[3, 4] The case of Young v. Pedrara Onyx Co., 48 Cal.App. 1, 192 P. 55, upon which appellant primarily relies would be applicable and controlling if applicant were proceeding against Goodrich but such is not the situation here. In the cited case it was held that said section 324 was for the protection of the corporation and those who claim under persons to whom certificates were originally issued; that it merely provided a method whereby the transfer might be made but that it did not prohibit other means. In other words the method provided by statute was cumulative. Therefore as between the parties a transfer of shares of stock could be made in any lawful manner other than that provided by said section 324. Or, as the court therein stated, 48 Cal.App. at page 14, 192 P. 60: "Shares of stock are personal property, and there is no reason why, as between the parties, they cannot be transferred as any other personal property." Accord: Crocker v. Crocker, 84 Cal.App. 114, 257 P. 611.

The judgment is affirmed in so far as the interests of the defendant and appellant McArthur are concerned.

ADAMS, P. J., and THOMPSON, J., concur.

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86 Cal.App.2d 754

CADOTTE v. INDUSTRIAL ACCIDENT COMMISSION et al.

No. 13684.

District Court of Appeal, First District, Division 1, California.

June 16, 1948.

1. Workmen's compensation 🔑1764

Finding of Industrial Accident Commission that accident occurred because grader blades, being moved on a 6-wheel dolly, tilted due to dangerous practice of "barring" by employee, was supported by substantial evidence, thereby precluding award of compensation based upon willful and serious misconduct of employer.

2. Workmen's compensation 🔑1939

Findings of Industrial Accident Commission are not subject to review except insofar as they may have been made without any evidence whatsoever in their support.

3. Workmen's compensation 🔑1764

Where Industrial Accident Commission on substantial evidence found that accident was not caused by condition of platform on which employee was working at time of his injury, any consideration of willful and serious misconduct of employer as a ground for additional compensation by reason of defective platform was eliminated, notwithstanding that there was sufficient evidence of unsafe condition of platform to support a finding of willful misconduct, had commission so found.

4. Workmen's compensation 🔑939

It is not enough to prove negligence or even gross negligence on part of employer, in order to fasten liability for additional compensation to injured employee because of serious and willful misconduct, but there must be a willful disregard of consequences with injury to employee.

5. Workmen's compensation 🔑1795

Where employer's foreman admitted unsafe condition of loading platform on which employee was working at time of injury but Industrial Accident Commission found that such condition was not proximate cause of accident, discovery of additional witnesses to unsafe condition of platform did not require a rehearing.

6. Workmen's compensation 🔑1939

Conflict in evidence as to whether injured workman was suffering from a permanent disability or had sustained a complete recovery was for Industrial Accident Commission.

7. Workmen's compensation 🔑1417

Industrial Accident Commission cannot arbitrarily reject testimony of injured employee on question of pain and disability on ground that such is a subject to be discussed only by medical men.

8. Workmen's compensation 🔑1939

Courts must affirm an award of Industrial Accident Commission without weighing conflicting evidence if commission's findings are supported by competent, substantial evidence.

9. Workmen's compensation 🔑1939

Doctrine of "res ipsa loquitur" does not apply to the examination of scar on foot of compensation claimant so as to compel court to assume that scar constitutes a permanent disability as a matter of law.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

10. Workmen's compensation 🔑1694

Where record indicated that there was only one suggestion early in the hearing, that referee look at claimant's injured foot, that referee directed examination of claimant by physician, that claimant did not controvert physician's report indicating complete recovery and allowed report to be submitted without renewing request for examination, refusal of referee to look at foot was not unreasonable or denial of any of claimant's rights. Labor Code, § 5704.

11. Workmen's compensation 🔑1313

In light of record, reference of compensation claimant to physician, who had previously examined him, for a report on re-examination without also having claimant examined by a doctor on staff of Industrial Accident Commission to check physician's findings, as allegedly requested by claimant's attorney, was not an abuse of discretion vested in referee.

12. Workmen's compensation 🔑1375

Compensation claimant has burden of proving his disability. Labor Code, § 5705.

13. Workmen's compensation 🔑1761

Finding by Industrial Accident Commission that any disability suffered by claimant after a specified date was not caused by injury was construed as having been intended to be a finding that all of claimant's claimed disability resulting from accident terminated on such date and not as barring claimant from asserting any claim for effect of injury which might subsequently result. Labor Code, §§ 5803, 5804, 5410.

Original proceeding on the petition of Leo J. Cadotte to review and annul two orders of the Industrial Accident Commission which respectively denied petitioner any award of compensation for permanent disability and denied him any additional compensation upon his claim that injury was caused by serious and willful misconduct of employer, opposed by State Compensation Insurance Fund, insurer, Valley Express Company, Inc., employer, and Valley Motor Lines, Inc.

Awards affirmed.

Arthur L. Johnson, of San Jose, for petitioner-appellant.

T. Groezinger and Robert Ball, both of San Francisco, for respondents.

BRAY, Justice.

Petition to review and annul two orders of the Industrial Accident Commission, the first of which denied petitioner any award of compensation for permanent disability, and the second of which denied him any additional compensation based upon his claim that his injury had been caused by the serious and wilful misconduct of the employer.

Having in mind the rule that this court is not permitted to interfere with findings which are based upon conflicting evidence or conflicting inferences which may be fairly deduced therefrom, and that the sole duty of this court is to determine whether there is substantial evidence, including permissible inferences, to support the findings of the commission (California Shipbuilding Corp. v. Industrial Acc. Comm., 27 Cal.2d 536, 165 P.2d 669), petitioner contends, first, that the commission acted without or in excess of its powers, and secondly, that the order, decision, or award was unreasonable.

The Commission Did Not Act In Excess Of Its Powers.

[1] Petitioner was employed as a truck driver by respondent Valley Express Company, for whom respondent State Compensation Insurance Fund was the compensation insurance carrier. On July 16, 1946, petitioner and three fellow employees were moving 15 grader blades on a 6-wheel dolly along a temporary, makeshift loading platform or dock. The blades were large and weighed about 2800 pounds. It is unnecessary to go into the details of the accident. Suffice it to say that there was substantial evidence which would support a finding that the accident was due to the unsafe condition of the platform, and there was also substantial evidence which would support the finding that the load tilted due to "barring," causing the load to "slither" off, carrying petitioner with it to the ground. This was the finding of the commission, and under the rule above mentioned we are bound by that finding.

[2] The evidence of the witness Scott that petitioner was "barring" the load at the time of the accident, coupled with that of the witness Trenholm that the flooring was in position after the accident and that of the witness Frasher that it was unsafe to "bar" a load as heavy as this one, was substantial support for the commission's finding, even though petitioner explained that he was using the bar under the dolly, but not under the blades. There was no testimony other than this as to how the accident happened, except that of the petitioner who at first stated that the dolly "must" have struck a pebble and then later stated that there "must" have been a soft spot in the platform. "The findings themselves are not subject to review except insofar as they may have been made without any evidence whatsoever in their support." Ethel D. Co. v. Industrial Acc. Comm., 219 Cal. 699, 706, 28 P.2d 919, 922.

The exact cause of the accident becomes important only on the question of wilful and serious misconduct hereafter discussed, as the liability of the respondents for the injuries to petitioner was admitted, the commission made an award for temporary disability, and the carrier supplied petitioner with medical services.

[3] While there may have been sufficient evidence of the unsafe and dangerous condition of the platform (the foreman testified that it was in that condition) to support a finding of serious and wilful misconduct, had the commission so found, the commission's finding that the accident was not caused by the condition of the platform, based as it is on substantial evidence, elim-

inates any consideration by this court of wilful misconduct. "* * * the questions of the weight of the evidence and the credibility of the witnesses are for the commission, and, if there is any evidence or reasonable inference which will support the commission's finding, the reviewing court has no power to disturb it." Nielsen v. Industrial Acc. Comm., 220 Cal. 118, 122, 29 P.2d 852, 854.

[4] Petitioner contends that the doctrine of res ipsa loquitur applies to this issue. However, he cites no cases, and we have been unable to find any, supporting such a novel contention. He is apparently confusing wilful misconduct with ordinary negligence, in which case res ipsa loquitur may apply. "It is not enough to prove negligence or even gross negligence on the part of the employer in order to fasten the added liability [of wilful misconduct] on it. In addition there must be a wilful disregard of consequences with injury to the employee as a probable result." Central California Ice Co. v. Industrial Acc. Comm., 66 Cal.App.2d 339, 346, 152 P.2d 33, 36.

[5] In his petition for rehearing petitioner stated that he had discovered four additional witnesses who would testify as to the "positively unsafe condition" of the platform. This evidence would have been merely cumulative of a condition which the foreman admitted, but which the commission found was not a proximate cause of the accident.

[6] Petitioner contends that he was deprived of due process of law because the commission refused to weigh or consider his own testimony as to pain and disability, and, in fact, completely disregarded it. There is nothing in the record to support this contention. He sustained several injuries, the most serious of which was to his left foot and ankle. After medical treatment he returned to work. Shortly thereafter he filed an application for further disability. Additional treatment was given and an operation had on his foot. The main injury he received which he now claims is permanent, in addition to a weak and painful ankle, is the injury to the sole of his foot. He claims to have a "ridge" on the bottom of his foot, running lengthwise in front of the instep where his foot hits the clutch pedal of a truck or automobile, bothering him in his work, causing pain when walking, and which will cause him pain the rest of his life. Dr. Mullen, the respondents' physician who took care of petitioner and who operated for two blood clots on the bottom of his foot, stated that the scar on the bottom of petitioner's foot "is firm, smooth, not elevated, and is painless. There is no longer any evidence of any induration [hardness]. He wears his shoe without difficulty and bears weight in a similar fashion." He further stated that petitioner was free from any disability resulting from the accident. Dr. Staub stated that "Recovery was complete with no residuals remaining."

The commission had before it the testimony of petitioner, on the one hand, that there was a "ridge" which was painful, and would continue so, constituting permanent disability, and on the other hand, the testimony of a medical witness that there was no hardness in the scar and that it was not painful, and that of two medical witnesses that there was no permanent disability due to the scar. We cannot say as a matter of law that the commission must accept the testimony of a petitioner as to pain and disability as against that of a medical man, or vice versa. The testimony of each must be considered by the commission and the conflict must be resolved by it. When that is done, this court may not interfere.

[7] However, petitioner contends that the commission refused to consider at all the testimony of the petitioner on this subject, considering it a subject to be discussed only by medical men. Were this true, the commission would have acted improperly. County of Los Angeles v. Industrial Acc. Comm., 14 Cal.App.2d 134, 137, 57 P.2d 1341; Employers' Liability Assur. Corp. v. Industrial Acc. Comm., 42 Cal.App.2d 669, 109 P.2d 716. But there is nothing in the record supporting this claim. The basis for the contention lies in a phrase in the "Report of Referee on 'Order Denying Applicant's Petition for Rehearing.'" Incidentally, this report is by a different referee than the one upon whose report the commission based its findings and award.

In recommending to the commission that the petition for rehearing be denied, and in commenting on the contention made by petitioner therein, that the evidence does not justify the finding that the injury caused no permanent disability, the report states: "Apparently, according to applicant's argument, medical evidence, which he did not seek to contradict by like evidence, should be disregarded in favor of the unsupported self-serving testimony of the applicant as to purely subjective symptoms." Petitioner contends that this is a statement that the commission in its earlier action refused to consider the testimony of petitioner on the theory that only that of medical men would be regarded. It is obvious that the phrase does not bear the construction given it. The second referee is merely pointing out that petitioner's contention is that a petitioner's testimony as to subjective symptoms must be accepted as against contrary medical opinion. Such, of course, is not the law. It is for the commission to decide where there is a conflict, which to believe.

[8] But assuming that it was the erroneous opinion of the second referee that the question was one which must be based on expert testimony, this court cannot assume that such was the opinion of the commission. There is nothing in the record at the time the findings and award were made to justify such assumption, and if it be that petitioner is claiming that the commission denied his request for a rehearing because of such opinion, there also is nothing to justify such contention. The action is not that of the referee, but of the commission, and if its action finds support in the evidence, that ends the case so far as this court is concerned. Liberty Mut. Ins. Co. v. Industrial Acc. Comm., 73 Cal.App.2d 555, 166 P.2d 908.

The Order or Award Was Not Unreasonable.

That the action of the commission was not unreasonable is shown by the foregoing. In the opinion of the commission the petitioner had fully recovered from his partial disability. Part of the unreasonableness claimed is that the commission denied the petition for rehearing. It is contended that the refusal of the referee to look at petitioner's foot at one of the hearings required the granting of a rehearing.

[9] Petitioner testified that the scar on the sole of his foot is "like a pencil, long ways in the foot, there is a ridge in there," that it is hard and painful. Dr. Mullen stated that while there is a slight thickening in the plantar [sole] fascia, there is no nodulation (lump or rounded mass), and no permanent disability. Petitioner contends that in view of this contradiction between petitioner and the doctor, the failure of the referee to see the condition for himself was serious. In fact, petitioner contends that the doctrine of res ipsa loquitur would have applied had the referee examined the foot as requested. Again, no authority is cited for this rule of law, and we know of none which compels this court to assume that a scar or thickening of the sole of the foot constitutes a permanent disability as a matter of law.

[10] So far as the failure of the referee to look at the foot is concerned, petitioner magnifies the incident far beyond its proper significance. Early in the hearing (page 5 of 31 pages of petitioner's testimony; page 13 of the return) the following occurred: "[Referee] Q. Your left foot? [Petitioner] A. Yes. If you care to see it— [Referee] Q. No. How does it bother you?" No other suggestion was made that the referee look at the foot. At the end of the hearing at which this occurred, petitioner was directed to be examined by Dr. Mullen. Thereafter he was so examined, and Dr. Mullen reported as above set forth, a copy of which report was received by petitioner. Petitioner made no attempt to attack or controvert the Mullen report, although such right was available under Labor Code, § 5704. Thereafter the cause was submitted without any request that the referee inspect the foot. In view of this record we cannot say that the refusal of the referee (if the incident can be dignified as a refusal) to look at the foot constitutes a deprivation of any of petitioner's rights.

[11] The same situation applies to the contention that petitioner's request that the commission's doctor be allowed to examine him to check Dr. Mullen's report was refused. While petitioner was testifying the

following occurred: The attorney for the State Fund said:

"I think you ought to go back to Doctor Mullen? A. I will go to either one.

"Referee: Well, maybe Mr. Neely, he might go out to some one else? A. I have no faith in Dr. Staub, the insurance company doctor at San Jose; he operated on my foot the first time, and it was right in the ball of the foot, which has formed into a callus now.

"Q. How do you get along with Doctor Mullen? A. Very good—he is a very good doctor.

"Q. Do you want to go back to him?

A. Yes, that is all right with me."

The only reference in the record to any request that the commission's doctor be brought into the proceeding occurred at the end of the hearing when the attorney for the employer (not the petitioner) said: "I just want to ask before you close whether Mr. Cadotte could be examined by the Commission, or examined by Dr. Mullens?" The referee then stated: "Apparently the man was satisfied with Doctor Mullens, and there are doctors on the Commission's staff, but if he is satisfied he can go there." The attorney for petitioner said: "Is that on the question of the permanent disability?" and made no suggestion whatever that the petitioner be examined by the commission's doctor or that Dr. Mullen's report when given be checked, nor did he object in any way to the examination to be made by Dr. Mullen.

[12] The petition contains the following: "* * * refusing the Applicant's request, through his attorney, that the Commission's doctor be allowed to examine him to check on Dr. Mullen's report, the Referee stating: 'That won't be necessary. The Applicant states that he has confidence in Dr. Mullen and I can see no reason for prolonging the matter.'" We are unable to find any such request of petitioner or any such statement of the referee in the record. However, assuming that this incident took place, we cannot say, under all the circumstances of this case, that the referee abused the discretion vested in him. Especially is this so in view of the fact that the burden of proving his disability was on the petitioner. Labor Code, Sec. 5705; Nelson v. Industrial Acc. Comm., 55 Cal.App. 681, 204 P. 23.

[13] In the "Findings of Fact" the following appears: "Any disability suffered by applicant after June 1, 1947, was not caused by the injury herein." Petitioner contends that this finding forever bars him from asserting any claim for effects of the injury which might hereafter result. While the language is unfortunate, it is apparent that no attempt is being made to bar him from future claims. It is obvious that what is intended is a finding that all of petitioner's claimed disability resulting from the accident terminated on June 1st. No finding of the commission could have the effect claimed by petitioner. Labor Code, §§ 5803, 5804, 5410; State Compensation Ins. Fund v. Industrial Acc. Comm., 73 Cal. App.2d 248, 166 P.2d 310.

The awards are affirmed.

PETERS, P. J., and WARD, J., concur.

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86 Cal.App.2d 173

ROSE v. SUPERIOR COURT IN AND FOR SAN JOAQUIN COUNTY et al.

Civ. 7476.

District Court of Appeal, Third District, California.

June 14, 1948.

Rehearing Denied July 12, 1948.

Hearing Denied Aug. 12, 1948.

1. Certiorari 🔑29

Certiorari will lie to annul proceedings of inferior tribunal only if such tribunal has exceeded its jurisdiction, and not to review errors of law and fact committed by inferior tribunal. Code Civ.Proc. § 1068.

2. Habeas corpus 🔑46

Superior court has jurisdiction to entertain an application for writ of habeas corpus for purpose of obtaining custody of a minor child.

3. Habeas corpus ⚿25(2)
Judgment ⚿815

Habeas corpus is proper procedure to release minor child from illegal restraint and to determine matters of custody, and, if custody has been awarded by decree of competent tribunal, writ is available to compel delivery of child to party declared entitled to such custody, and comity requires that judgments of sister states in regard to custody be recognized.

4. Habeas corpus ⚿114

Certiorari would not lie to annul order of superior court within its jurisdiction in habeas corpus proceeding decreeing that grandparents, as adoptive parents, were entitled to custody of minor child and ordering mother to deliver child to them. Code, Civ.Proc. §§ 1068, 1074.

◆

Certiorari proceeding by Inez Rose against the Superior Court of the State of California in and for the County of San Joaquin and others to annul a writ of habeas corpus and all proceedings connected therewith.

Writ of certiorari discharged.

Chas. H. Epperson, of Stockton, for appellant.

C. P. Rendon, of Stockton, for respondent.

SCHOTTKY, Justice pro tem.

Petitioner herein filed a petition for a writ of certiorari whereby she sought to have annulled a writ of habeas corpus and all proceedings connected therewith in a habeas corpus matter heard in the Superior Court of San Joaquin County. A writ was issued by this court commanding the respondent Superior Court to certify and return to this court a complete record of the proceedings in said habeas corpus matter.

Briefly stated the facts as they appear from the record are as follows:

Petitioner is the mother of one Donald Evans Washington, also called Donnie Evans Mercer, a child about eight years old. The child was born in Kentucky and the mother of the child, petitioner herein, was abandoned by her then husband at the time of the child's birth. When only a few months old the child was adopted by R. H. Mercer and his wife, Sue Mercer, the parents of petitioner herein, petitioner and her husband, the father of the child, having contested thereto. At that time petitioner and the child resided with her said parents in Kentucky, and the child continued to reside with said parents of petitioner until May of 1947, when he was brought to California by petitioner. The parents of petitioner, who are grandparents of the child and parents under the adoption proceeding, claimed that the child was brought to California with their permission upon petitioner's promise to return him to Kentucky at the end of three months. Upon the refusal of petitioner to return the child, her parents, R. H. Mercer and Sue Mercer, sent a representative to Stockton where petitioner resided with said child and filed in the Superior Court of San Joaquin County a petition for a writ of habeas corpus in and by which they sought to have the child returned to them. Petitioner herein filed a traverse in said habeas corus proceeding, and also filed in the Superior Court of San Joaquin County an independent action in which they attacked the decree of adoption which had been entered in Kentucky as being fraudulent and void.

The hearing of the habeas corpus proceeding extended over several days. Petitioner herein attended with the child on the first day, but did not attend thereafter and on October 17, 1947, the court issued a writ of apprehension for the production of the child in court. On October 21st, the hearing having been concluded, the court made its order decreeing that the infant, Donnie Evans Mercer, was illegally restrained of his liberty by Inez Rose, petitioner herein, and that R. H. Mercer and his wife, grandparents and adopted parents of the child, were entitled to the custody of the child and ordering Inez Rose to deliver the child to them. Thereafter on October 27th Inez Rose filed in this court her petition for a writ of certiorari.

[1] As was said by our Supreme Court in Estrin v. Superior Court, 14 Cal.2d 670, at page 674, 96 P.2d 340, at page 342:

"It is well settled that the writ of certiorari will not lie unless it can be said that the inferior tribunal has exceeded its jurisdiction. Code Civ.Proc. § 1068. As was said in the case entitled Howe v. Superior Court, 96 Cal.App. 769, 772, 274 P. 992, 993, 'The writ of certiorari is an extraordinary remedy, equitable in its nature, the issuing of which rests in the sound discretion of the court.' It lies only when the final determination of an inferior court, tribunal, or board is in excess of its jurisdiction. 'The language of the section (Code Civ.Proc. § 1068) limits it to cases where the tribunal "has exceeded" its jurisdiction.' Holabird v. Railroad Commission, 171 Cal. 691, 694, 154 P. 831, 832; Sayers v. Superior Court, 84 Cal. 642, 24 P. 296.

"To the same effect is the case entitled McLaughlin v. Industrial Accident Comm., 87 Cal.App. 469, 470, 262 P. 53, where the court said: 'In order that relief by certiorari may be granted, there must have been an excess of jurisdiction by a tribunal exercising judicial functions; and an excess of jurisdiction is to be distinguished from errors of either law or fact committed by a judicial tribunal within the limits of its jurisdiction. In the Matter of Hughes, 159 Cal. 360, 363, 113 P. 684; Karry v. Superior Court, 162 Cal. 281, 122 P. 475, 128 P. 760.' See, also, authorities cited in Vol. 3, Cal.Jur. 10-yr. Supp. p. 363.

"Likewise, in the case entitled Monreal v. Bush, 46 Cal. 79, it was said (syllabus) that, 'Certiorari does not lie to review an erroneous judgment which the Court below *had jurisdiction to render*', and it was there held that rendition of a judgment for a demand which was not due when the action was commenced was not an act in excess of jurisdiction, but was merely error in the exercise of jurisdiction. (Italics added.)

"In the case of Karry v. Superior Court, 162 Cal. 281, 284–286, 122 P. 475, 476, 128 P. 760, the distinction between error in the exercise of jurisdiction and a judgment rendered in excess of jurisdiction is discussed. In that case the court said, 'a court has jurisdiction to decide wrongly as well as correctly; and the only remedy of a party aggrieved by a merely erroneous decision is such as may be afforded by our statutory provisions relating to motions for a new trial and appeals. If no such remedy be given, the action of the trial court, *within its jurisdiction,* is conclusive. * * * We have here no different case in principle form the one we would have if the action had been one of a promissory note for $100, appealed to the superior court, and not only the answer and the uncontradicted evidence, but also the findings, showed that the note had been fully paid, and nevertheless the superior court had given judgment in favor of the plaintiff for the full amount of the note. Such a judgment would, of course, be erroneous; but there would have been no excess of jurisdiction, and the aggrieved party would have been without any remedy by way of certiorari. A judgment that fails to accord to a party his legal rights is, of course, always to be regretted. But there must be a point in every proceeding beyond which the law will not permit further controversy as to the merits of the case. In actions of the character of the one under consideration, * * * the final appellate jurisdiction is in the superior court. Even if the judgment of that court on the merits was clearly erroneous in this case, a question we do not decide, it is final and conclusive; no excess of jurisdiction being made to appear.' See, also, to the same effect, Borchard v. Board of Supervisors, 144 Cal. 10, 14, 77 P. 708."

In re Hughes, 159 Cal. 360, at page 363, 113 P. 684, 686, the Court said:

"But this is not an appeal from the decision in the habeas corpus case. No appeal lies from a judgment, given in a proceeding in habeas corpus. In re Perkins, 2 Cal. [424], 430; People v. Schuster, 40 Cal. 627. This is an application for a writ of review or certiorari. The Supreme Court has jurisdiction in certiorari to review a judgment of the superior court only in a case where that court has exceeded its jurisdiction (Code Civ.Proc. § 1068), and in such cases only for the purpose of inquiring whether or not the judgment sought to be reviewed was in excess of jurisdiction, or, as the code expresses it, 'the review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.' Code Civ.Proc. § 1074. If such tribunal has regularly pursued its authority, our inquiry stops. We cannot consider or correct errors of law committed by the inferior court in the exercise of its authority on the merits of the cause it has jurisdiction to entertain and decide. No matter how erroneous that decision may be, even on the face of the record, we have no power to change, annul, or reverse it in this proceeding, if that court had jurisdiction to act in the matter before it. This has been repeatedly stated in former decisions of this court."

The Court also stated, 159 Cal. at page 366, 113 P. at page 687:

"The conclusion necessarily follows that we have no power in a proceeding in certiorari, to annul a judgment of the superior court, or an order of a judge thereof, regularly made after obtaining jurisdiction of the parties, discharging a prisoner lawfully committed to the state prison upon conviction of a crime. There appears to be no lawful method of reviewing such judgment or order, however erroneous it may be. If such review is desired, it can be provided only by legislative act authorizing an appeal by the state or some other mode of annulling such judgment of discharge."

[2,3] That the Superior Court has jurisdiction to entertain an application for a writ of habeas corpus for the purpose of obtaining the custody of a minor child is well established by numerous decisions. In 13 California Jurisprudence, page 251, it is stated:

"Habeas corpus is the proper procedure to release an infant from all manner of illegal restraint and to determine matters of custody. Thus, the writ is available to determine whether one who has custody without authority of legal proceedings is entitled to such custody and to release the child if the restraint is found to be unlawful; and the writ will lie even though such person no longer has custody, if he has secreted the infant in anticipation of the writ, and it appears that the child may be produced. If custody has been awarded by a decree of a competent tribunal the writ is available to compel the delivery of the child to the one declared entitled to such custody, and comity requires that the judgments of sister states in this regard be recognized."

[4] It is clear, therefore, that the Superior Court of San Joaquin County did not exceed its jurisdiction in making the orders sought to be annulled and under the authorities hereinbefore set forth this court is without power in this proceeding to vacate and annul said orders.

In view of the foregoing, the writ of certiorari heretofore issued by this court should be and the same is hereby discharged.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER, J., dissenting.

86 Cal.App.2d 204

PEOPLE et al. v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR CITY & COUNTY OF SAN FRANCISCO et al.

Civ. 13838.

District Court of Appeal, First District.
Division 2, California.
June 15, 1948.

1. Dismissal and nonsuit 🔑60(1)

The duty of the court to dismiss an action which has not been brought to trial within five years unless the facts furnish a legally sufficient excuse for the delay is mandatory. Code Civ.Proc. § 583.

2. Mandamus 🔑43

Mandamus lies to enforce the mandatory duty of court to dismiss an action which has not been brought to trial within five years unless the facts furnish a legally sufficient excuse for the delay. Code Civ. Proc. § 583.

3. Continuance ⟹9
Dismissal and nonsuit ⟹60(6)

Where action was filed on January 14, 1942, and case was dropped from calendar at suggestion of defendant's attorney to await decision of certain cases pending in Supreme Court and such cases were decided on July 5, 1944, and in November, 1944, there was an exchange of letters between counsel concerning a possible compromise, exchange of letters was not a "stipulation in writing" to extend time for trial and there was no legal excuse for failure to bring action to trial within five years and motion to dismiss on account thereof made on October 30, 1947, should have been granted. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Stipulation in Writing".

4. Dismissal and nonsuit ⟹60(3)

The burden of bringing an action to trial within five-year period provided by the Code of Civil Procedure is upon plaintiff, and failure of Attorney General to communicate further with plaintiff's attorney about the proposed compromise furnished no ground, for failure to bring action to trial within such period. Code Civ. Proc. § 583.

◆

Petition by the People of the State of California and California Employment Stabilization Commission, etc., for a writ of mandate to compel the Superior Court of the State of California in and for the City & County of San Francisco, Honorable Thomas M. Foley, Judge, to dismiss an action for failure to bring the case to trial within five years after the filing of complaint.

Peremptory writ of mandate directed to issue.

Fred N. Howser, Atty. Gen., Charles W. Johnson, Deputy and William L. Shaw, Deputy, for appellants.

Alfred F. Breslauer, of San Francisco, for respondents.

DOOLING, Justice.

Petition for writ of mandate to compel the trial court to dismiss an action pursuant to Code of Civil Procedure section 583 for failure to bring the case to trial within five years after the filing of the complaint. The complaint was filed January 14, 1942. A motion was made on October 30, 1947, to dismiss the action which was denied by the respondent court on November 5, 1947.

[1, 2] Under Code Civ.Proc. sec. 583 the duty of the court to dismiss where the action has not been brought to trial within five years, unless the facts furnish a legally sufficient excuse for the delay, is mandatory and its performance may be enforced by writ of mandate. Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 219 P. 1006; Bank of America National Trust & Savings Ass'n v. Superior Court, 84 Cal. App.2d —, 189 P.2d 799; Elmhurst Packers v. Superior Court, 46 Cal.App.2d 648, 116 P.2d 487.

The affidavit in opposition to the motion to dismiss shows the following: that prior to July 5, 1944 certain cases were pending in the supreme court involving questions of law which might be controlling in the instant case and that this case was dropped from the trial calendar at the suggestion of defendant's attorney to await the decision of those cases; that those cases were decided on July 5, 1944; that thereafter on November 16, 1944 counsel for plaintiffs wrote a letter to the deputy attorney general in charge of the case for defendant suggesting a basis of compromise; that on November 27, 1944 this deputy replied by letter stating: "We shall look over our file in the above matter and advise you of our conclusions shortly"; that nothing further was heard from the office of the attorney general and on July 24, 1947 counsel for the plaintiffs wrote another letter to the attorney general's office referring to his letter of November 16, 1944 and renewing the offer of compromise.

[3] The last letter was written well after the expiration of the five year period and may be disregarded. The other facts, under the decisions, show no legal excuse for failure to bring the action to trial within five years. The only legal justification provided in the statute for such failure is a stipulation in writing extending the time of trial. (See Stats.1933, p. 853; Stats.

1945, p. 2460.) We may disregard the 1947 amendment under which the stipulation in writing is now required to be filed. (Stats. 1947, p. 1715.) The exchange of letters concerning a possible compromise is not a stipulation in writing to extend the time of trial. In Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 340, 219 P. 1006, 1008 it was said:

> "The provision that a written stipulation be entered into was intended to preclude all disputes, with their attendant charges and countercharges of overreaching and unethical conduct, by a requirement that clear and uncontrovertible evidence be presented to the court that the statutory time was deliberately intended to be extended by both parties.
>
> "If it be a 'serious question' whether an oral stipulation in open court entered upon the minutes of the court in terms extending the statutory period and thereby expressing recognizing the fact of defendant's right to a dismissal and a waiver of such right would suffice to satisfy the requirements of this section, surely it cannot be said that the mere insistence of the counsel for the defendants that the Turner case precede the other three actions did satisfy the requirements of the section. Such an insistence falls far short of attaining the dignity of an oral stipulation in open court, and certainly does not come within the category of written stipulations. The waiver of defendants' rights to dismiss and a consent to an indefinite continuance can only be implied or inferred from such conduct. To hold that this inferential consent is the same as a written stipulation would be to give to this section a strained construction, which, while it might relieve the harshness of the result in these particular cases, would be to render futile the salutary provisions of this section intended to secure preciseness of practice and procedure. The very harshness of the rule would seem to be intended to put the plaintiff on the qui vive to secure irrefutable evidence of the defendant's consent to an extension of the statutory time."

Similarly in Bank of America National Trust & Savings Ass'n v. Superior Court, supra, 84 Cal.App.2d —, 189 P.2d 801, we find the following: "There is a reference to a period during which the respective attorneys either personally or by letter attempted to agree on a statement of facts upon which the case should be submitted, but there is no contention that defendant lulled plaintiff into a sense of security or practiced fraud in agreement on continuances for trial. If sound, this contention would give ground to a claim of estoppel. This does not appear to be a proper ground for making an exception to Code of Civil Procedure, sec. 583. In Christin v. Superior Court, 9 Cal.2d 526, at pages 529, 530, 71 P.2d 205, at page 207, 112 A.L.R. 1153, the court considers the contention made by respondent that petitioners' acts 'inducing the plaintiff to allow the cause to go off calendar pending negotiations for settlement, justifies the application of the doctrine of estoppel. * * * But estoppel resulting from such conduct does not appear to be a proper ground for creating an exception to the terms of the statute. See Miller & Lux v. Superior Court, 192 Cal. 333, 339, 219 P. 1006.'"

Legal justification for failing to bring a case to trial within the five year period has been found in some cases where going to trial is "for all practical purposes * * * impossible * * * impracticable and futile." Christin v. Superior Court, 9 Cal. 2d 526, 533, 71 P.2d 205, 208, 112 A.L.R. 1153; Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361; Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665; Westphal v. Westphal, 61 Cal.App. 2d 544, 143 P.2d 405. This case falls outside the limits of the exception applied in the last cited cases. Unconcluded negotiations for a settlement do not render it impossible or impracticable and futile to bring a case to trial.

[4] From the time that the deputy attorney general wrote on November 27, 1944 until January 14, 1947 (the last day of the five year period) over two years elapsed. The burden of bringing the action to trial within the five year period was on the plaintiffs and the failure of the attorney general to communicate further with plaintiffs' attorney about the proposed compromise furnished no sound excuse, let

alone legal ground, for their failure to bring their cause to trial within the five year period.

Let a peremptory writ of mandate issue as prayed.

GOODELL, Acting P. J., and GRIFFIN, J. pro tem., concur.

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86 Cal.App.2d 139

In re TREFREN'S ESTATE.

Civ. 7438.

Sac. 5872.

District Court of Appeal, Third District, California.

June 10, 1948.

1. Wills 🔑386

In reviewing sufficiency of evidence in an action involving a will contest, the test to be applied is whether there is any substantial evidence to support findings of jury or trial court.

2. Wills 🔑386

All questions of the weight of the evidence and the credibility of the witnesses in a will contest are for the jury and the trial court, and if there is any substantial evidence to support the verdict or finding, it cannot be set aside though reviewing court may believe the great preponderance of the evidence was the other way.

3. Wills 🔑386

On appeal from a judgment on a will contest, all conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences indulged to uphold verdict if possible, and when two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of the trial judge or the jury.

4. Wills 🔑384

On appeal from judgment in will contest, all evidence most favorable to respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of the facts, and if the evidence so viewed, is sufficient as a matter of law, judgment must be affirmed.

5. Wills 🔑164(4)

In will contest by testatrix's husband against testatrix's son by a prior marriage to whom testatrix gave her half of the community property, husband was properly permitted to introduce evidence that there was no marital discord between him and testatrix.

6. Wills 🔑165(5)

In contest by testatrix's husband of will leaving testatrix's half interest in community property to testatrix's son by a prior marriage, testimony as to declarations made by testatrix within six months prior to making of will that testatrix desired to leave her property to husband, was properly admitted for purpose of showing undue influence.

7. Wills 🔑155(1)

"Undue influence" warranting repudiation of a will must be such as in effect destroys a testator's free agency, and substitutes for his own, another person's will, and mere general influence, however strong or controlling, not brought to bear on testamentary act, is not sufficient.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

8. Wills 🔑158

Where a wife is active in obtaining the preparation and execution of a contested will making her husband sole beneficiary, wife's activity is imputed to the husband.

9. Wills 🔑166(2)

In contest by testatrix's surviving husband of will leaving testatrix's interest in community property to her son by a former marriage, evidence established that a confidential relationship existed between testatrix's son and his wife who procured execution of the will, that son and his wife were active in preparation and execution of the will, and that son and his wife unduly profited by the will, so as to place on the son the burden of showing that the will was not induced by undue influence.

10. Wills ⚷166(1)

Evidence sustained finding that will which excluded testatrix's surviving husband and gave testatrix interest in community property to son by prior marriage, was obtained by undue influence exercised by son's wife.

◆

Appeal from Superior Court, Amador County; J. A. Smith, Judge.

Proceeding in the matter of the estate of Martha Elizabeth Trefren, also known as Mattie Trefren, also known at Pat Trefren, deceased. From a judgment denying probate to the will of the deceased, Dee Spann, opposed by Everett T. Trefren, contestant, appeals.

Judgment affirmed.

Busick & Busick, of Sacramento, for appellant.

Ralph McGee and G. G. Chisholm, both of Jackson, and Russell A. Harris, of Sacramento, for respondent.

SCHOTTKY, Justice pro tem.

Dee Spann, sole legatee under the alleged will of Martha Elizabeth Trefren, appeals from a judgment denying probate to said will based upon findings of the jury (1) that said Martha Elizabeth Trefren was not of sound and disposing mind at the time said will was executed, and (2) that she was induced to sign said will by means of undue influence. Upon this appeal proponent contends that there is not sufficient evidence to sustain either of said findings and also that the trial court erred in the admission over appellant's objection of certain testimony.

[1-3] In reviewing the sufficiency of the evidence in an action involving a will contest, the test to be applied by an appellate court is the same as that which applies on other appeals, namely, whether or not there is any substantial evidence to support the findings of the jury or trial court. All questions of the weight of the evidence and the credibility of the witnesses are for the jury and the trial court, and if there is any substantial evidence to support the verdict or finding it cannot be set aside by the reviewing court, although said court may believe the great preponderance of the evidence was the other way. See In re Pessagno's Estate, 58 Cal.App.2d 390, 136 P.2d 644; In re Estate of Downey, 51 Cal. App.2d 275, 124 P.2d 637; In re Estate of Hansen, 38 Cal.App.2d 99, 100 P.2d 776; In re Estate of Miller, 16 Cal.App.2d 141, 60 P.2d 492. As in other cases involving the sufficiency of the evidence to sustain a verdict or finding, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion of the trier of the facts. All conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge or jury. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Teel, 25 Cal. 2d 520, 154 P.2d 384.

[4] As was said in the In re Estate of Teel, supra, at page 527 of 25 Cal.2d, at page 388 of 154 P.2d: "All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed."

Bearing the foregoing principles of law in mind, we shall summarize briefly the factual situation as shown by the record, stating the facts in a light most favorable to respondent, disregarding any conflicts in the evidence and giving full credit only to that portion of the evidence which tends to support the judgment denying probate of the will.

The decedent, Martha Elizabeth Trefren, referred to in the transcript as "Pat", and her husband, Everett Trefren, were married in 1935 and lived together as husband and wife for a period of ten years prior to her death. They had no family difficulty according to at least two witnesses other than Mr. Trefren. They resided in their own home in Plymouth, and on September 29, 1945, Mrs. Trefren became quite ill and was taken by her husband to a hospital in Placerville. On the way to the hospital the decedent at that time stated to her husband that if anything should happen to her, she wanted Arlene Spann to have her personal belongings, and that the rest should go to her husband, the contestant. She said the same thing the night before she was operated on, the date of her operation being October 15, 1945. Prior to her illness she had stated that Arlene Spann had tried to get her to make a will leaving her property to her son. On these occasions the decedent had stated that Arlene was "money mad" and that her husband should keep what he had earned and worked for. Following the operation she was in considerable pain up to the time of her death and was under hypnotic drugs or sedatives much of the time. Several witnesses testified that she was often irrational, that her mind seemed to wander off, that she did not recognize her husband or friends at times, that she read very little if at all, and that at times she was delirious. The decedent while at the hospital was very weak and in poor physical condition. The will in question was executed on October 22, 1945, one week after the operation, and decedent died in the hospital on November 10, 1945, having been confined to her bed there from the time of her entry on September 29th.

The will, which was drawn in Crescent City by an uncle of Mrs. Spann, wife of proponent, in accordance with Mrs. Spann's instructions, left all of decedent's estate, which consisted of her half of the community property of herself and contestant, to the proponent, appellant Dee Spann, a son of decedent by a former marriage. Appellant and his wife made a trip from Crescent City to Placerville to see decedent and stayed four or five days, and Mrs. Spann testified that it was during that visit that decedent asked her to have the will prepared. Appellant and his wife returned to Placerville about October 19th, bringing with them the will which had been drawn in Crescent City between the first and second trips. Appellant and Mrs. Spann visited decedent daily between the 19th and the 22nd, the date of the execution of the will, but said nothing to decedent about the will until just before it was executed on October 22nd. The will was witnessed by Mrs. Spann and a nurse, no one else being present, the nurse being called into the room by Mrs. Spann. Just prior to decedent's operation she was asked by her husband if she desired to make a will and she said that she did not. After his wife's death, Mr. Trefren gave Arlene Spann the decedent's personal belongings, including a sewing machine, in accordance with her expressed wishes. The husband knew nothing of the will until after her death although he visited the decedent every day during her confinement in the hospital. At times she could not form a complete question, told her husband that she was unable to read, and he read to her. Additional facts shown by the record will be hereinafter set forth.

The jury returned a verdict finding that at the time of executing the will the testatrix was of unsound mind, and that she was induced to sign the will by means of undue influence. The trial court denied a motion for judgment notwithstanding the verdict and entered judgment denying probate.

[5] Appellant has assigned as error three instances in which testimony on behalf of contestant was admitted over his objection. The first of these relates to questions asked of contestant relating to the married life of contestant and testatrix in rebuttal of evidence of appellant that there was marital discord; the second relates to gifts and financial assistance by testatrix and contestant to appellant; and the third relates to statements made by deceased to contestant and others concerning her wishes in respect to the disposition of her property interests upon death.

Appellant has cited no authority in support of his first two assignments of error, and we are satisfied that there was no error in the admission of this testimony. The relations between the testatrix and the members of her family have a bearing upon the state of mind of the testatrix, and are both material and relevant for that purpose.

[6] Appellant's remaining assignment of error concerning the admission of testimony relates to the overruling of objections to testimony of the contestant and also to the witness Gertrude McCulloch as to declarations made by the testatrix to the effect that she thought that the contestant, her husband, should in the event of her death have what they had accumulated, apart from her personal effects which she stated that she desired to go to Arlene Spann, and further declarations that Arlene Spann wanted her to leave her part of their property to appellant, Arlene Spann's husband, the son of testatrix by a prior marriage. Some of the declarations were made when the testatrix was suffering what proved to be her last illness, and within several days prior to the execution of the contested will. The other statements were made prior to that time but within six months prior thereto.

The rule with reference to the admissibility of such declarations is well expressed in Re Estate of Snowball, 157 Cal. 301, 107 P. 598, in which case the court considered the admissibility of statements made ten months before the execution of the will to the effect that she would leave her property to certain persons in certain amounts. Said the court at page 308 of 157 Cal., at page 601 of 107 P.: "The rule in this state in regard to the admissibility of such declarations, when not so made as to constitute a part of the res gestae, is clearly established by the decisions. They are not admissible in proof or disproof of any statement of fact contained in them, or for the purpose of showing the exercise of undue influence. But wherever the condition or state of mind of the declarant is a material matter, declarations of the testator, legitimately tending to shed light on that question, are admissible solely for that purpose—that is for the purpose of showing his then condition or state of mind—the effect being, as was said in Re Estate of Arnold, 147 Cal. [583], 594, 82 P. [252], 256, 'carefully limited to the question of his condition of mind.' The most common case in which such declarations are admissible is, of course, the case where the question is as to the mental capacity of the testator to make a will. But the authorities recognize that, as is obvious, the condition or state of mind of the testator at times preceding the execution of the will is a material matter where the issue is undue influence, not for the purpose of showing the exercise of undue influence by another, which cannot be so shown, but for the purpose of showing the effect of undue influence proved by other evidence. As is said in the case last cited, there is a distinction between the effect of such declarations to prove the undue influence and fraud and their effect to prove the state of mind of the testator. What was said in Re Estate of Arnold, supra [147 Cal. 583, 594, 82 P. 252, 256], was said with reference to the issue of undue influence, and in the later case of In re Estate of Thomas [155 Cal. 488], 101 P. 798, it was said that in cases involving the question of the testator's sanity or the issue of undue influence, the underlying principle was the same with respect to such declarations, the declarations being admitted not in proof or disproof of any statement of fact contained in them, but as tending to show the condition or state of mind of the declarant; this condition or state of mind having a direct and important bearing upon the disputed question of his mental capacity or the execution of the will under undue influence." See, also, In re Estate of Ricks, 160 Cal. 467, 117 P. 539; In re Estate of Allen, 177 Cal. 668, 171 P. 686.

In the instant case the trial court instructed the jury as follows: "You are instructed that the evidence of declarations made by Martha Elizabeth Trefren was admitted for the sole purpose of showing the friendliness or unfriendliness existing between the said Martha Elizabeth Trefren and her husband, Everett T. Trefren, and her son, Dee Spann, and for the purpose of showing the state of mind of the said Martha Elizabeth Trefren and the mental attitude of the said Martha Elizabeth Trefren toward the various objects of her bounty and are to be considered by you only for that purpose."

We shall next discuss the contention of appellant that there is no substantial evidence to support the finding of the jury that Mrs. Trefren was induced to sign the will by means of undue influence. Appellant argues that the very most that the evidence shows is that Mrs. Spann made suggestions that her husband, Dee Spann, should be made the beneficiary, but that there is an absence of any evidence that Mrs. Spann, through the force of her personality or because of any confidential relationship, persuaded Mrs. Trefren to make a will which was contrary to her wishes. Appellant argues further that contestant failed to show that Mrs. Spann exerted any pressure to overpower the mind and bear down upon the volition of the testatrix at the very time the will was executed.

[7] There can be no doubt that the general rule, established by numerous authorities, is as stated in Re Estate of Easton, 140 Cal.App. 367, at page 370, 35 P.2d 614, 616, from which case appellant quotes: "The legal principles to be used in determining whether a will is the product of undue influence are well settled by a continuous line of decisions. They are set forth in the In re Estate of Morcel, 162 Cal. 188, 121 P. 733, 735, In re Estate of Bryson, 191 Cal. 521, 217 P. 525, In re Estate of Perkins, 195 Cal. 699, 235 P. 45, and several later cases hereinafter cited. As pointed out therein, the kind of influence that may be held to be undue influence warranting a repudiation of a will 'must be such as in effect destroyed the testator's free agency, and substituted for his own another person's will' (In re Estate of Motz, 136 Cal. 558, 563, 69 P. 294, 295); and mere general influence, however strong or controlling, not brought to bear on the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount 'to coercion destroying free agency on the part of the testator.' In re Estate of Keegan, 139 Cal. 123, 127, 72 P. 828, 829; In re Estate of Fleming, 199 Cal. 750, 251 P. 637; In re Estate of Holloway, 195 Cal. 711, 235 P. 1012. So, also, proof of mere opportunity to influence the mind of the testatrix, even though coupled with an interest or with a motive so to do, is insufficient. In order to warrant setting aside a will on this ground, there must be substantial proof, direct or circumstantial, of a pressure which overpowers the volition of the testator and operates directly on the testamentary act."

Appellant also quotes the following language from In re Estate of Gleason, 164 Cal. 756, 765, 130 P. 872, 876: "The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of 'a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.' In re Estate of Carithers, 156 Cal. [422], 428, 105 P. [127], 130; In re Estate of Lavinburg, 161 Cal. [536], 543, 119 P. 915; In re Estate of Kilborn, supra [162 Cal. 4, 11, 120 P. 762]."

Respondent in reply invokes the rule set forth in Re Estate of Lances, 216 Cal. 397, at pages 403, 404, 14 P.2d 768, 770, where the court said: "Where one who unduly profits by a will sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, the burden is upon him to show that the will was not induced by his undue influence. In re Estate of Shay, 196 Cal. 355, 363, 237 P. 1079; In re Estate of Gallo, 61 Cal.App. 163, 214 P. 496. This is but another way of saying that upon the concurrence of the elements just mentioned, a presumption of undue influence has arisen which must be overcome by the proponent. Whether it was overcome was a question, in the first instance, for the jury to determine."

Respondent argues that it appears from the evidence (1) that the sole beneficiary under the will was appellant, a son by a former marriage, the husband of testatrix through whose labor the estate of testatrix was earned being left no part of the estate and not even being mentioned in the will; (2) that Arlene Spann, the wife of the sole beneficiary, who had known testatrix intimately for twenty years, and who testified that she and deceased were "just like sisters," was active in the preparation of, and in obtaining the execution of the will at a time when testatrix was upon her deathbed and extremely weak physically.

There can be no doubt that a confidential relationship existed between Arlene Spann and testatrix nor can there be any doubt that Arlene Spann was active in both the preparation and execution of the will. Appellant makes little effort to dispute this. It also appears from the record that appellant was aware of the activity of his wife, Arlene Spann, before the will was drawn in Crescent City and that he knew that it was the plan to have the will executed by testatrix.

[8] We believe that both reason and authority support the proposition that where a wife is active in obtaining the preparation and execution of a will making her husband the sole beneficiary, the activity of the wife is imputed to the husband. In Re Estate of Nutt, 181 Cal. 522, at page 526, 185 P. 393, 394, the court said: "Respondents rely upon the rule that if a confidential relation between the testatrix and the beneficiary appear, coupled with activity of the latter in the preparation of the will a presumption of undue influence arises, and the burden is on the beneficiary to show that the testament was not procured by undue influence (citing In re Estate of Baird, 176 Cal. 381, 168 P. 561), and the rule that any undue influence exercised by Dr. Simpson would be imputed to appellant (citing Ross v. Conway, 92 Cal. 632-637, 28 P. 785)."

And in II Alexander on Wills, at page 899, it is stated: "It has been held that the presumption of undue influence arising from a bequest from a ward to a guardian extends to the wife of the guardian."

In Bridwell v. Swank, 84 Mo. 455, the court held that a bequest to the wife of the guardian is within the operation of the rule imposing upon him and his wife the burden of repelling the presumption of undue influence where it appears that the guardian may expect and derive substantial advantage and benefit from such will of his ward, saying, "the next best thing, after a bequest to one's self, is a bequest to his wife. Indeed, in many instances, the latter may be regarded as the safer and preferable one."

See, also, In re Estate of Miller, 16 Cal. App.2d 154, at pages 166, 167, 60 P.2d 498, 504, where the court said: "The proper inference to be deducted from the testimony is that the acts of the attorney who drew the will, being the attorney for the appellant, are imputable and chargeable to appellant. In re Estate of Nutt, 181 Cal. 522, 185 P. 393."

We shall next consider the question of whether or not appellant and his wife unduly profited by the will. The natural objects of one's bounty are his descendants, surviving spouse and parents who by reason of such relationship may be assumed to have claims upon his bounty. 26 Cal. Jur., p. 695; In re Estate of Easton, supra, 140 Cal.App. at page 377, 35 P.2d 614; In re Estate of Jacobs, 24 Cal.App.2d 649, 76 P.2d 128.

In Re Estate of Teel, supra, the will of testatrix left her entire estate to her husband to the exclusion of her only daughter. In sustaining a finding of undue influence our Supreme Court referred to the will as unnatural in the following quotation from page 528 of 25 Cal.2d, at page 388 of 154 P.2d: "A fiduciary relationship exists between husband and wife in respect to the issue of undue influence in a will contest, and where such fiduciary relationship is combined with unduly profiting by the will, and its being unnatural, and activity on the part of the proponent in procuring its execution, we have persuasive evidence of undue influence. [Citing cases.]"

And in Re Estate of Lances, supra, the testator was an unmarried Indian whose only relative was the contestant who claimed to be an uncle. He left his entire estate to proponent, a neighbor with whom he had been on friendly terms for twenty years. Proponent prepared the will and it was read to testator in the presence of the subscribing witnesses, and testator stated that that was the way he wanted it. The trial court, relying on earlier decisions, held that there was no substantial evidence of undue influence and directed a verdict in favor of proponent. Upon appeal the judgment was reversed, our Supreme Court holding that there was a presumption of undue influence and that it was for the jury to determine whether such presumption was overcome. The court said at page 403 of 216 Cal., at page 770 of 14 P.2d: "There is next brought home to the proponent an uncontradicted showing that he unduly profited by the terms of the will. He was to receive the whole of the estate, representing a very substantial amount and to the prejudice of the heirs of the decedent."

[9] As already pointed out in the instant case, the estate of testatrix consisted almost entirely of property which had been accumulated by respondent and herself during their ten years of married life. Several witnesses testified that she had stated that she did not desire to make a will as she wanted her husband to have what they had as he had earned it. Appellant's wife, with his knowledge and cooperation, had a will prepared which left no part of the property that testatrix was entitled to devise and bequeath to respondent, and had said will executed by the testatrix. If there had been no will respondent would have received all of said property and appellant none. Under such circumstances we do not believe that it can be held that there is no evidence in the record from which a jury would be justified in concluding that appellant and his wife unduly profited by the will. As we have hereinbefore pointed out, there is in the record substantial evidence upon which the jury could conclude: (1) that a confidential relationship existed between appellant and his wife and the testatrix; (2) that appellant and his wife were active in the preparation and execution of the will; and (3) that appellant and his wife unduly profited by the will. This placed upon appellant the burden of showing that the will was not induced by undue influence, and it was for the jury to determine in the first instance whether or not the presumption of undue influence which arose had been overcome by appellant.

[10] Appellant makes an able and earnest argument in an effort to prove his contention that the record does not sustain a finding of undue influence. If the verdict of the jury had been in favor of appellant, his argument would be very helpful in pointing out evidence in support of such verdict, but in the face of the adverse verdict of the jury upon this issue the testimony pointed out and relied upon by appellant merely accentuates the conflict in the testimony, and, as hereinbefore pointed out, it was the province of the jury to weigh the evidence. Therefore, we deem it unnecessary to discuss at length the argument of appellant as to the insufficiency of the evidence. However, the jury may well have concluded that there was sufficient evidence to justify a presumption or inference of undue influence, and having so concluded it was for the jury to determine whether such presumption or inference was overcome by appellant. In the instant case there are various circumstances which support the conclusion reached. The testatrix was in a weakened physical and mental condition due to the illness and operation which resulted in her death, and the mental and physical condition of the testatrix are factors to be considered on the issue of undue influence. In re Estate of Teel, supra, 25 Cal.2d at page 527, 154 P.2d 384. Arlene Spann testified that testatrix asked her to have a will prepared leaving all of her property to appellant. To her husband, respondent, and others the testatrix had expressed a different intention. Arlene Spann did not send an attorney from Placerville, where testatrix was in the hospital, to talk with testatrix and draw her will, but she went home to far-off Crescent City and there had her uncle, with whom testatrix had no opportunity to talk, draw the will. This last circumstance is very significant, for, as stated by the court in Re Estate of Hartley, 137 Cal.App. 630, at page 634, 31 P.2d 240, 242: "The preparation of the will by a lawyer who obtained all his knowledge from Wagner [the beneficiary] and was neither requested to consult nor given opportunity of adequate conference with the testatrix speaks volumes against the good faith of Wagner. In re Estate of Nutt, 181 Cal. 522, 527, 185 P. 393." The will itself consisted of four lines, left the entire estate to appellant, and did not mention respondent husband. Appellant and Arlene Spann brought the will back to Placerville and it was not until several days thereafter that the will was executed, although they saw the testatrix every day. At the time of the execution of the will Arlene Spann called a nurse into testatrix's hospital room to witness it, no one else being present. It is

fairly inferable from the record that Arlene Spann sought a time when no one else was present for the execution of the will. After the execution of the will neither appellant nor Arlene Spann told any one that the will had been executed, and respondent knew nothing about it until after it had been filed for probate. All of these circumstances, combined with the other facts and circumstances appearing in the record, are sufficient to support the verdict of the jury on the issue of undue influence.

The following language from In re Estate of Graves, 202 Cal. 258, at page 262, 259 P. 935, 936, is quite applicable to the instant case: "Three well-established facts, among others, which are recognized as being indicative of undue influence, or a subversion of a decedent's volition, stand out clearly in the record: The relations between appellant and the decedent afforded to appellant an opportunity to control the testamentary act; the decedent's condition was such as to permit of a subversion of her freedom of will; the appellant was active in procuring the instrument to be executed. In addition, appellant unduly profited as beneficiary under the will. While none of these circumstances, standing alone, has the effect of creating a presumption against the validity of the instrument, their probative force, in combination, is to impose upon the proponent the obligation of presenting evidence of volition, and to make the question as to undue influence one of fact for the jury's determination. 26 Cal.Jur., pp. 647, 648. Appellant correctly contends that mere proof of opportunity to influence the mind of the testatrix, even though shown to be coupled with interest, or a motive to do so, does not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on her testamentary act. In re Estate of Morcel, 162 Cal. 188, 194, 121 P. 733. But in this case it clearly appears that the appellant took an active part in securing the execution of the will at a time when there existed a confidential relation between himself and Mrs. Graves. The rule is well settled that: '"where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the will was not induced by coercion or fraud" (In re Estate of Baird, 176 Cal. 381, 384, [168 P. 561]; In re Estate of Nutt, 181 Cal. 522, 528, [185 P. 393]), and that "a presumption of undue influence arises from proof of the existence of a confidential relation between the testator and such a beneficiary, coupled with activity on the part of the latter in the preparation of the will." In re Estate of Higgins, 156 Cal. [257] 261, [104 P. 6]. In re Estate of Relph, 192 Cal. 451, 465, 221 P. 361, 367. Appellant did not sustain the burden cast upon him in the lower court, and has not satisfied us that the finding of the jury, and the consequent judgment revoking the will, are incorrect as matters of law. In view of the surroundings in which the testatrix was placed, prior to and after making the will, we deem of little moment the fact that she lived about two months after its execution."

We conclude, therefore, that the finding of the jury that testatrix was induced to sign the will by means of undue influence finds ample support in the record.

In view of our conclusion that the will was properly denied probate on the ground of undue influence, we deem it unnecessary to prolong this opinion by discussing the contention of appellant that the evidence was insufficient to sustain the jury's finding that testatrix was not of sound and disposing mind. It may be conceded that the evidence in support of that finding is not so strong as that in support of the finding of undue influence, but it would serve no useful purpose to enter upon a detailed discussion of that issue.

In view of the foregoing the motion of appellant for a judgment notwithstanding the verdict was properly denied by the trial court, and the judgment should be and is hereby affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

HIM v. CITY & COUNTY OF SAN FRANCISCO et al.

No. 13598.

District Court of Appeal, First District, Division 1, California.

June 11, 1948.

Subsequent Opinion Aug. 3, 1948.

See 196 P.2d 135.

1. Statutes 🔑158

Repeal of statutes by implication is not favored, especially where prior enactment has been judically construed and is generally understood and acted upon.

2. Statutes 🔑158

It will be presumed, in absence of express terms, that legislature did not intend to repeal statute by later act, if both can be given effect by fair and reasonable construction.

3. Statutes 🔑159, 167(1)

To overcome presumption that act was not intended to repeal former act, the two acts must be irreconcilable that is, clearly repugnant, as to vital matters to which they relate and so inconsistent that they cannot operate concurrently, or it must be apparent that later act is revision of entire subject matter and designed as substitute for earlier act, or intent to effect repeal must be otherwise expressed in unmistakable language.

4. Statutes 🔑159, 225

Two laws on same subject will be so construed as to maintain integrity of both, if reasonably possible, as courts are bound to uphold prior act, if both may well subsist together, but if they cannot be reconciled, the last act governs and repeals former act so far as they are repugnant.

5. Statutes 🔑158

Theory of repeal of statute by inadvertence will not be considered, if another result may be reached by application of any rule of construction.

6. Statutes 🔑245

Tax laws are strictly construed in favor of taxpayer and against the state, whether property is to be seized or tax enforced by suit.

7. Taxation 🔑791

Statute providing that owner of real property deeded to state for taxes, or sold to state by operation of law, prior to specified date, may bring action to contest validity of tax sale or tax deed to state is limited to property either tax deeded or sold to state by operation of law, prior to date specified. Revenue and Taxation Code, § 3618 et seq., 3620, 3637; St. 1943, p. 2465; St. 1945, p. 1173.

8. Limitation of actions 🔑5(1)
Statutes 🔑225½

Specific statute on subject controls over general provision where there is conflict, particularly where it is possible at least partially to iron out inconsistencies and make the whole harmonious, and such rule of statutory contruction applies to statutes of limitation.

9. Statutes 🔑162

General statute will not repeal by implication former one which is special or limited in application unless there is something in general law making it manifest that legislature intended repeal.

10. Taxation 🔑791

Statute prescribing limitation for action to contest validity of tax deed is a special statute dealing with tax deeds issued prior to certain date and is not impliedly repealed by general statute applying to all tax deeds. Revenue and Taxation Code, §§ 175, 3618 et seq., 3620, 3637.

◆

Appeal from Superior Court, City & County of San Francisco; Herbert C. Kaufman, Judge.

Action by Henry Wong Him against the City & County of San Francisco and another, to contest the validity of a tax deed. Judgment for defendants and plaintiff appeals.

Reversed.

Eugene K. Sturgis and John D. DenDulk, both of Oakland, for appellant.

John J. O'Toole, City Atty., and Lawrence S. Mana, Deputy City Atty., both of San Francisco, Fred N. Howser, Atty. Gen., and E. G. Benard, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Appeal from a judgment of the superior court of San Francisco after order sustaining demurrers of respondents City and County of San Francisco and State of California without leave to amend.

The main question here is whether the adoption in 1945 of section 175 of the Revenue and Taxation Code repealed by implication section 3637 of that Code.

Appellant, Henry Wong Him, was the owner of two lots in the City and County of San Francisco. In the year 1927-28 the city levied its taxes on the realty, and, in addition, on the personal property located thereon. The complaint alleges that this assessment was illegal and invalid because the personal property belonged to persons other than the appellant and other than the legal and assessed owner of the property. The taxes were unpaid, and on June 25, 1928, the property was marked sold to the state by the city and county for nonpayment of the taxes levied for that fiscal year. On September 6, 1933, the city tax collector made and executed a deed to the State of California for failure to pay taxes. This action was brought on October 22, 1946, under Chapter 5.7, Part 6, Division 1, of the Revenue and Taxation Code and against the city and state, to contest the validity of the tax deed. The deed was alleged to be invalid because the levy upon which the tax was originally based was illegal and void, and because no legal notice of the sale under which the property was deeded to the state was made or given by the city. The demurrers of the respondents on the ground that the action was barred by section 175 were sustained without leave to amend.

Appellant concedes that if section 175 is applicable to this action, then it was not brought in time, as under that section the latest date to bring it would have been September 15, 1946. He, however, contends that section 3637, rather than 175, applies, and under that section the action could be brought any time up until January 1, 1948.

Chapter 5.7 of the Revenue and Taxation Code, entitled "Taxpayer's Action to Contest the Validity of Tax Sale or Tax Deed," was originally added to the code in 1941. Section 3620 thereof sets forth the purpose of the chapter, and section 3637 provides the limitation of the remedy. The same Legislature which had passed section 175 had, just a few weeks before, extended the operation of section 3637. Section 175 was approved by the Governor June 25, 1945, and became effective September 15, 1945. (Stats. 1945, Chap. 1017, p. 1963.) Sections 3620 and 3637 were amended and became effective immediately as urgency measures on May 31, 1945. (Stats. 1945, Chap. 637, p. 1172.) Respondents' sole contention is that sections 3637 and 175 are inconsistent and irreconcilable, and therefore there was a repeal by implication when the latter was added to the Code. Appellant, however, contends that there is no inconsistency; that section 175 presents a new remedy, making the procedure for that remedy the procedure under Chapter 5.7 and placing its own statutes of limitation thereon, and, therefore, there is no repeal by implication.

[1-5] In order to apply this doctrine, there must, of course, be an irreconcilable conflict between the two. 23 Cal. Jur. 694, Sec. 84, quoted with approval in Burger v. Hirni, 50 Cal.App.2d 709, 711, 123 P.2d 891, 893, states: "Presumption Against Repeal by Implication. It is elementary that the repeal of statutes by implication is not favored, especially where the prior enactment has been judicially construed and is generally understood and acted upon. Likewise, in the absence of express terms it will be presumed that the legislature did not intend by a later act to repeal a former one, if by a fair and reasonable construction effect can be given to both. To overcome this presumption, the two acts must be irreconcilable—i. e., clearly repugnant—as to the vital matters to which they relate, and so inconsistent that the two cannot have concurrent operation, or it must be apparent that the later statute is a revision of the entire subject matter and designed as a substitute for the earlier act, or the intent to effect a repeal must be otherwise

expressed in unmistakable language. Accordingly, where there are two laws upon the same subject, they will, if reasonably possible, be so construed as to maintain the integrity of both, the courts being bound to uphold the prior act if the two may well subsist together, though if the two cannot be reconciled, the last act will, of course, govern, and repeals the former in so far as the two are repugnant. The theory of repeal by inadvertence will not be considered if another result may be reached by the application of any rule of construction, * * *."

Section 175 was added as Chapter 3 to Part 1 ("General Provisions"), Division 1 ("Property Taxation"), of the Revenue and Taxation Code, and reads: "Chapter 3. Limitation of Actions. Section 175. Tax deeds: Presumption where action not commenced in year: Manner of prosecution. All deeds heretofore and hereafter issued to the State of California or to any taxing agency, including taxing agencies which have their own system for the levying and collection of taxes, by reason of delinquency of property taxes or assessments levied by any taxing agency or revenue district, shall be conclusively presumed to be valid unless held to be invalid in an appropriate proceeding in a court of competent jurisdiction to determine the validity of said deed commenced within one year after the execution of said deed, or within one year after the effective date of this section, whichever be later. Such proceedings may be prosecuted within the time limits above specified in the manner and subject to the provisions of Sections 3618 to 3636 of this code."

Section 3637, as originally enacted on May 19, 1941, provided that an action brought under Chapter 5.7 must be commenced within one year after the date of execution of the tax deed, or one year after the effective date of said chapter. (Stats. 1941, Chap. 293, p. 1439.) The amendment of May 22, 1943, limited the time to one year after the date of execution of the tax deed or one year after January 2, 1945. (Stats.1943, Chap. 709, p. 2465.) As amended on May 31, 1945, and as it now reads, the section provides: "Any proceedings brought in accordance with the provisions of this chapter can only be commenced within one year after the date of execution of the tax deed, or within one year after January 2, 1947, whichever is later." (Stats.1945, Chap. 637, p. 1172.)

Whether section 175 provides a new remedy, and whether it is wholly inconsistent with section 3637, depends upon the legislative meaning and intent in enacting section 3620, determining who may bring an action under Chapter 5.7. The latter section has always been passed as an urgency measure, and, as last amended, effective May 31, 1945, reads: "The owner of any real property deeded to the State for taxes, or sold to the State by operation of law prior to July 1, 1939, or any other person who may redeem such property, may bring an action in the superior court of the county wherein the real property is located, to contest the validity of the tax sale or the tax deed to the State."

Appellant contends that this section limits the remedy of Chapter 5.7 to the owner of any real property deeded or sold to the state prior to July 1, 1939, and that the addition of section 175 provides a new remedy for all tax deeds, and, specifically, for tax deeds made after 1939. He contends that before the passage of section 175 there was no provision for any such proceedings as to deeds made after July 1, 1939. Respondents, on the other hand, contend that the proper interpretation of this section is that it permits the bringing of an action on property deeded to the state, no matter when the deed was made, but limits the bringing of an action for property sold, but not deeded, prior to July 1, 1939. Thus, the question here is—does section 3620 limit the relief under Chapter 5.7 to property deeded or sold prior to July 1, 1939, or does the limitation apply only to property sold but not deeded? If the date refers to both deeds and sales, then the remedy is strictly limited; whereas section 175 applies to all tax deeds without restriction as to date.

[5] In approaching the proper interpretation of the legislative acts involved here, it must be borne in mind that "Since tax proceedings are in vitum, tax laws are

strictly construed in favor of the taxpayer and against the state, whether property is to be seized or the tax enforced by suit." Whitmore v. Brown, 207 Cal. 473, 482, 279 P. 447, 451, quoting 24 Cal.Jur. pp. 27, 28. See also County of Los Angeles v. Jones, 13 Cal.2d 554, 561, 90 P.2d 802, and Anglo Cal. Nat. Bank v. Leland, 9 Cal.2d 347, 351, 70 P.2d 937, to the same effect.

[7] The key to the legislative intent is found in the punctuation used in the 1943 amendment of section 3620 and the statements of the facts requiring the passage of Chapter 5.7, and all subsequent amendments thereto, as urgency measures. These clearly show that the remedy of this chapter, in itself, is limited to property either tax deeded or sold to the state by operation of law, prior to July 1, 1939.

As originally enacted in 1941, Chapter 5.7 was entitled "Taxpayer's Action to Contest the Validity of Tax Deed" and section 3620 read as follows: "The owner of any real property deeded to the State for taxes, or any other person who may redeem such property, may bring an action in the superior court of the county wherein the real property is located to contest the validity of the tax deed to the State."

In 1937 in the case of Otis v. Los Angeles Co., 9 Cal.2d 366, 70 P.2d 633, the court held the tax levy of Los Angeles County for the fiscal year 1933–34 invalid and excessive, thereby invalidating all tax deeds resulting from such levy. The statement of the facts constituting the urgency of the measure indicates that the Legislature had in mind the effect of the decision in the Otis case, for, after declaring that numerous levies by taxing agencies had been, directly or indirectly, declared invalid by court decision, it stated: "Many taxpayers are willing to pay these delinquent taxes and to redeem properties from tax sale if a quick and immediate remedy can be afforded for so doing. No such remedy now exists which has met with the approval of title companies and attorneys for public bodies. It is estimated that large amounts of delinquent taxes, necessary to the continued welfare of the fiscal systems of local governments, will be immediately paid upon the adoption of a quick and simple remedy by which such tax liabilities can be determined in an action brought by the taxpayer." (Stats.1941, Chap. 293, p. 1440.)

On May 22, 1943, Chapter 5.7 was again amended in several particulars. The title of the chapter was amended to read: "Taxpayer's Action to Contest the Validity of Tax Sale or Tax Deed." (Emphasis added.) An amendment to section 3620 authorized an action to contest the validity of a tax sale as well as a tax deed. Of particular importance to the instant question is the punctuation used in this amendment. It read in part as follows: "The owner of any real property deeded to the State for taxes, or sold to the State by operation of law, prior to July 1, 1935, or any other person * * *." (Emphasis added.)

The insertion of the comma after the word "law" and before the word "prior" would seem clearly to refer the section to property either deeded or sold to the state, prior to July 1, 1935. If the punctuation as used in this amendment left any doubt as to the intent of the Legislature, it has been completely dispelled by the statement of facts in the urgency clause, which clearly connects the remedy with property both deeded and sold to the state during the depression. It reads: "During the widespread depression, out of which we have now emerged, thousands of parcels of property, because of the inability of taxpayers to pay their taxes, were tax sold or tax-deeded. The appellate courts of this State have heretofore determined that many of said deeds or taxes were and are invalid. To permit an action by the taxpayer to contest the validity of tax sales and tax deeds would not only determine the validity of said tax sales and said tax deeds for the benefit of the State, but would also immediately restore properties to the tax rolls and thereby add badly needed revenue for the operation and maintenance of government." (Stats.1943, Chap. 709, p. 2465. Emphasis added.)

It is true that in the subsequent amendment of section 3620, on May 31, 1945, changing the specified date to July 1, 1939, the comma is omitted between the words "law" and "prior." However, in view of the fact that the statement of the necessity for its passage as an urgency measure even more explicitly relates the remedy to both tax deeds and sales prior to 1939, and during the depression years, the omission is obviously the result of inadvertence. The material portion of the urgency clause therein reads as follows: "Thousands of parcels of property, because of the inability of taxpayers to pay their taxes were *sold or tax deeded in the years prior to 1939,* before we emerged out of the countrywide depression." (Emphasis added.) The remainder is substantially the same as that stated in the 1943 amendment. (See Stats. 1945, Chap. 637, p. 1173.)

As noted in the urgency clause, one of the primary purposes was to restore property to the tax rolls and provide revenue for local governments. Undoubtedly the greater number of tax delinquencies occurred, and, consequently, the greater number of tax deeds issued and sales were made, during the depression, and it was to the restoration of these that the chapter was directed. Apparently it was during this time that the courts had declared so many of these tax deeds and sales invalid. Hence, it is logical that the Legislature would grant a longer extension of time within which to contest these deeds and sales under section 3637, to aid those who lost property due to illegal and excessive tax levies during a time of general hardship (when they could least afford any additional burdens) than in ordinary or even prosperous times thereafter when section 175 was enacted. It would seem that the very purpose of maintaining Chapter 5.7 was to provide this remedy over the extended period of time to January 1, 1948, in order to compensate in part for the inequities coincident with these excessive and illegal hardships and the simultaneous hard times.

[8] It is true that some inconsistency might exist inasmuch as section 175 states that "All deeds heretofore and hereafter issued to the State of California * * * shall be conclusively presumed to be valid unless * * *" etc. However, this section is found in Part 1, of Division 1, on "General Provisions," and it is well settled that a specific statute on a subject controls over a general provision where there is a conflict. "This is especially true when it is possible at least partially to iron out the inconsistencies and make the whole harmonious." People v. Moroney, 24 Cal.2d 638, 644, 150 P.2d 888, 891. This general rule of statutory construction applies also to the various statutes of limitation. Glassell Dev. Co. v. Citizens' Nat. Bk., 191 Cal. 375, 216 P. 1012, 28 A.L.R. 1427; Cohen v. City of Alameda, 168 Cal. 265, 142 P. 885.

Section 175 applies to all tax deeds; whereas section 3637 seems to have been intended to apply only to proceedings to determine the validity of tax deeds issued prior to 1939.

[9] Boyd v. Huntington, 215 Cal. 473, 482, 11 P.2d 383, quoted with approval in Division Of Labor Law Enforcement v. Moroney, 28 Cal.2d 344, 346, 170 P.2d 3, 4, stated: "* * * a general statute will not repeal by implication a former one which is special or which is limited in its application unless there is something in the general law that makes it manifest that the Legislature contemplated and intended a repeal."

[10] The Legislature, in passing section 175, obviously had Chapter 5.7 in mind, as they referred to all but two sections thereof (3637 and 3638 on dismissal for failure to prosecute). It is difficult to see how they could have inadvertently failed to repeal those sections had they so intended. Hence, there is nothing "in the general law that makes it manifest that the Legislature contemplated and intended a repeal."

It is clear that section 3637 is a statute dealing with a special and specific class of tax deeds, namely, those issued prior to July 1, 1939, and is not repealed by the enactment of section 175, which is a general statute dealing with tax deeds generally.

The judgment appealed from is reversed.

PETERS, P. J., and WARD, J., concur.

86 Cal.App.2d 364

NOLLER et ux. v. MAILLOUX et al.

Civ. 3683.

District Court of Appeal, Fourth District, California.

June 22, 1948.

1. Pleading ⚷345(1, 2)

A judgment on pleadings is improper where a material issue is raised by answer to complaint, but such a judgment is proper where any denial in answer amounts to nothing more than a conclusion of law, and where any new matter set up as a defense is insufficient for that purpose.

2. Pleading ⚷345(1)

In action to foreclose contract to sale and quiet title, where affirmative defense by one of defendants alleged a contract between such defendant and two of three purchasers to whom plaintiff had originally sold property, but failed to show any connection between plaintiffs and such defendant other than statement that $1,800 had been paid to a third party, as agent both of defendants from whom he purchased property and of plaintiffs, without alleging facts upon which such agency could be based, affirmative defense was insufficient to present an issue, so that judgment in favor of plaintiffs on the pleadings was proper.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by George Noller and Mary Noller, husband and wife, as joint tenants, against Helen Mailloux, Roy Port, and others to foreclose a contract of sale and quiet title. From a judgment entered on the pleadings in favor of plaintiffs, the defendant Roy Port alone appeals.

Affirmed.

J. Dean La Motte, of Oceanside, for appellant.

Hillyer & Hillyer, of San Diego for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment on the pleadings entered in favor of the plaintiffs. The sole question presented is whether a material issue was raised by the answer of the defendant Port.

The action is one to foreclose a contract of sale and quiet title. The complaint, filed on December 2, 1946, alleged that the plaintiffs were the owners of the property in question; that on April 15, 1945, they entered into an agreement with defendants Mailloux and Cross, under which these defendants agreed to purchase the property for $7000 and to pay for the same in monthly payments of $200, with the provision that in the event of a default in the making of any monthly payment the contract should be terminated and the sellers released from all obligations to convey; that these defendants are in default and there is due the sum of $5311.95 with certain interest; that the defendant Port has or claims to have some right or interest in the property; and that any such claim is subordinate to the rights of the plaintiffs.

All of the defendants, with the exception of Port, failed to answer or appear and their defaults were entered. In his answer the defendant Port admitted, by failing to deny, all allegations of the complaint except that he denied that his claim is subordinate to that of the plaintiffs. As an affirmative defense he then alleged that on July 4, 1945, he had entered into an agreement with the defendant Mailloux and her husband under which he agreed to buy from them the property in question for the sum of $8000, payable in monthly installments; that pursuant to this agreement he had paid to one Royer, as agent of the Maillouxs and of the plaintiffs, about $1800 which Royer had accepted as such agent; that on April 9, 1946, he had rescinded this agreement and offered to return all he had received on condition that all moneys paid would be returned to him; and that Royer, as such agent, has failed and refused to return said moneys.

[1] The appellant relies on the usual rule that a judgment on the pleadings is improper where a material issue is raised by the answer to the complaint. It is equally well settled, however, that such a judgment is proper where any denial in

the answer amounts to nothing more than a conclusion of law, and where any new matter set up as a defense is insufficient for that purpose. Cohn v. Klein, 209 Cal. 421, 287 P. 459; Benham v. Connor, 113 Cal. 168, 45 P. 258; Scheeline v. Moshier, 172 Cal. 565, 158 P. 222.

[2] In his answer the appellant admitted all allegations of the complaint except the one that his claim was subordinate to that of the respondents. This denial raised no issue of fact and related entirely to a conclusion on the question of law presented.

The affirmative defense alleged a contract between the appellant and two of the three purchasers to whom the respondents had originally sold the property. It made no attempt to allege any connection between the respondents and the appellant other than the statement that $1800 had been paid to a third party, Royer, as agent both of the Maillouxs and of the respondents. This again is merely a conclusion and no facts are alleged upon which the fact of such agency could be based. Moreover, were it to be assumed that such an agency existed and that the respondents received the $1800, there is nothing to indicate that the appellant then had any rights as against the respondents. Even if the $1800 was in some way to be applied on the respondents' contract with Mailloux and Cross, it appears that the monthly payments thereon coming due before the action was filed amounted to $3800, leaving a deficiency of about $2000, apart from the accellerated payments due. It is in no way suggested that any possible rescision of the other contract involved the respondents in any way, or affected their rights under the original contract.

According to the pleadings the dealings of the appellant were with parties other than the respondents, no material issue or defense as against the respondents was raised by the answer filed, and a judgment on the pleadings was properly entered. Morel v. Morel, 203 Cal. 417, 264 P. 760; White v. Jacobs, 204 Cal. 334, 267 P. 1087; McNew v. Mulcahy, 24 Cal.App.2d 656, 76 P.2d 143; Minor v. Carpenter, 28 Cal.App. 368, 152 P. 737.

The judgment is affirmed.

GRIFFIN, J., and MUSSELL, Justice pro tem., concur.

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86 Cal.App.2d 203

Ex parte BODKIN.

Cr. 2528.

District Court of Appeal, First District,
Division 2, California.
June 15, 1948.

1. Municipal corporations ⚷703(1)

A municipality may enact and enforce reasonable regulations for the control of traffic and the use of the streets.

2. Highways ⚷153

The primary purpose of a highway is the passing and repassing of the public, which is entitled to the full unobstructed and uninterrupted enjoyment of entire width of layout for that purpose.

3. Municipal corporations ⚷703(1)

The essence of test of validity of ordinance pertaining to use of streets is whether regulation is reasonable or whether it necessarily constitutes an abridgement of constitutional rights.

4. Constitutional law ⚷206(1), 274

City ordinance requiring that when free passage of a street or sidewalk is obstructed by a crowd, persons composing crowd must disperse and move on at direction of a police officer, which ordinance contained no prohibition otherwise as to use of street, is not unconstitutional as an abridgement of rights of free speech and assembly or a violation of privileges and immunities clause as applied to one addressing a crowd of workmen, which crowd in fact obstructed sidewalk. U.S.C.A. Const.Amends. 1, 14.

5. Constitutional law ⚷274

Individuals making up the general public have a right to make use of the public sidewalks for passage which is superior to right of a crowd to obstruct sidewalk to listen to a speech. U.S.C.A.Const.Amend. 1.

6. Constitutional law ⚷38

The rule that test of validity of legislation is what may be done under terms thereof has reference to what would be the reasonable permanent effect of legislation rather than to the mere possibility of unconstitutional acts of enforcement which possibility is inherent in every class of legislation.

7. Constitutional law ⚷81

The state may incidentally, by reasonable regulations for benefit of general public, regulate but not prohibit individual's exercise of his civil rights.

8. Municipal corporations ⚷703(3)

Ordinance, which related solely to regulation of use of public streets, preserving them for benefit of public against obstructions and did not impose a restriction on what may be uttered or published, is a valid exercise of the police power and is not unconstitutional, merely because it operated to prevent one from presenting his ideas to as large a number of persons at a given place as he might think desirable.

9. Municipal corporations ⚷703(3)

Under city ordinance requiring persons composing a crowd obstructing a street or sidewalk to move on at direction of a police officer, whether free passage of street or sidewalk was obstructed is a question of fact.

Proceeding on the petition of Wesley Bodkin for a writ of habeas corpus.

Writ denied.

Edises, Treuhaft & Condon, of Oakland, for petitioner.

J. F. Coakley, Dist. Atty., County of Alameda, Richard H. Chamberlain, Chief Asst., and William H. Quinn, City Atty., of Emeryville, all of Oakland, for respondent.

DOOLING, Justice.

The petitioner was convicted of a violation of Ordinance No. 304 of the City of Emeryville, providing as follows: "Section 1. Whenever the free passage of any street or sidewalk in the Town of Emeryville shall be obstructed by a crowd, the persons composing such crowd shall disperse or move on when directed to do so by a police officer. It shall be unlawful for any person to refuse to so disperse or move on when so directed to do so by a police officer as herein provided."

Petitioner was standing on Peladeau Street, a small, lightly traveled street in the industrial part of Emeryville, addressing between one hundred and one hundred fifty workers on the Taft-Hartley Act then pending before Congress. He was directed to move on by a police officer and refused to do so. The court found there had been an "obstruction" of the street by the crowd. The conviction was affirmed on appeal.

The ordinance is attacked as unconstitutional in that it is an abridgement of the rights of free speech and assembly, and is a violation of the privileges and immunities clause of the Fourteenth Amendment.

[1] The petitioner concedes that a municipality may "enact and enforce reasonable regulations for the control of traffic and the use of the streets", but urges that there is no power "under the guise of traffic control or regulation to abridge or deny the freedom of speech, assembly, or the right to petition the government * * *."

The contention is urged that the decisions of the U. S. Supreme Court in Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; and Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262, necessarily overrule the decision of the Washington Supreme Court in City of Tacoma v. Roe, 190 Wash. 444, 68 P.2d 1028. There the ordinance involved was to exactly the same effect as the one herein, i. e. obstructing the free passage of the public along public streets was made a misdemeanor. The primary point decided by the Washington court was (page 1029 of 68 P.2d): "We do not think any regulation which tends to facilitate the movement of traffic * * * can be said to be an unreasonable exercise of police power * * *. In fact, such ordinances are conducive to the public peace and safety." Certainly there is no inconsistency between the City of Tacoma decision and the dictum more expressly mentioned below in the Schneider case to the effect that the public authorities have a duty to protect the public's right to use the streets.

While not directly in point, the ruling in City of Yakima v. Gorham, 200 Wash. 564, 94 P.2d 180, is illustrative of the same principle. There the court held that the right of peaceful picketing could not be exercised in a manner which interfered with or obstructed traffic.

[2] The underlying principle is as stated in the decision of In re Anderson, 130 Cal.App. 395, 398, 399, 19 P.2d 1027, 1028: "The primary purpose of a highway is the passing and repassing of the public, which is entitled * * * to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose."

In Schneider v. State of New Jersey, Town of Irvington, supra, 308 U.S. 147, 60 S.Ct. 146, 150, 84 L.Ed. 155, the express point decided was merely that the purpose of keeping the streets clean and of pleasing appearance was not sufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. But the court further stated: "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; * * *."

It must be noted that in the Schneider case the ordinances in question were forthright prohibitions against any passage of handbills on the public streets.

However, the petitioner urges that the Supreme Court, by the dictum above quoted, definitely limited the scope of regulations on the user of streets for public meetings, i. e. that the street involved must be a crowded, busy street or intersection.

[3] This contention cannot be supported. The essence is whether or not there is a reasonable regulation; or whether the regulation necessarily constitutes an abridgement of constitutional rights.

The ordinance in question, it will be noted, does not prevent, or attempt to prevent, any use of the public streets which does not obstruct the free passage of the general public. There is no absolute prohibition as there was in the ordinance involved in the Schneider case, supra. The Hague case, supra, involved licenses to hold meetings; and De Jonge v. State of Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278, is not in point, involving the question of the scope of Criminal Syndicalism Laws. In Hague v. C. I. O., supra, 307 U.S. 496, 59 S.Ct. 954, 964, 83 L.Ed. 1423, it is said that the "privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; * * * and must be exercised in subordination to the general comfort and convenience * * * but it must not, in the guise of regulation, be abridged or denied." In the Valentine case, (316 U.S. 52, 54, 62 S.Ct. 921, 86 L.Ed. 1262), the court said: "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares." The opinion, however, clearly recognizes the principle that primarily the streets are designed for public passage and the use thereof by individuals must be kept subservient to the inherent right of use by the general public.

[4, 5] In the present case there can be no question but that, had the crowd formed for the purpose of observing a traffic accident, a brawl, or a dog fight, and the persons making up the crowd had been obstructing the street to the detriment of the members of the public who wished to proceed thereon about their business, a conviction for refusal to disperse would be readily accepted. It was established in this case that the passage of some members of the public along the street was in fact obstructed. If nobody had desired to use this street at the time another question would be presented. Whether the obstruction merely impaired the progress of one member of the general public, or a thousand, does not alter the case. If one member of the public attempts to pass along a sidewalk obstructed by a crowd, no matter how heavy the normal traffic is or is not, and is unable to do so, he must resort to walking around the obstruction into the street where he is immediately endangered by vehicular traffic. Is it any solace to such a pedestrian to say—as the petitioner would have us say—that since this is not the busiest street in town we may obstruct it to any extent we see fit, and you, a member of the public, should take a more frequently traveled thoroughfare? We think not. The individuals making up the general public have certain rights which the authorities, as is so aptly stated in the Schneider case, supra, have a duty to preserve. The argument that these rights are lessened or non-existent except when a large number of the members of the public wish to exercise them seems to us specious and untenable.

Petitioner argues further that "the true test of the validity of any legislation is what may be done under the terms thereof (Abbott v. McNutt, 218 Cal. 225 [22 P.2d 510, 89 A.L.R. 1109]; County of Los Angeles v. Jessup, 11 Cal.2d 273 [78 P.2d 1131])."

In the Abbott case the court held invalid legislation requiring judges to act in a capacity other than their ordinary judicial position would require. The court contemplated that were the legislation upheld the jurists might be so encumbered with extra-judicial duties as to seriously interfere with their official duties as judges. In the County of Los Angeles case the language favorable to petitioner is a direct quotation from the case of City of Los Angeles v. Lewis, 175 Cal. 777, 167 P. 390. In that case the legislation under attack left it open for the county's acquisition of cement plants and operation thereof in permanent competition with private enterprise.

[6, 7] The distinction between that type of case and the one here before us is clear. To say that the test of any legislation is what may be done thereunder without any limitation whatever is an absurdity, for every conceivable class of legislation has inherent in it the possibility of unconstitutional acts of enforcement. The two cases above cited referred to what would be the reasonable permanent effect of the legislation. The rule, as expressed by the Supreme Court, is that the state may incidentally, by reasonable regulations for the benefit of the general public, regulate but not prohibit the individual's exercise of his civil rights.

[8] Since the ordinance here in question is solely a regulation of the use of the public streets, preserving them for the benefit of the public against obstructions and not a restriction on what may be uttered or published, the cases cited for the proposition that the state may not suppress civil liberties except in conformity with the "clear and present danger" rule are not in point.

[9] Again, since the question of whether or not the free passage of the street or sidewalk was "obstructed" is one of fact, it was entirely possible for the petitioner herein to make the same speech on some other busier but broader street where the attendant crowd would not have constituted an "obstruction" within the meaning of the ordinance.

Since the ordinance cannot be said to be an unreasonable regulation on its face, it cannot be held unconstitutional merely because it may also operate to prevent one from presenting his ideas to as large a number of persons at a given place as he might think desirable. Whether the enforcement, in a particular case, might be unconstitutional because arbitrary, unreasonable, or discriminatory, is a question of fact and not now before us.

The writ of habeas corpus is therefore denied.

GOODELL, Acting P. J., and GAIFFIN, J. pro tem., concur.

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86 Cal.App.2d 324

RALPHS v. RALPHS.

Civ. 16124.

District Court of Appeal, Second District, Division 3, California.

June 22, 1948.

1. Divorce ⚷245(3)

Trial court may not reduce alimony awarded by interlocutory divorce decree in absence of showing of change in conditions subsequent to entry of decree, and reduction of alimony was unauthorized in view of husband's testimony that there had been no change in his income.

2. Divorce ⚷226

Failure to award wife attorney's fees in connection with hearing on application by husband for modification of alimony provision in interlocutory decree was proper, in absence of application in trial court for allowance of attorney's fees.

◆

Appeal from Superior Court, Los Angeles County; Paul Vallee, Judge.

Action by Stella Marie Ralphs against Leslie R. Ralphs. An interlocutory decree of divorce was granted in favor of plaintiff. From an order reducing, on defendant's application, the amount of alimony awarded plaintiff, the plaintiff appeals.

Reversed.

Allan L. Leonard and Glenn R. Seavey, both of Los Angeles, for appellant.

Leslie R. Ralphs, in pro. per.

McCOMB, Justice Assigned.

This appeal is from an order made April 8, 1947, reducing on defendant's application the amount of alimony awarded plaintiff in an interlocutory decree of divorce from $150 to $100 a month.

The record discloses that on November 26, 1946, an interlocutory decree of divorce was granted in favor of plaintiff in which she was awarded $150 a month for the support and maintenance of herself and the minor children of the parties. Thereafter defendant served upon plaintiff an order to show cause why the amount of alimony awarded her should not be reduced. After a hearing at which defendant testified that there had not been any change in his income since November 26, 1946, the trial court modified its previous order by reducing the amount of alimony to be paid by defendant for the support and maintenance of plaintiff and the minor children from $150 a month to $100 a month, the modification to be effective from and after April 3, 1947. At the same time an order was made denying plaintiff any attorney's fees in connection with the hearing of the application for a modification of the alimony provision in the interlocutory decree.

Plaintiff urges that the trial court erred in (a) modifying the provisions for alimony awarded in the interlocutory decree, and (b) denying her attorney's fees. This proposition in the main is correct.

[1] The trial court is without authority to make an order reducing the amount of alimony awarded in an interlocutory decree of divorce in the absence of a showing that there has been a change in conditions subsequent to the entry of the interlocutory decree of divorce. (Snyder v. Snyder, 219 Cal. 80, 81, 25 P.2d 403; Molema v. Molema, 103 Cal.App. 79, at page 81 et seq., 283 P. 956.) This rule is applicable to the pres-

ent case for the reason that defendant testified that there had been no change in his income from the time the interlocutory decree of divorce was entered to and including the date of the hearing on his application for a modification of such decree. Therefore, the court was without authority to reduce the amount of alimony awarded plaintiff by the interlocutory decree of divorce.

[2] The settled statement on appeal fails to disclose that plaintiff made application in the trial court for an allowance of attorney's fees. In the absence of such an application, the trial court did not err in failing to make an award of attorney's fees to plaintiff. (Burdick v. Burdick, 95 Cal. App. 304, at page 306, 272 P. 752.)

The order is reversed.

SHINN, Acting P. J., and WOOD, J., concur.

86 Cal.App.2d 178

Ex parte TORRES.

Cr. 590.

District Court of Appeal, Fourth District, California.

June 14, 1948.

1. Criminal law 🔑1001

Order of Justice Court suspending five months of petitioner's six months sentence for battery subject to good behavior had effect of placing petitioner on probation.

2. Criminal law 🔑1001

Where violation of the terms of an order of suspension or probation is determined as a fact in open court after notice, and an order is "therefor" made sending a defendant back to jail to serve remainder of term originally provided for, it affirmatively appears that the suspension or probation has been "revoked or terminated" as required by the statute for issuance by justice of a commitment for one whose sentence had theretofore been suspended. Pen. Code, § 1203.2.

3. Criminal law 🔑1001

Where justice's docket immediately below entry of original order suspending portion of jail term for good behavior contained recital that defendant was brought in and had pleaded guilty of violating probation and that it was "therefore ordered and adjudged" that defendant be imprisoned for remainder of sentence and that commitment issue accordingly, a sufficient "revocation or termination" of original order of suspension or probation appeared, as required by statute authorizing issuance of commitment, without use of the word "revoked" or "terminated". Pen.Code, § 1203.2.

4. Criminal law 🔑1001

Under statute authorizing a resentence or a requiring of the completion of a sentence already imposed, justice court could issue commitment for remainder of sentence for a probation violator six months and six days after conviction. Pen.Code, §§ 1191, 1203.2.

Proceeding in the matter of the application of Alfred Riveles Torres for a writ of habeas corpus.

Writ discharged and petitioner remanded.

Meyer & Dreizen, of Santa Ana, for petitioner.

James L. Davis, Dist. Atty., and Willard R. Pool, Asst. Dist. Atty., both of Santa Ana, for respondent.

BARNARD, Presiding Justice.

The petitioner seeks a discharge upon a writ of habeas corpus. It appears from the record that on October 20, 1947, the petitioner was arraigned in the justice's court of Orange Township, County of Orange, on a charge of battery and that he pleaded guilty thereto, waiving time for plea and sentence. An order was then entered on that date, as appears from the justice's docket, ordering and adjudging that he be imprisoned in the county jail for a period of six months, with the further provision "it is ordered 5 months of the said six months term be suspended for 2 years, subject to proper behavior of the deft. Commitment is issued for 30 days." The petitioner served the thirty days called for by this commitment.

Thereafter, a bench warrant was issued and the petitioner was brought into court and a further order was made that he be imprisoned in the county jail for the term of five months. In this regard the docket, immediately below the order above quoted, shows the following:

"April 26, 1948. Deft. in. Bench warrant returned. Deft Pleads guilty of violating terms of probation, placed on him in Oct. 1947.

"It is therefore ordered and adjudged the Deft be imprisoned in the Orange Co. jail for the period of 5 months.

"Commitment for said term of 5 months. Done in open court this 26 day of April, 1948."

[1] The order entered on October 20, 1947, suspending five months of the sentence imposed had the effect of placing the petitioner on probation (In re Herron, 217 Cal. 400, 19 P.2d 4), and this was conceded at the oral argument. The petitioner's main contention is that the order and commitment issued on April 26, 1948, were illegal and void for the reason that the court failed to make an order setting aside or revoking its former "judgment" suspending five months of the sentence on good behavior "and/or probation for the term of two years." Petitioner relies solely on section 1203.2 of the Penal Code and the case of In re Giannini, 18 Cal.App. 166, 122 P. 831. It is accordingly argued that the court was without power to order the petitioner to serve the remaining five months of the term originally imposed without first entering an order setting aside or revoking its former judgment or order.

[2] Section 1203.2 of the Penal Code provides that where the terms of probation have been violated the court may in its discretion "revoke and terminate" such probation. The case of In re Giannini, 18 Cal. App. 166, 122 P. 831, states that in order to exercise the power to issue a commitment for one whose sentence had theretofore been suspended a revocation or modification of the order of suspension is an essential prerequisite. It is further stated that since no intendments are in favor of a judgment of a justice of the peace his authority to issue a commitment must affirmatively appear. In that case nothing appeared after the entry of the original judgment and order except the later issuance of a commitment, and it was accordingly held that the commitment was issued without authority of law. While that case is authority for the proposition that in such a case as this some form of revocation or modification of the original order must affirmatively appear, nothing in that decision requires that such revocation or modification appear in any particular form, or that a formal order using the words "revoked" or "terminated" must be entered. Where a violation of the terms of an order of suspension or probation is determined as a fact in open court after notice, and an order is "therefore" made sending a defendant back to jail to serve the remainder of the term originally provided for, it would seem that it affirmatively appears that the suspension or probation has been revoked or terminated. In re Cook, 67 Cal.App.2d 20, 153 P.2d 578.

[3] In this case there was entered in the justice's docket, immediately below the entry of the original order, a recital of the further facts that the defendant was brought in and had pleaded guilty of violating the terms of his probation, that it was "therefore ordered and adjudged" that he be imprisoned for the remaining five months, and that commitment issue accordingly. This was a sufficient revocation or termination of the original order of suspension or probation, and it affirmatively appears from the record that the original order was thus revoked or terminated and that in lieu thereof the petitioner was required to serve the remainder of the sentence originally imposed. Under these circumstances the essential facts sufficiently appear and the petitioner is not entitled to his discharge merely because the word "revoked" or the word "terminated" was not used in the order. See Ex parte Moore, 12 Cal.App. 161, 107 P. 129.

[4] The only other point raised is that the justice's court was without jurisdiction to issue the commitment because it was based upon a judgment rendered six months and six days after conviction, and that this is beyond the time permitted by section 1191 of the Penal Code. This contention is without merit. A resentence or the requiring of the completion of a sentence which has already been imposed is specifically authorized by section 1203.2 of the Penal Code. People v. Scott, 74 Cal.App.2d 782, 169 P. 970.

The writ is discharged and the petitioner remanded.

GRIFFIN, J., and MUSSELL, J. pro tem., concur.

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86 Cal.App.2d 240

MORAN TOWING & TRANSPORTATION CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 13784.

District Court of Appeal, First District, Division 2, California.

June 16, 1948.

Hearing Denied Aug. 13, 1948.

1. Commerce 🔑46

New York corporation which entered California solely for performance of a general agency agreement with War Shipping Administration under which it had charge of a fleet of tugboats belonging to United States while they were in San Francisco Bay, repairing, supplying and maintaining them, purchasing food for use on board, hiring crews, and paying for such supplies, repairs and maintenance and wages of crews was engaged in "intrastate activities" within meaning of statute pertaining to substituted service of process. Corporations Code, § 6504.

See Words and Phrases, Permanent Edition, for all other definitions of "Intrastate Activities".

2. States 🔑4

The rule against imposition of restrictions upon a foreign corporation entering state solely as an agent of federal government is not absolute, and a foreign corporation entering state to perform services for United States under a contract with it is not immune from reasonable state regulations which are nondiscriminatory.

3. Prohibition 🔑27

Where foreign corporation, which had withdrawn from state, in petition for writ of prohibition to prevent superior court from asserting jurisdiction over an action against corporation pursuant to substituted service of process, alleged that it entered state only under a general agency agreement with federal government, but terms of contract were not pleaded and did not appear in record, District Court of Appeal would assume, in absence of proof to contrary, that corporation was in fact an independent contractor rather than a true agent in strict legal sense and was subject to reasonable state regulation including provision for substituted service of process. Corporations Code, § 6504.

4. Commerce 🔑46
Corporations 🔑668(14)

Where foreign corporation entered state under general agency agreement with War Shipping Administration to have charge of fleet of tugboats, but a portion of its activity was of intrastate character, action for wrongful death which occurred on a tug which was tied up in San Francisco for decommissioning arose out of an intrastate activity and superior court acquired jurisdiction over corporation, even after it had withdrawn from state, by substituted service of process. Corporations Code, § 6504.

◆

Original proceeding on the petition of Moran Towing & Transportation Company for a writ of prohibition against the Superior Court of the State of California, in and for the City and County of San Francisco.

Petition denied.

Dorr, Cooper & Hays, and Dorr, Stevenson & Cooper, all of San Francisco, for appellant.

Fitz-Gerald Ames and Hugh B. Miller, both of San Francisco, for respondent.

DOOLING, Justice.

Petitioner, Moran Towing and Transportation Company, a corporation organized under the laws of New York, was sued for the wrongful death of one Fred Schwecke. The corporation having withdrawn from the state, service was made on the secretary of state pursuant to Corporations Code, sec. 6504 (formerly Civ.Code sec. 406a). Petitioner appeared specially on a motion to quash and its motion was denied. It seeks a writ of prohibition on the grounds that it was not engaged in any intrastate business in California and that its sole business in California was as an agent of the United States Government.

[1] Petitioner entered California solely for the performance of a "general agency agreement" with the War Shipping Administration of the United States. Under this agreement it opened an office in San Francisco and had charge of a fleet of tugboats belonging to the United States while they were in San Francisco Bay, repairing, supplying and maintaining them, purchasing food for use on board, hiring crews, and paying for such supplies, repairs and maintenance, and the wages of the crews. When the tugs were to leave San Francisco Bay they sailed under sealed orders furnished by the U. S. Navy. For its services petitioner received $630 per month per tug. While the tugs were not engaged in intrastate commerce but went exclusively to foreign ports or to the open sea as a part of the war effort, that the petitioner's activities were of a character to constitute the doing of intrastate business is made clear by the recent decision in Oro Navigation Co. v. Superior Court, 82 Cal.App.2d ——, 187 P.2d 444. Indeed the particular tugboat on which the decedent Schwecke met his death had been withdrawn from service and was docked in San Francisco Bay preparatory to being decommissioned here.

The more serious question is presented by the claim that the petitioner was constitutionally exempt from state regulation, including the requirement that upon withdrawing from the state it remain subject to substituted service, by reason of the fact that it entered the state and transacted business herein solely on behalf of the United States of America. Petitioner relies on Pembina Consolidated Silver Mining & Milling Co. v. Commonwealth of Pennsylvania, 125 U.S. 181, 8 S.Ct. 737, 31 L.Ed. 650; Horn Silver Mining Co. v. People of State of New York, 143 U.S. 305, 314, 315, 12 S.Ct. 403, 36 L.Ed. 164; and Boteler v. Conway, 13 Cal.App.2d 79, 84, 56 P.2d 587. Those cases contain language indicating that the state can impose no restrictions upon a foreign corporation entering the state solely as an agent of the federal government.

[2] However this rule is not absolute. Cases from the Supreme Court of the United States later than those cited by petitioner are collected in 23 Am.Jur. 243 in support of the following statement: "However, a state is not precluded from the exercise of its normal powers over a foreign corporation * * * because the corporation's business in a state consists in part, or even entirely, in the assumption and the performance of obligations under contracts with the Federal Government, made in furtherance of Federal purposes, so long as there is no discrimination against such corporation on account of the Federal nature of its business, and no attempt is made to impose direct burdens upon the Federal contract itself."

Specifically in Ohio River Contract Co. v. Gordan, 244 U.S. 68, 37 S.Ct. 599, 601, 61 L.Ed. 997, the plaintiff in error was an Indiana corporation which entered the State of Kentucky solely to perform a contract with the federal government. Service was made on an agent designated for the purpose under compulsion of a Kentucky statute. The plaintiff in error insisted that the trial court was without jurisdiction "because when the accident occurred the company and the plaintiff were engaged in work under a contract with the United States Government."

The answer of the court to this argument was: "We at once put out of view the contention that the trial court was without jurisdiction because the parties, at the time of the accident, were engaged in work under a contract with the United States Government, since the want of merit in the proposition has been previously established." Citing Gromer v. Standard Dredging Co., 224 U.S. 362, 371, 132 S.Ct. 499, 56 L.Ed. 801.

And the Supreme Court of Arkansas, having the precise question before it, held that a foreign corporation, even though in the state solely pursuant to a federal contract, was bound to comply with the state laws as to the terms of entry into the state, and was subject to penalty for failure to do so. The court aptly said: "* * * and we can see no more reason for the power to tax such a corporation under the state law than the power to require it to comply with state laws in order to do business in the state * * *." E. E. Morgan Co., Inc., v. State, 202 Ark. 404, 150 S.W.2d 736, 738. Motion to dismiss granted for want of substantial question. Rehearing denied 314 U.S. 571, 62 S.Ct. 77, 86 L.Ed. 463.

[3, 4] It seems clear from the decisions that a foreign corporation entering a state to perform services for the United States of America under a contract with it is not immune from reasonable state regulation. While the contract here is called a "general agency agreement" its terms are not pleaded and nowhere appear in the record. We must assume if necessary in the absence of proof to the contrary that the petitioner was in fact an independent contractor rather than a true agent in the strict legal sense.

Guerin Mills v. Barrett, 254 N.Y. 380, 173 N.E. 553, deals with the power to regulate a foreign corporation engaged solely in interstate commerce. It is not in point since a foreign corporation acting for the federal government is amenable to state regulations which cannot be imposed on one doing a strictly interstate business. James v. Dravo Contracting Co., 302 U.S. 134, 158, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318.

The petition for a writ of prohibition is denied.

NOURSE, P. J., and GOODELL, J., concur.

GELFAND et al. v. O'HAVER et al.*

Civ. 16088.

District Court of Appeal, Second District,
Division 1, California.

June 15, 1948.

Hearing Granted Aug. 12, 1948.

1. Nuisance ⇨33

Evidence sustained finding that method of operation of music studio was unnecessary, unreasonable, and injurious, constituting an enjoinable "nuisance" though there was no showing that studio was operated in any different manner than other music studios in city, where practicing vocally and with instruments was carried on from early morning till late at night in studio which was not sound proof, while doors and windows were open. Code Civ.Proc. § 731a.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

2. Nuisance ⇨36

Judgment enjoining and restraining operators of music studio from creating a nuisance by unnecessary, unreasonable, and injurious method of operating studio, was sufficiently clear to be enforceable, where reference to findings disclosed that nuisance consisted in disturbance of neighbors by loud and repetitious sounds emanating from studio, and that the unnecessary, unreasonable, and injurious method of operation consisted in the failure to adapt the studio, which was an ordinary dwelling house, for use as a studio so as to control the emission of such sound.

* Subsequent opinion 200 P.2d 790.

Appeal from Superior Court, Los Angeles County; W. T. Belieu, Judge.

Suit by Dr. Leo Gelfand and others against Mr. Charles H. O'Haver and Mrs. Phyliss O'Haver to enjoin the defendants from creating a nuisance by unreasonable operation of defendant's music studio From a judgment for plaintiffs, defendants appeal.

Judgment affirmed.

Charles H. O'Haver, in pro per.

Hortense Stahl, of Beverly Hills, for respondents.

WHITE, Justice.

This is an appeal from a judgment by which defendants were enjoined and restrained "from creating a nuisance by unnecessary, unreasonable and injurious methods of operation of their said music studio in their residence at 611 North Larchmont Boulevard, Los Angeles, California, which methods of operation can be corrected by adapting said premises to such commercial use." Appellants contend that the evidence is insufficient to support the judgment; that the judgment is ambiguous and not sufficiently clear to be enforceable; and that "the judgment ignores and violates section 731a of the Code of Civil Procedure."

The plaintiffs are neighbors of defendants, residing immediately to the south, north, east and southwest of defendants' premises; they charged that the defendants, who maintain a music studio in their residence, have been causing or permitting in such residence "persons to sing and to rehearse and practice on musical instruments individually and in groups, such as bands and orchestras consisting of wind instruments, brass instruments and combinations thereof daily including Sundays from the hours of 9:00 a. m. to 10:00 p. m., and on some occasions to 12:00 midnight; that during such singing, rehearsing and practicing the defendants open or permit others to open the doors and windows of defendants' said residence; that such singing, rehearsing and practicing occurs in such volume and with such repetition in the manner aforesaid that the noise and clamor is transmitted with intensity to the vicinity surrounding said residence of defendants; that such noise and clamor are offensive, disturbing and annoying * * * the defendants have maintained and are maintaining a nuisance * * * injurious to the wellbeing of the plaintiffs * * * ."

Certain of the plaintiffs are physicians maintaining offices across the street from defendants' premises. They charge that the singing, practicing and rehearsing make it impossible for the physicians to make physical examinations of patients "when such examinations are dependent upon auditory perceptions" and make it impossible to conduct ordinary conversations or telephone conversations and render the medical offices unsuitable for medical practice.

It was further charged that the aforesaid conduct of defendants' music studio caused great nervous distress to certain plaintiffs making it impossible for them to sleep and interfering with their health and comfort.

The same charges were made in behalf of two other plaintiffs occupying a dressmaking establishment in the vicinity.

After trial, the court found:

"That * * * defendants have conducted a voice and music studio in their home without soundproofing the same or adapting it for such use, and that in so doing have caused or permitted persons to sing and rehearse and practice on musical instruments, individually and in groups, such as bands and orchestras consisting of wind instruments, brass instruments and combinations thereof, as well as vocal exercises daily and including sounds from early hours of the morning to late hours of the night.

"That during such practicing and rehearsing, defendants have opened or permitted others to open doors and windows of defendants' residence.

"That such singing, rehearsing and practicing as aforesaid, occurs in such volume and with such repetition that the noise and clamor thus caused is heard in the homes and vicinity of the residences and places of business of said plaintiffs."

The court further found that "such din, clamor and discord, and the sounds thus caused and created injuriously disturbs and offend the plaintiffs and the neighborhood thereabouts"; that it hinders the physicians in their practice as charged; that the "playing, practicing and rehearsing of bands, orchestras, wind and string instruments, and vocal exercises, are carried on simultaneously in defendants' home, both in the day and night time, * * * that the same has hindered the sleep of plaintiffs * * * affected the nervous system of said plaintiffs to their detriment."

The court further found: "That the home of the defendants where they conduct such musical studios, is an ordinary dwelling not designed for nor adapted to such purpose, insofar as controlling discordant musical sounds coming therefrom, is concerned.

"That the methods of operation of defendants' said studios are unnecessary, unreasonable and injurious.

"That the defendants are creating the nuisance herein complained of as the direct result of said unnecessary, unreasonable and injurious methods of operation.

"That the home of the defendants where they carry on their music studio work, is situated in a zone of the City of Los Angeles, which permits the operation of such business therein, but that in so doing, they are not permitted to raise or create a nuisance in the operation of such business by the employment of unreasonable, unnecessary and injurious methods of operation."

The two questions presented by this appeal are (1) whether the evidence supports the trial court's finding that defendants' methods of operation are "unnecessary, unreasonable and injurious" and (2) whether, as appellants contend, the judgment is "ambiguous and not sufficiently clear to be enforceable."

Section 731a of the Code of Civil Procedure, so far as here material, provides:

"Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial uses are expressly permitted * * * no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. * * *"

[1] It is appellants' contention that to support an injunction or a finding that their use constituted a nuisance, it was necessary for plaintiffs to show that the studio was being operated in a manner different from that usually and customarily employed by other music studios in Los Angeles. It is true that no evidence was presented as to methods of operation in other studios, but we think it can safely be said that music studios cannot legally be conducted in the manner disclosed by the record before us. There was ample evidence to support the findings that defendants used no soundproofing or other means of adapting their dwelling for use as a music studio; that they carried on playing and practicing vocally and with instruments, both individually and in groups; that the doors and windows were open during such activities; and that these activities were continued from early morning until late at night. It cannot be assumed that operation of a music studio in the manner described and with the results complained of and set forth in the findings is either necessary or reasonable, in the particular location and under the conditions with which we are here confronted.

In support of their contention that the judgment is "not sufficiently clear to be enforceable", appellants cite authorities to the effect that "an injunction should contain sufficient information on its face to apprise the party upon whom it is served of what he is restrained from doing" (Wheeler v. Superior Court, 82 Cal.App. 202, 209, 255 P. 275, 278) and that to hold a person guilty of contempt for violating an injunction, the acts constituting the contempt must be clearly and specifically prohibited by the terms of the injunction. Brunton v. Superior Court, 20 Cal.2d 202, 124 P.2d 831; Weber v. Superior Court, 26 Cal.2d 144, 156 P.2d 923. It is argued that the judgment "leaves it up to the defendants to decide what they are to do or not to do and does not apprise them of any acts prohibited."

The judgment reads as follows: "That defendants be enjoined and restrained from creating a nuisance by unnecessary, unreasonable and injurious methods of operation of their said music studio in their residence at 611 North Larchmont Boulevard, Los Angeles, California, which methods of operation can be corrected by adapting said premises to such commercial use."

[2] We have concluded that the judgment herein sufficiently apprises the appellants of what they are to do or refrain from doing. They are enjoined from "creating a nuisance by unnecessary, unreasonable and injurious methods of operation." Reference to the findings discloses that the "nuisance" consists in the disturbance of their neighbors by the loud and repetitious sounds emanating from their establishment, as is detailed in the findings hereinbefore quoted; that the "unnecessary, unreasonable and injurious" methods of operation consist in the failure to adapt their ordinary dwelling-house for use as a music studio so as to control the emission of such sounds. The result to be achieved is the control of the sound; the method of control is the problem of appellants. The requirement that they "adapt" their premises "to such commercial use" is sufficiently clear. In Williams v. Blue Bird Laundry, 85 Cal.App. 388, 259 P. 484, 486, the court said: "It is strenuously contended that because the judgment merely restrains the defendant from so conducting its plants as to cause loud noises, offensive odors, black smoke and soot, it is so indefinite as to render it ineffective, and that it must be reversed; that it is impossible to determine what degree of noise, or degree of odor, etc., would constitute a violation of the injunction; and that the defendant may be subjected to citations for contempt at any time that one of the plaintiffs may deem any noise, odor or smoke objectionable to himself. However, the judgment plainly states that the laundry or laundries shall be so operated as to avoid causing loud noises, offensive odors, black smoke, or soot, or in any other such manner as to be deleterious to the health of the plaintiffs. We think the entire judgment when read together is sufficiently definite in this regard."

In Ebur v. Alloy Metal Wire Co., 304 Pa. 177, 155 A. 280, 285, the court on appeal rewrote the trial court's judgment to provide that the defendant be "restrained from operating its plant in such a manner as to emit from said plant smoke, odors, gases, smudge, noises, and vibrations which are unnecessary and unreasonable under the circumstances, and which can be eliminated by the efficient operation of its plant and by the installation of the most effective reasonably available devices for the reduction of smoke, odors, gases, smudge, noises, and vibrations in its plant, * * *," and in Payne v. Johnson, 20 Wash.2d 24, 145 P.2d 552, a judgment was upheld enjoining the defendant from operating the sound effect of an open-air theatre in such a manner that under ordinary atmospheric conditions the sound would be audible in closed buildings on plaintiffs' land.

Here, the requirement is that appellants control the sounds emanating from their premises so far as they can by eliminating the "unnecessary, unreasonable and injurious" methods heretofore used by them and which methods are described in the findings of fact.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

86 Cal.App.2d 41

BULPITT et al. v. BLATZ.

Civ. 16478.

District Court of Appeal, Second District, Division 2, California.
June 7, 1948.

Appeal and error ⚿348(1)

Where notice of entry of judgment was mailed to defendant's attorney in same city on October 30, 1947, defendant's motion for new trial was denied by operation of law on December 31, 1947, by failure of court to rule thereon and notice of appeal filed on February 2, 1948 was belated and conferred no jurisdiction on appellate court. Code Civ.Proc. §§ 12, 12a(b), 1013; Pol.Code, § 10; Rules on Appeal, rule 3(a).

◆

Action by Paul A. Bulpitt, Sr., and Helen G. Bulpitt against F. Alfred Blatz. From a judgment for plaintiffs, the defendant appeals. On respondents' motion to dismiss appeal.

Motion granted.

Leonard Wilson and Arnold L. Leader, both of Los Angeles, for appellant.

Bertrand Rhine and Herbert Gall, both of Los Angeles, for respondents.

McCOMB, Justice.

Respondents move to dismiss this appeal upon the ground that it was not taken within the time permitted by Rule 3(a), Rules on Appeal (22 Cal.2d 2), and therefore that this court is without jurisdiction to entertain the same.

Chronology

I. October 24, 1947, judgment was entered in favor of respondents.

II. October 30, 1947, respondents mailed to appellant's attorneys, whose offices were in the same city as the offices of respondent's attorneys, written notice of the entry of judgment.

III. November 7, 1947, notice of intention to move for a new trial was filed in the clerk's office by appellant.

IV. December 31, 1947, was the last day for the court to grant or deny the motion for a new trial and upon the court's failure to act, such motion was denied by operation of law.

V. February 2, 1948, notice of appeal from the judgment was filed.

This is the sole question presented for our determination:

Had appellant's time for filing a notice of appeal from the judgment entered against him expired on February 2, 1948, the date the notice of appeal was filed?

This question must be answered in the affirmative and is governed by the following rules:

(1) Where service is by mail, and both parties have offices in the same city, the time within which an act may be done by the adverse party is extended one day. (Sec. 1013, C.C.P.)

(2) Where an act is required by law to be done within a specified period of time, the time is extended by the number of days equal to the number of holidays (other than special holidays) appointed by the President or Governor during such specified period. (Sec. 12a (b), C.C.P.)

(3) In computing the time within which an act is to be done, the first day is excluded and the last day is included. (Sec. 12, C.C.P.)

(4) Thanksgiving day is a holiday appointed by the President of the United States or the Governor of the state. (Sec. 10, Pol.Code.)

Applying the foregoing rules to the facts in the instant case it appears that on October 30, 1947, notice of entry of the judgment was mailed to appellant, therefore by excluding October 31, 1947 (See rules 1 and 3, supra), the sixty day period within which the trial court had jurisdiction to pass upon the motion for a new trial would ordinarily have expired on December 30, 1947. However, since Thanksgiving day, a Presidential holiday (rule 4, supra), intervened, the time was extended one day to December 31, 1947. Under rule 3(a), Rules on Appeal, appellant had thirty days after this latter date within which to file his notice of appeal. By rule 3, supra, we exclude December 31, 1947, and thirty days thereafter is January 30, 1948 (Friday), the date on which appellants' time for filing a notice of appeal expired. Since the notice of appeal was not filed until February 2, 1948, it was filed too late and this court is without jurisdiction to entertain the appeal.

It is to be noted that Shepherd v. Superior Court, 54 Cal.App. 673, 202 P. 466, holding that the provisions of section 12 of the Code of Civil Procedure do not extend the time within which a motion for a new trial may be passed upon by the trial court, has been superseded by amendment to section 660 of the Code of Civil Procedure, which provides that the sixty day period within which the trial court has jurisdiction to grant a motion for a new trial is extended in accordance with the provisions of section 12a of the Code of Civil Procedure.

Adolph Ramish, Inc. v. Behr, 40 Cal. App.2d 54, 104 P.2d 410, cited by respondents, is not applicable to the present case since February 22, the holiday there in question, was not a holiday appointed by either the President of the United States or Governor of the State of California. While in the instant case Thanksgiving day was appointed by the President of the United States, and thus came within the provisions of section 12a (b) of the Code of Civil Procedure.

For the foregoing reasons the motion to dismiss the appeal is granted.

MOORE, P. J., and WILSON, J., concur.

32 Cal.2d 105

PEOPLE v. TRUJILLO et al.

Cr. 4845.

Supreme Court of California.

June 15, 1948.

1. Criminal law ⚿511(1)

In murder prosecution, corroboration of an accomplice tending to connect defendant with crime must create more than a suspicion of guilt, but is sufficient even though it be slight and, when standing by itself, entitled to but little consideration. Pen.Code, § 1111.

2. Criminal law ⚿511(2)

In murder prosecution it is sufficient to sustain conviction when evidence offered as corroborative of testimony of an accomplice, tends to connect defendant with commission of the crime in such a way as reasonably may satisfy jury that accomplice is telling the truth, and accomplice need not be corroborated as to every fact to which he testifies. Pen.Code, § 1111.

3. Criminal law ⚿511(2)

In murder prosecution, testimony of accomplice was sufficiently corroborated by evidence tending to connect defendants with the crime to make guilt of defendants a jury question. Pen.Code, § 1111.

4. Criminal law ⚿741(5), 742(2)

In murder prosecution, the weight of corroborative evidence tending to connect defendants with the crime, as well as that of accomplice testifying against defendants, was for jury. Pen.Code, § 1111.

5. Criminal law ⚿393(1)

In murder prosecution, testimony that fibers from clothing found near decedent's body matched fibers from defendant's clothing, which was taken from defendant's clothing ten months after crime was committed, was admissible as relating to physical identification of defendant, and was not inadmissible as violating defendant's constitutional rights against self-incrimination, and remoteness of time between date clothing was obtained and its introduction in evidence went solely to weight of the evidence and did not justify its exclusion. Const. art. 1, § 13.

6. Indictment and Information ⚿10

Testimony of a witness before grand jury respecting codefendant's silence at conversation respecting commission of proposed felony was not "hearsay" but was "legal evidence" which could be considered by grand jury in returning murder indictment, since testimony was admissible under the statute as a declaration of another in the presence of a party and as showing codefendant's reaction to the statements, and that his conduct was such as to implicate him in commission of the homicide. Pen. Code, §§ 919, 995; Code Civ.Proc. § 1870, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay" and "Legal Evidence".

7. Criminal law ⚿407(1)

Inculpatory statements made in the presence of an accused and not denied or contradicted by him, are admissible against accused only when they are offered in connection with evidence of statements or conduct of the accused, tending to give credibility to the accusation. Code Civ.Proc. § 1870, subd. 3.

8. Indictment and Information ⚿10

Fact that hammer found near murdered man bore initials of accused was circumstantial evidence of ownership which grand jury was entitled to consider in returning indictment against accused for murder notwithstanding no one identified the hammer as belonging to accused. Pen.Code, § 919.

9. Indictment and Information ⚿10

Indictment for murder was based upon sufficient evidence before the grand jury to connect defendant with the crime and was not subject to motion to set it aside. Pen.Code, § 995.

10. Criminal law ⚿404(4)

In murder prosecution, articles found near decedent's body were admissible in evidence against defendant upon a prima facie showing of his connection with the murder.

11. Criminal law ⚿404(4)

Generally, physical objects constituting a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation.

12. Criminal law ⚷404(4)

In murder prosecution, a gun found in room of one defendant identified as having been in possession of that defendant and admittedly stolen by defendants was admissible as evidence connecting defendants with the shooting of decedent.

13. Criminal law ⚷369(15)

In murder prosecution, testimony of tavern owner that a crowbar found near body was taken when tavern was burglarized prior to the murder admittedly by defendants was relevant for purpose of identification.

14. Criminal law ⚷404(4)

In murder prosecution, exhibits consisting of instruments and tools found near decedent's body tending to prove the manner in which the murder was committed, were admissible as against parties shown to have been connected with murder by evidence other than testimony of accomplice, and were admissible against defendant whose connection with the murder was shown by accomplice.

15. Homicide ⚷268

In murder prosecution, the weight to be given evidence having probative value is for jury.

CARTER and SCHAUER, JJ., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; Milton D. Sapiro, Judge pro tem.

Joseph Trujillo and Ernest Woodmansee were convicted of murder in the first degree and they appeal.

Affirmed.

Jos. G. Gallagher, Gerald J. Kenny, Public Defender, and William L. Ferdon, Deputy Public Defender, all of San Francisco, for appellants.

Fred N. Howser, Atty. Gen., and Miriam E. Wolff, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

Joseph Trujillo and Ernest Woodmansee were indicted for the murder of Charles Odom. Trujillo was found guilty of murder in the first degree without recommendation and sentenced to death. Woodmansee was convicted of murder in the first degree, with the recommendation that he be confined in the state prison for life.

The body of Charles Odom, a special police officer in San Francisco, was found shortly after 5 p. m., on the morning of September 10, 1946, at Dan's Creamery. The body was slumped on the ground, with a scarf around the neck. A hammer, screw driver, ripping bar, flashlight, pliers, cold chisel, small cold chisel, drift pin and a pair of gloves were scattered nearby.

Evidence presented at the trial shows that Odom was shot through the heart, and suffered severe lacerations of the head and face. His gun, fully loaded, was found in his holster. The outside door of the premises had been opened, and one of the interior doorways forced. An effort had been made to break through another door inside of the building.

Woodmansee was 18 and Trujillo about 28 years of age at the time the crime was committed. Foakes, the youngest of the three, was promised immunity if he would testify against the other two. He told the jury that he escaped from the San Francisco Juvenile Detention Home on September 8th. About 9 p. m. that evening, he went to a pool room where he found Trujillo and Woodmansee. After discussing his escape from the detention home, he informed Trujillo that he had no money, and asked if he had a "job lined up" for that night. Trujillo told him that he did not, but that they were going to "pull a job" the following night. Foakes made arrangements to meet them at the pool hall the next night, and asked if they wanted him to steal a car. Trujillo stated that "everything was taken care of" and Foakes need not get a car.

The next night, Foakes returned to the pool room and found Trujillo playing the pin ball machines. Later Trujillo and Foakes went to Wong's Cafe, where they met Woodmansee. They drove to the cafe in a coupe. The three boys had some pie and coffee and after they left Wong's, at Foakes' suggestion, they bought four marihuana cigarettes for $1. each. Their next stop was a place in Golden Gate Park known to them as "the hide-out", where they parked the car and smoked the cigarettes.

When the cigarettes were smoked, with Trujillo driving the car, they went to the corner on which Dan's Creamery was located. At the corner, the car was parked in a manner to command the view of any persons coming down any of the streets intersecting at that point. Foakes was instructed to stay in the car, be the "look-out", and have the car ready to get away whenever it was necessary. He was also told to warn the other two by a whistle if he saw any danger.

Trujillo and Woodmansee got out of the car and walked across the street in the direction of the rear of Dan's Creamery. Foakes testified that he was dizzy from the cigarettes and, after the other two had gone, he put his head down on the steering wheel. Soon Woodmansee came back to the car and said that "Joe was doing O. K. over there". Woodmansee then "went back over there". Foakes heard a noise like a shot, and a few seconds later Trujillo and Woodmansee ran back to the car, and threw something, which sounded like tools, in the rear. Foakes drove them away in the car and, as he did so, Woodmansee and Trujillo were yelling at each other that "they shouldn't have done this and that". Trujillo and Woodmansee cursed him for his failure to keep a lookout and give them the signal.

About a week later, Foakes had a conversation with Trujillo, asking him "what he did it for". Trujillo replied that they did not know it was an officer and "they just lost their head". By other testimony of Foakes, he identified a gun introduced in evidence as "looking like" the gun which Trujillo had shown him at the hide-out in Golden Gate Park the night of the homicide. He also said that the scarf which was around the neck of Odom was one which he had seen on a trunk in Trujillo's room, and the gloves found near the body were the ones worn by Trujillo when Odom was killed.

The gun was identified by the owner of the 718 Club as one stolen from him when it was burglarized about a month before the homicide. Trujillo and Woodmansee both admitted burglarizing the 718 Club and taking the gun, some change amounting to between $30. and $50., and two bottles of whiskey. A screw driver and jimmy bar were used by them in committing that crime, but both of them denied that the screw driver found near the body of Odom had ever been in their possession. They stated it was not one of the tools used by them in the 718 Club burglary. A jimmy bar, admitted in evidence, was found in a coupe which Trujillo admitted he had stolen from a garage.

Moulage casts had been made by the police of the door which was forced to obtain entrance to the 718 Club. The jimmy bar closely fitted the cast, and the screw driver found near Odom's body also was the same size as certain marks in it.

The gun was found by the police under a radio in the home of Dorothy Corder. She testified that she was in the tavern the night Trujillo was arrested. She left the tavern immediately after his arrest, went to his room and took the gun which she found underneath the carpet beside a trunk. The police officers and Trujillo arrived just as she was leaving the house with the gun. When she got home, she filed the inside of the barrel of the gun with a rat-tailed file.

A ballistics expert testified that he had examined the gun and also the bullet which killed Odom. He described the gun as being in poor condition. No definite determination could be made, he explained, that the bullet in evidence had been fired from that gun "because the bullet did not fit tightly into the barrel * * * [and] the bullet had undergone a certain amount of mutilation after having been fired. * * *" The effect of his testimony was that the bullet could have come from that gun because it had five lands and five grooves, and the rifling of the bullet indicated it was fired from one having such characteristics.

Clothing belonging to Trujillo was subjected to a test by an expert for the purpose of matching fibers with those found on the scarf and other pieces of apparel from Odom's body. Eleven different sets of matching fibers were found, many of which were duplicated with multiple fibers. Dr. Kirk testified that the chances were one in a hundred billion that this number of matches would be a coincidence; therefore, he concluded, these articles had come in contact with one another.

The gun was identified by four witnesses, other than Foakes and the defendants, as having been in Trujillo's possession; the scarf was recognized and identified by two witnesses other than Foakes as having been on Trujillo's trunk, and the screw driver was recognized by one witness, other than Foakes, as having been in Trujillo's possession previous to the night of the crime.

Before the grand jury, Foakes testified as a disinterested witness, but he did not admit participation in the crime. His testimony then included none of the events of the evening of the homicide and was limited to the plans to break into the creamery. According to that testimony, he had been in on these plans but he did not show up at the pre-arranged time and go with the other defendants.

As witnesses in their own behalf, both defendants denied having had anything to do with Odom's death although they admitted that the gun in evidence was stolen by them when they burglarized the 718 Club. The hammer found near the body of Odom was marked with the initials "E. W.", but Woodmansee denied ownership of it. After his arrest in the State of Virginia, Woodmansee sent his mother a telegram requesting her to retain an attorney and also to "get in touch with Joe."

Woodmansee argues that the indictment found by the grand jury was void, as the only testimony before it was illegal and the superior court was without jurisdiction to try the charge. As to the evidence presented at the trial, it was prejudicial error, says Woodmansee, to admit the gun and the articles found at the place of the crime. His contention is that there is nothing in the record to connect him with them.

The defendants join in contending that the evidence is legally insufficient to sustain the verdicts of guilty because there is no corroboration of the testimony of Foakes, who was the only witness to testify to any of the essentials of the crime. They take the position that as Foakes was an accomplice, his testimony, without corroboration, is not sufficient to sustain the conviction.

Trujillo complains of the testimony of the expert who testified in regard to the matching of fibers after an examination of his clothing. He asserts that such testimony was inadmissible because it compelled him to testify against himself in violation of the provisions of the State and Federal Constitutions.

[1-2] Lack of corroborative evidence of the testimony of the accomplice is the main question raised by both defendants. Foakes was an admitted accomplice and his testimony requires corroboration which tends to connect the defendants with the crime. Penal Code, sec. 1111. Such corroboration must create more than a suspicion of guilt, but is sufficient even though it "be slight and, when standing by itself, entitled to but little consideration". People v. Negra, 208 Cal. 64, 69, 280 P. 354, 356; People v. Wilson, 25 Cal.2d 341, 347, 153 P.2d 720; People v. Shaw, 17 Cal.2d 778, 803, 112 P. 2d 241; People v. Yeager, 194 Cal. 452, 473, 229 P. 40. It is sufficient when the evidence offered as corroborative tends to connect a defendant with the commission of the crime in such a way as reasonably may satisfy a jury that the accomplice is telling the truth. It is not necessary that the accomplice be corroborated as to every fact to which he testifies. If his testimony could be completely proven by other evidence, there would be no occasion to offer him as a witness. People v. Negra, supra; People v. Yeager, supra. For the same reason, it is not necessary that the independent evidence be sufficient to establish the defendants' guilt. The prosecution is not required to single out an isolated fact which in itself, unrelated to other proven facts, is considered to be sufficient corroboration. It is the combined and cumulative weight

of the evidence furnished by non-accomplice witnesses which supplies the test.

[3] The testimony of Foakes supplies the details of the crime. But, aside from his testimony, the state introduced evidence tending to show that the bullet which killed Odom could have come from the gun which was admitted by Trujillo to have been in his possession prior to the crime and which, after his arrest, was taken from his room by Dorothy Corder. The scarf found at the scene of the crime was recognized and identified by two witnesses, other than Foakes, as having been on the trunk in Trujillo's room. The fiber matching test on Trujillo's clothing tends to prove that his clothing had come in contact with pieces of apparel from Odom's body. Also, there is substantial evidence to support the conclusion that the screw driver found near the body of Odom was the one used by Trujillo and Woodmansee when they burglarized the 718 Club.

[4] Another link in the chain of evidence is that the hammer found beside the body of Odom bore the initials "E. W.". The telegram which Woodmansee sent to his mother upon his arrest requesting her to get in touch with "Joe" is an additional fact which is entitled to consideration in connection with the question of corroboration. Although these particular bits of evidence, standing alone, might be entitled to but little consideration, all of it, taken together and considered in connection with the other evidence, is sufficient to connect each of the defendants with the crime. The weight of the corroborative evidence, as well as that of the accomplice, is a question for the jury to determine. People v. Barker, 114 Cal. 617, 620, 46 P. 601.

[5] The only other question presented by Trujillo concerns the admissibility in evidence of his clothing and the testimony in regard to the matching fibers. He asserts that this evidence was inadmissible and violative of the constitutional prohibition against self-incrimination. No contention is made that the clothing was obtained other than by legal process; the appellant complains that it was taken ten months after the crime was committed, that there was nothing to link it to the crime, and no consent to the examination was given by Trujillo.

Article I, section 13, of the Constitution of the State of California provides in part: "* * * No person shall be * * * compelled in any criminal case, to be a witness against himself * * *." Wigmore, in an exhaustive and scholarly discussion of the history and policy behind the provision of the Federal Constitution, which is substantially the same as the California mandate, concludes that the object of the protection "is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence * * * it exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's testimony extracted by force of law.

"Such, finally, is the practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence; for if the privilege extended beyond these limits, and protected an accused otherwise than in his strictly testimonial status,—if, in other words, it created inviolability not only for his physical control in whatever form exercised, then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcible overthrowing his possession and compelling the surrender of the evidential articles, —a clear 'reductio ad absurdum'.

"In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion." VIII, Wigmore, on Evidence, sec. 2263, p. 363.

But preservation of the constitutional privilege does not require extension of its protection to the extent now urged by Trujillo. He attempts to show that the rule of law applied in the cases in which evidence was held to be admissible with reference to finger-prints (People v. Jones, 112 Cal.App. 68, 296 P. 317), handwriting

(People v. Gormley, 64 Cal.App.2d 336, 148 P.2d 687), physical examinations (People v. Bundy, 168 Cal. 777, 145 P. 537; People v. Salas, 17 Cal.App.2d 75, 61 P.2d 771; and People v. Guiterez, 126 Cal.App. 526, 14 P.2d 838), and the identification of the defendant in the court room (People v. Clark, 18 Cal.2d 449, 116 P.2d 56; People v. Oliveria, 127 Cal. 376, 59 P. 772; People v. Goldenson, 76 Cal. 328, 19 P. 161), is not controlling in regard to the evidence presented against him.

In each of these cases, the doctrine of self-incrimination was limited to testimonial compulsion, and there is no legal reason for a further extension of it. In the words of Mr. Wigmore:

"If an accused person were to refuse to be removed from the jail to the court-room for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused." VIII, Wigmore on Evidence, 3d Ed., sec. 2265, p. 374.

The evidence challenged by Trujillo falls within the classification of that which relates to physical identification. As was said in People v. One 1941 Mercury Sedan, 74 Cal.App.2d 199, 206, 168 P.2d 443, 447, "the mere fact that the evidence, other than testimonial evidence, had its origin with defendant, even where taken against his will, is no ground for its exclusion". If Trujillo's theory were the rule, all chattels, including his gun, or anything found on his person at the time of his arrest, would be subject to the rule. It would be difficult to convict one who had committed a crime if, upon his objection, all physical evidence connecting him with the crime would be inadmissible. The remoteness of time between the date the clothing was obtained and its examination by the expert relates solely to the weight of the evidence, and the defendant's objection to it upon that ground was properly overruled. People v. Nakis, 184 Cal. 105, 193 P. 92; People v. Flanagan, 65 Cal.App.2d 371, 150 P.2d 927.

[6] Woodmansee has presented other questions for decision. First, he claims that the indictment returned against him was void, and consequently the superior court had no jurisdiction to try him. The ground for his position is that the testimony presented to the grand jury was hearsay and incompetent and did not amount to legal evidence connecting him with the crime charged. He relies upon that portion of section 919 of the Penal Code which provides: "The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence."

It is true that, at the time of the hearing before the grand jury, Foakes had not admitted his complicity and appeared as a disinterested witness, testifying to facts different from those related by him at the trial. But his testimony at the grand jury hearing was not hearsay as to Woodmansee. He testified that Woodmansee was present during a conversation between himself and Trujillo at which time he was told that Trujillo and Woodmansee had a "job lined up" for the following evening. As Foakes related the incident, Woodmansee took no part in the conversation; "he just sat there". This testimony was clearly admissible under section 1870 of the Code of Civil Procedure, which provides that "* * * evidence may be given upon a trial of the following facts: * * * 3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto; * * *."

[7] Generally this provision of the statute is applied in the case of inculpatory statements made in the presence of an accused and not denied or contradicted by him, and the statements "are admissible, only when they are offered in connection with evidence of statements or conduct of the accused, tending to give credibility to the accusation." People v. Allen, 138 Cal. App. 652, 656, 33 P.2d 77, 79; People v. Petersen, 66 Cal.App.2d 420, 152 P.2d 347. However, the same reasoning leads to the conclusion that the evidence here challenged

was properly admitted. The statement of the witness is not direct evidence, but is admissible in connection with the conduct of Woodmansee for the purpose of showing his reaction to the statements, and that his conduct was such as to implicate him in the commission of the crime with which he is charged. People v. Lew Fat, 189 Cal. 242, 207 P. 881; People v. Wade, 71 Cal. App.2d 646, 163 P.2d 59; People v. Peete, 54 Cal.App. 333, 202 P. 51; 8 Cal.Jur. 101. As such it is "legal evidence" within the meaning of section 919 of the Penal Code.

[8, 9] In addition to Foakes' statement as to the conversation which he had with Trujillo, the hammer bearing the initials "E. W." was introduced in evidence before the grand jury. It is true that no one identified the hammer as belonging to Woodmansee, but the fact that it bore his initials is circumstantial evidence of ownership which the grand jury was entitled to consider. Code Civ.Proc. sec. 1954; cf. People v. Adamson, 27 Cal.2d 478, 485, 165 P.2d 3; and cases cited therein. Assuming, without deciding, that the question of the sufficiency of the evidence before the grand jury may be reviewed upon appeal (cf. Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713), it follows that the finding of the indictment of the grand jury was based upon sufficient evidence to connect Woodmansee with the crime, and was not subject to a motion to set it aside. Penal Code, sec. 995.

[10, 11] Finally, Woodmansee complains of the admission in evidence of certain exhibits in the case against him. These exhibits consist of the articles found near Odom's body. All of them are admissible in evidence upon a prima facie showing of a connection with the crime committed. People v. Miller, 177 Cal. 404, 170 P. 817; 8 Cal.Jur. 143 and cases there cited. Each of them tends to prove the manner in which the crime was committed. People v. Peete, supra. "As a general rule, physical objects which constitute a part of the transaction, or which serve to unfold or explain it, may be exhibited in evidence, if properly identified, whenever the transaction is under judicial investigation." People v. Green, 13 Cal.2d 37, 43, 87 P.2d 821, 823, quoting with approval from People v. Bannon, 59 Cal.App. 50, 56, 209 P 1029.

[12, 13] The gun was also admissible as evidence connecting the defendants with the commission of the offense charged. 8 Cal.Jur. 145, and cases cited therein. It was found in Trujillo's room and identified by witnesses other than Foakes as having been in his possession. Moreover, both Trujillo and Woodmansee admitted that they had stolen it from the 718 Club. The purpose of presenting the crowbar to the jury was to show the burglary of the tavern, whose owner testified that it was taken at that time and the evidence was clearly relevant for the purpose of identification.

[14, 15] The testimony of the accomplice Foakes placed Woodmansee at the scene of the crime, and, regardless of who had possession of the instruments and tools prior to and after the commission of the crime, the exhibits were admissible as against each of the parties who were otherwise shown to have been connected with the crime. Merely because his connection with the crime was proved by accomplice testimony, it does not follow that evidence, which would be admissible had his connection been proved in some other fashion, is inadmissible. Cf. People v. Santos, 134 Cal.App. 736, 746, 26 P.2d 522. Evidence which has probative value may be admitted. The weight to be given such evidence is a question for the jury to determine. People v. Adamson, supra, 27 Cal.2d at page 485, 165 P.2d at page 7.

The judgments and the orders denying the motions for a new trial are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I concur in the judgment of affirmance as to defendant Trujillo, but I dissent from that portion of the majority opinion which holds that the evidence is sufficient to support the judgment against defendant Woodmansee.

In my opinion there was insufficient corroboration of Foakes' testimony to connect defendant Woodmansee with the crime, and that the judgment as to this defendant should be reversed. The only evidence of that character consists of the presence at the scene of the crime of a hammer upon which appears in stamped letters the initials E. W. (the same as those of Woodmansee); that Woodmansee and defendant Trujillo were seen together before and after the crime and had jointly committed a previous burglary; that a screw driver found at the scene of the crime was similar to one used in the previous burglary and the telegram sent by Woodmansee to his mother when he was arrested asked her to retain counsel and contact "Joe" meaning Joe Trujillo.

Even conceding that there was sufficient evidence at the trial (which I do not), there was a total absence of evidence to support the indictment against Woodmansee. The sole evidence concerning his connection with the crime is (1), the presence of the hammer at the scene of the crime with letters stamped thereon which corresponded to his initials, and (2), his presence and maintenance of silence at a conversation between Foakes and Trujillo in which the latter told Foakes he and Woodmansee would probably do a "job" the next night. It needs no discussion to demonstrate the total inadequacy of the first item of evidence. There was no evidence that the hammer belonged to Woodmansee, or that he had ever had it in his possession. Certainly the mere presence at the scene of a crime of an article with letters stamped on it that correspond to some person's initials completely fails to connect him with the crime. The second item of evidence was hearsay and therefore not sufficient under section 919 of the Penal Code. The theory of its admissibility in this case is most commonly applied where the pertinent feature is the reaction of a person to accusatory statements made to him. See, People v. Simmons, 28 Cal.2d 699, 172 P.2d 18. Conceding that such exception to the hearsay rule is not confined to the "accusatory statements" situation, its basic philosophy is that "silence gives consent," and the fundamental premises necessary for its application are that the one whose conduct is concerned must have heard the statement and it must have been made under circumstances which required some comment on his part, such as a denial if it were not true. This evidence was clearly inadmissible under settled rules which have been ably stated as follows: First, "* * * it is usually said that the proponent of the evidence must show, not merely that the party was *present* when the remark was made (and 'presence' of course implies 'proximity within a distance sufficient to permit hearing'), but also that the party actually *heard and understood* what was said. But this seems too strict; the presence of a party may be assumed to indicate that he heard and understood." Wigmore on Evidence, 3d Ed., § 1072. Second: "The general principal of Relevancy (ante, § 29) tells us that the inference of assent may safely be made only when no other explanation is equally consistent with silence; and there is always another possible explanation—namely, ignorance, or dissent—unless the circumstances are such that a dissent would in ordinary experience have been expressed if the communication had not been correct. This much has always been conceded judicially when the question has been presented." Wigmore on Evidence, 3d Ed., § 1071. And a third rule which is clearly applicable here, has been stated thus: "So, too, if the party had plainly no *motive for responding,* his silence permits no inference; and this is often the case *where the statement is addressed to another person,* and not to the party himself. Much more is the silence without significance when a deterrent motive, such as fear, was operating upon the party." Wigmore on Evidence, 3d Ed., § 1072. Applying these rules in the instant case it is obvious that the silence of Woodmansee did not constitute an adoption of Trujillo's statement that a "job" was going to be done by them the following night. There was no evidence before the grand jury of any previous relationship or acquaintance between Trujillo and Woodmansee. The conversation between Foakes and Trujillo took place in a pool room where there obviously would be noise. Foakes was talking to and with Trujillo. He was not talking to Woodmansee. As far as appears Woodmansee was merely a stranger who happened to be in the pool room. There is no showing that he was in such proximity to the conversation that he could hear what was said. There were other persons in the pool room. The only reference by Trujillo was to a "creamery job." There is nothing to show what was meant by a "job", and he said no more than that Woodmansee and he would *"probably* go on the job together." It does not appear that Woodmansee could have heard the conversation. He did not participate in the conversation. He was a stranger to it. It did not call for a denial on his part. Trujillo simply made a vague suggestion that Woodmansee would go on the job with him. What kind of a job was not mentioned.

The foregoing evidence being eliminated there is nothing left but the hammer. That is no evidence at all. It was not identified as the property of Woodmansee.

Here Woodmansee's motion to set aside the indictment on the ground that it had no evidentiary support was denied. That was an interlocutory order before judgment. Such interlocutory orders are reviewable on appeal from the judgment of conviction. It is said: "Upon appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, *review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment,* which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant." Pen.Code, sec. 1259. [Emphasis added.] See, also, Pen. Code, sec. 1237; 8 Cal.Jur. 560.

Since it has been held that the court has no *jurisdiction* to try a case where there is no evidence to support the indictment (Greenberg v. Superior Court, 19 Cal.2d 319, 121 P.2d 713), the only possible conclusion is that the conviction of Woodmansee cannot be sustained. The case of People v. McCalla, 63 Cal.App. 783, 220 P. 436, which holds that it is not prejudicial error to deny a motion to quash an information where there was no preliminary hearing, should be disapproved. As the court lacked jurisdiction under the Greenberg case to proceed with the trial on the indictment against Woodmansee, the judgment against him must be reversed.

SCHAUER, J., concurs.

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32 Cal.2d 119

GERRY OF CALIFORNIA v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 20494.

Supreme Court of California.

June 16, 1948.

Rehearing Denied July 15, 1948.

1. Mandamus ⚷31

Mandamus is an appropriate remedy to compel the exercise of jurisdiction by a superior court.

2. Torts ⚷10

Peaceful picketing and secondary boycott by uncertified unions to organize nonstriking employees are lawful under state law.

3. Courts ⚷489(1)
States ⚷4

The laws of the United States are as binding on citizens and courts as state laws, and state courts competent to exercise it have concurrent jurisdiction with the federal court to enforce federal law unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction creates the duty to exercise it.

4. States ⚷4

The exclusion of state action may be implied from the nature of federal legislation and subject matter although express declaration of that result is wanting.

5. Courts ⚷489(1)

When the question is whether a state court may take jurisdiction of matters arising under federal law, inquiry must first be directed to the intention of Congress in that regard.

6. Administrative law and procedure ⚷232
Courts ⚷489(1)
Master and servant ⚷15(1)

Whether a state court has concurrent jurisdiction to enjoin peaceful picketing and secondary boycott by uncertified unions to organize nonstriking employees must be determined from a construction of the National Labor Relations Act as amended. National Labor Relations Act, §§ 1 et seq., 9, as amended by Labor Management Relations Act of 1947, § 101, 29 U.S.C.A. §§ 151 et seq., 159.

7. Administrative law and procedure ⚷232
Master and servant ⚷15(1)

Under the National Labor Relations Act before the 1947 amendment, unfair labor practices on the part of employee organizations were not within the jurisdiction of the National Labor Relations Board and action to enjoin such practices could be initiated in the courts. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

8. Administrative law and procedure ⚷228
Master and servant ⚷15(1)

The 1947 amendment of the National Labor Relations Act shows an intent not to confer powers on the courts at the suit of private parties with the exception of jurisdiction expressly granted, which does not include the exercise of equity powers. National Labor Relations Act, §§ 1 et seq., 9, as amended by Labor Management Relations Act of 1947, § 101, 29 U.S.C.A. §§ 151 et seq., 159.

9. Administrative law and procedure ⚷232
Courts ⚷489(1)
Master and servant ⚷15(1)

Under the National Labor Relations Act as amended, state court is without jurisdiction to entertain an action by employer to enjoin peaceful picketing and secondary boycott by uncertified unions to organize nonstriking employees but primary jurisdiction rests with the National Labor Relations Board. National Labor Relations Act, §§ 1 et seq., 9, as amended by Labor Management Relations Act of 1947, § 101, 29 U.S.C.A. §§ 151 et seq., 159.

10. Administrative law and procedure ⚷232
Courts ⚷489(1)
Master and servant ⚷15(1)

The fact that labor unions had failed to file reports and affidavits required by the National Labor Relations Act as amended did not justify employer in resorting to state court to have allegedly unfair labor practices by unions enjoined. National Labor Relations Act, §§ 1 et seq., 9, as amended by Labor Management Relations Act 1947, § 101, 29 U.S.C.A. §§ 151 et seq., 159.

◆

Original proceeding by Gerry of California for a writ of mandate addressed to the Superior Court of the State of California in and for the County of Los Angeles, and others, directing the named respondent to assume jurisdiction of an application for an injunction in an action brought in that court against various labor unions and officers thereof. On a general demurrer to the petition.

Alternative writ discharged and peremptory writ denied.

Knight, Gitelson & Ashton and Alfred Gitelson, all of Los Angeles, for petitioner.

David Sokol and John C. Stevenson, both of Los Angeles, for respondents.

SHENK, Justice.

The petitioner seeks the writ of mandamus to direct the respondent, the Superior Court in and for the County of Los Angeles, to assume jurisdiction of an application for an injunction in an action brought in that court against various labor unions and officers thereof. The alternative writ issued and the matter is submitted on a general demurrer to the petition.

The record shows the following facts which for the purpose of this proceeding are deemed to be true:

The petitioner, herein also called the plaintiff or the company, is a California corporation with its principal place of business in Los Angeles County. It manufactures women's wearing apparel from finished piece goods, supplies and trimmings for the most part purchased outside of the state and shipped to petitioner within the state. The finished articles to the extent of approximately eighty per cent are sold and delivered outside the state. The petitioner employs about one hundred forty persons in production and shipping.

The petitioner's employees are unorganized. On November 4, 1947, the defendant unions, particularly International Ladies' Garment Workers Union, Pacific Coast Regional Office, and Western Warehouse Council of the International Brotherhood of Teamsters (A. F. of L.), sought to organize the employees of petitioner and placed a picket line around its place of business. On that date the company signed an agreement with the unions to enter into negotiations, but it was also agreed that neither party would enforce the union shop clause unless the employees voted to authorize such an agreement pursuant to section 9 of the National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449, 453, as amended by the Labor Management Relations Act, 1947, c. 120, Title 1, § 101, 61 Stat. 136, 29 U.S.C.A. §§ 151 et seq., 159, herein also called the 1947 Act. On November 12th The Gerry Employees' Association, comprising 116 of the employees, filed with the National Labor Relations Board a petition seeking an election and certification of itself as the bargaining agent of the Gerry employees. At the same time a petition was filed by an employee with the board alleging that the agreement of November 4, 1947, had been entered into without the participation and approval of a majority of the employees. On November 25th the company filed with the board its consent and stipulation to the holding of an election by the employees. The record shows no action on the foregoing matters before the board. Although the uncertified unions continued their picketing operations, including secondary boycott activities, no complaint or charge was filed by the company with the board for relief pursuant to the 1947 Act. None of the employees left their jobs.

In December, 1947, a complaint for injunction and damages was filed by the company in the respondent court charging that the picketing and concerted secondary boycott activities were unlawful under the 1947 Act, alleging damages and the continuation of injury unless the union activities were enjoined. A hearing was had on the return to an order to show cause during the course of which by objection the defendant raised the issue of the respondent court's jurisdiction to grant equitable relief. The court concluded that the company was engaged in interstate commerce and that the union activities sought to be enjoined were subject to the provisions of the 1947 Act. The objection was sustained. The court ruled that it had no jurisdiction to proceed with the cause of action for equitable relief and would refuse to exercise jurisdiction thereof unless commanded by this court to do so. No question is here presented as to the jurisdiction of the court to entertain the cause of action for damages.

[1] Mandamus is an appropriate remedy to compel the exercise of jurisdiction by a superior court. Middlecoff v. Superior Court, 220 Cal. 410, 31 P.2d 200; Katenkamp v. Superior Court, 16 Cal.2d 696, 698, 108 P.2d 1, and cases cited; Miller v. Municipal Court, 22 Cal.2d 818, 852, 142 P.2d 297, and cases cited. The only question now presented is whether the court correctly refused to assert its jurisdiction to enjoin the peaceful picketing and secondary boycott activities by uncertified unions for the purpose of organizing the non-striking employees.

[2] It should be noted that the union objective and the means employed to attain it were not unlawful insofar as the law of this state is concerned. Inasmuch as the majority of this court, in In re Blaney, 30 Cal.2d 643, 184 P.2d 892, invalidated the hot cargo and secondary boycott law of 1941, there is no California statute or decision which declares unlawful the objective or method of obtaining it pursued by the unions. At the hearing the plaintiff agreed that the activities sought to be enjoined were peaceful and that there was no state law pursuant to which the company could obtain equitable redress. The petitioner invokes sections 8(b) and 303 of the Labor Management Relations Act, 1947, as furnishing the law pursuant to which the respondent court must exercise the equity jurisdiction conferred by section 5 of Article VI of the state Constitution.

For present purposes it will be sufficient, without setting out the specific provisions, to note that section 8(b) of the 1947 Act declares it to be an unfair labor practice affecting interstate commerce for a labor organization to engage in the concerted activities specified in the record. Accordingly it is assumed that the alleged activities on the part of the uncertified unions are unfair labor practices as designated by that section. Section 303(a) declares the same practices unlawful "for the purposes of this section only." Subsection (b) states: "Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States * * * or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

[3-6] It is the petitioner's argument that the state courts have concurrent jurisdiction with the federal courts to enforce rights created by a federal statute. Inasmuch as the laws of the United States are as binding on citizens and courts as state laws, state courts competent to exercise it have concurrent jurisdiction with the federal courts to enforce federal law unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction creates the duty to exercise it. Martin v. Hunter's Lessee, 1816, 14 U.S. 304, 4 L.Ed. 97; Claflin v. Houseman, 1876, 93 U.S. 130, 23 L.Ed. 833; Second Employers' Liability Cases, (Mondou v. New York, N. H. & H. R. Co., 223 U.S. 1, 32 S.Ct. 169, 56 L.Ed 327, 38 L.R.A.,N.S., 44; McKnett v. St. Louis & S. F. R. Co., 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227. In Bethlehem Steel Co. v. New York State Labor Relations Board, April, 1947, 330 S.Ct. 767, 67 S.Ct. 1026, 1029, 91 L.Ed. 1234, it was recognized as a settled rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of that result be wanting citing Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432. At the same time the Supreme Court also pointed out that Congress had not seen fit to lay down even a general guide to the construction of the National Labor Relations Act as it sometimes does (referring to the Securities Act of 1933, § 18, 48 Stat. 85, 15 U.S.C.A. § 77r; Securities Exchange Act of 1934, § 28, 48 Stat. 903, 15 U.S.C.A. § 78bb; United States Warehouse Act, § 29, 39 Stat. 490, 46 Stat. 1465, 7 U.S.C.A. § 269) by saying that its regulation either shall or shall not exclude state action. This court has also recognized that when the question is whether a state court may take jurisdiction of matters arising under a federal law inquiry is first directed to the intention of Congress in that regard. Miller v. Municipal Court, supra, 22 Cal.2d 818, 836, 142 P.2d 297. Therefore, whether concurrent state jurisdiction exists is a matter to be determined from a construction of the act itself.

A proper conclusion depends in part upon the construction of the act before the 1947 amendments. Pursuant to section 10 of the National Labor Relations Act, 29 U.S.C.A. § 160, the National Labor Relations Board was empowered, upon issuing a complaint and notice, to conduct a hearing on a charge of employer unfair labor practices defined in the act and to issue a cease and desist order, together with orders for affirmative relief. Such orders were enforced by petition to the Circuit Court of Appeals which was empowered to conduct a hearing and render a decree (including temporary injunctive relief) enforcing, modifying and enforcing, or setting aside the order of the board. For the purposes of section 10, the limitations imposed by the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C.A. §§ 101–115, upon the issuance of restraining orders and injunctions in cases involving labor disputes were removed.

By section 10(a) before amendment the power thus reposed in the National Labor Relations Board was made "exclusive" and not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." In Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 264, 60 S.Ct. 561, 563, 84 L.Ed. 738, the Supreme Court said, with reference to providing the remedy for the specified unfair labor practices: "Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective." The Supreme Court pointed out that the course of procedure was definite and restricted; that the board and the board alone could determine whether an employer had engaged in an unfair labor practice; that the board was chosen as the instrument or agency, exclusive of any private person or group, to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce, and that the board alone was authorized to take proceedings to enforce its order. The sole authority of the board to secure prevention of unfair labor practices affecting commerce was thus recognized. That section 10 of the National Labor Relations Act committed to the board the exclusive power to decide whether unfair labor practices by the employer had been engaged in and to determine the action that should be taken to remove or avoid the consequences thereof was again stated in National Licorice Co. v. National Labor Relations Board, 309 U.S. 350, at page 365, 60 S.Ct. 569, at page 577, 84 L.Ed. 799. Also, National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 46, 47, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352, and Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 48–50, 58 S.Ct. 459, 82 L.Ed. 638, upheld as constitutional the vesting of the exclusive power in the board. The most recent pronouncement of the Supreme Court to come to our attention is in Bethlehem Steel Co. v. New York State Labor Relations Board, supra, 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234, reversing 295 N.Y. 601 and 607, 64 N.E.2d 350, wherein it was held that state and federal action covering the subject matter of the National Labor Relations Act could not co-exist. Similarly in Blankenship v. Kurfman, 1938, 7 Cir., 96 F.2d 450, 454, it was held that the National Labor Relations Act might not be construed as intending to create rights for employees which could be enforced in federal courts independently of action by the National Labor Relations Board; that it was clear that the only rights which were made enforceable by the Act were those which had been determined by the board to exist under the facts of each case, and that when determined the method of enforcing them provided by the Act must be followed. In Fur Workers Union, Local 72 v. Fur Workers Union, 70 App.D.C. 122, 105 F.2d 1, with reliance on the Blankenship case, such double jurisdiction was likewise held to be contrary to the intent manifested by the provisions of the National Labor Relations Act. See also Styles v. Local 74, D.C., 74 F.Supp. 499.

The Supreme Court of the United States has also recognized the application of the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted"—referring to the application to the National Labor Relations Board for determination of the factual issues and the appropriate relief designated in the National Labor Relations Act. Myers v. Bethlehem Corporation, supra, 303 U.S. at pages 50, 51, citing numerous cases; see also Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U.S. 54, 58 S. Ct. 466, 82 L.Ed. 646; United Brick & Clay Workers v. Junction City Clay Co., 6 Cir., 158 F.2d 552; Steinberg v. Lebus, D. C., 71 F.Supp. 121, 124.

[7] In a different category are cases such as Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740, 748, 749, 62 S.Ct. 820, 86 L.Ed. 1154, wherein it was held that the state's exercise of its police power (e. g., the prevention of mass picketing of the employer's factory, threatening personal injury or property damage to employees desiring to work, obstructing entrance to and egress from the employer's factory, obstructing the streets and public roads, picketing the homes of employees, and other breaches of the peace in connection with labor disputes) was not intended to be exlcuded by the provisions of the National Labor Relations Act, and that the exercise of that power by the state could stand consistently with the operation of the federal act. State power in the field not occupied by the National Labor Relations Act has been appropriately exercised or recognized in other cases. Carpenters and Joiners Union of America v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143: United Electrical Radio & Machine Workers v. Westinghouse Electric Corporation, D.C., 65 Fed. Supp. 420, 421; Northwestern Pac. R. R. Co. v. Lumber & Sawmill Workers Union, 31 Cal.2d 441, 189 P.2d 277, and cases cited; Park & Tilford Import Corporation v. International etc. of Teamsters, 27 Cal.2d 599, 603, 608, 165 P.2d 891, 162 A.L.R. 1426; James v. Marinship Corporation, 25 Cal.2d 721, 743, 744, 155 P.2d 329, 160 A.L.R. 900; Bautista v. Jones, 25 Cal. 2d 746, 155 P.2d 343; Fansteel Metallurgical Corporation v. Lodge 66 of Amalgamat-

ed Ass'n, etc., 295 Ill.App. 323, 14 N.E.2d 991; Wisconsin Labor Relations Board v. Fred Reuping Leather Co., 228 Wis. 473, 279 N.W. 673, 117 A.L.R. 398 and Note. Cases relied on which were decided before the 1947 Act (assuming they involved interstate commerce), in which peaceful picketing for unlawful purposes has been enjoined by state action are therefore not in point. Under the National Labor Relations Act before amendment by the 1947 Act, unfair labor practices on the part of employee organizations were not included within the jurisdiction of the National Labor Relations Board. It was therefore a sphere in which action could be initiated in the courts.

As noted, the National Labor Relations Act before its amendment by the 1947 Act did not define or place within the scope of the National Labor Relations Board's jurisdiction unfair labor practices on the part of labor organizations. By section 8 (b) of the 1947 Act the conduct charged to the defendant unions in this case is declared to be unfair labor practices.

Prior to the 1947 amendment the powers of the board under section 10 of the act were limited to the issuance of cease and desist orders against employers, after investigation and hearing, and the enforcement thereof by petition to the Circuit Court of Appeals for injunction and other process. Concurrently with the inclusion by the 1947 Act of declared unfair labor practices by labor organizations (section 8 (b)), Congress deemed it expedient to provide accelerated means for obtaining injunctive orders. Under the 1947 Act a temporary restraining order may be obtained after the issuance of a complaint by the board as to *any* unfair labor practice, by petition filed in the United States District Court, upon notice and hearing (sec. 10(j)). In certain cases of unfair labor practices by labor organizations designated in section 8(b), the duty to apply for temporary injunctive relief is mandatory whenever preliminary investigation by the board indicates reasonable cause for belief that the charge is true (sec. 10(1)). Section 10(h) removes the restrictions and limitations upon the equity jurisdiction of United States Courts imposed by the Norris-LaGuardia Act insofar as action by the National Labor Relations Board is concerned. See Bakery Sales Drivers Local Union No. 33 v. Wagshal, March 15, 1948, 333 U.S. 437, 68 S.Ct. 630.

The provision of section 303(a) of the 1947 Act restricting the unlawfulness there declared to the purposes of that section discloses an intent not to authorize criminal prosecutions for the commission of the specified unfair labor practices by labor organizations. The section then permits suits in district courts of the United States and other courts having jurisdiction of the parties for the recovery of damages occurring from the "unlawful" acts on the part of labor organizations. This is the only jurisdiction over suits by private parties which is expressly recognized by the act. In designating the nature of the board's power in section 10(a) of the 1947 Act, Congress omitted the word "exclusive" from the National Relations Act. The petitioner argues that the omission implies an intent to permit injunctive relief as well as damages at the suit of parties injured by the designated unfair labor practices committed by labor organizations. But in amending that section to eliminate the word "exclusive," Congress also added a proviso empowering the National Labor Relations Board by agreement to cede to state agencies jurisdiction in any industry (with certain exceptions) although a labor dispute affecting interstate commerce was involved, where the local regulatory provisions were consistent with the federal act. The word "exclusive" would be inconsistent with the exercise of ceded power by agencies created pursuant to the state regulatory legislation invited by the proviso.

[8] The provisions of the 1947 Act show an intent to preserve the functional purposes of the National Labor Relations Act with increased objectives, and an intent not to confer powers on the courts at the suit of private parties with the exception of the jurisdiction expressly granted, which does not include the exercise of equity powers. This intent is also indicated by the record of the conference and committee reports and congressional debates.

The pertinent portions of those reports and debates were reviewed by the Fourth Circuit Court of Appeals in Amazon Cotton Mill Co. v. Textile Workers Union of America, 167 F.2d 183, 188. The appeal in that case involved the jurisdiction of the federal district court under the National Labor Relations Act as amended by the 1947 Act to issue an injunctive order at the suit of a labor organization. A mandatory injunction theretofore issued by the District Court required the employer to bargain collectively with a union of its employees. It was concluded that the history of the National Labor Relations Act and the decisions rendered thereunder made it clear that the purpose of the act was to establish a single paramount administrative authority in connection with the development of federal law regarding collective bargaining; that the only rights made enforceable were those determined by the National Labor Relations Board to exist under the facts of each case; that there was nothing in the text or the history of the enactment of the 1947 Act which indicated a departure from the foregoing purposes or policies, or showed any intention to vest jurisdiction in the courts except to the limited extent that jurisdiction was expressly conferred; that only under section 303 was jurisdiction given to entertain actions brought by private parties and then only to render judgments for damages arising out of jurisdictional strikes and boycotts. That court also reached the conclusion from a study of the new act and the conference reports that the purpose of omitting the word "exclusive" from section 10(a) of the National Labor Relations Act was merely to synchronize with the power reposed in the board the added elements of jurisdiction expressly vested in the courts and which may be ceded to state agencies under the 1947 proviso of said section. The court said: "There is nothing in the history of the act, the reports of committees or the debates in Congress which even vaguely supports the contention that its effect was to vest jurisdiction in the District Courts to grant relief against unfair labor practices. Everything said by anyone remotely bearing on the matter is to the contrary. * * * It is hardly thinkable that, if the effect of the Labor Management Relations Act was to make a fundamental change in the jurisdiction to deal with unfair labor practices, this important fact would not have dawned upon some member of the House or the Senate and have been referred to in the course of the lengthy debate of a measure that was passed over a Presidential veto. That no such suggestion was made gives ample support to the interpretation which, as we have already indicated, we would place upon the text of the act if the history of its passage and Congressional debates were not available to us." The court mentioned cases in trial courts where injunctive relief had been denied (Douds v. Wine, Liquor & Distillery Workers Union, D.C., 75 F. Supp. 477; Fitzgerald v. Douds, D.C., 76 F.Supp. 597, Southern District of New York; and the present case), and referred to the disastrous consequences to any successful administration of the labor law, and the repugnance to the orderly administration of justice, if courts should take coordinate jurisdiction with the National Labor Relations Board to restrain unfair labor practices. The court also noted the absurdity which would result from unauthorized court actions at the suit of labor organizations, since Congress clearly intended to withhold redress on a charge of unfair labor practices made by a labor organization unless the latter had filed certain financial statements and affidavits (sec. 9 (f), (g), (h)). Not overlooked was the possibility that unusual cases might arise where courts of equity could be called upon to protect the rights created by the act. But the court recognized that the case involved nothing out of the ordinary, that the procedure before the board provided an adequate administrative remedy, and that the extraordinary powers of a court of equity could not be invoked until the administrative remedy had been exhausted, citing Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 4 Cir., 91 F.2d 730, affirmed supra, 303 U.S. 54, 58 S.Ct. 466, 82 L.Ed. 646. No question is here presented as to what the situation would be if the petitioner had exhausted its administrative remedy.

[9] The reasons for concluding that express jurisdiction was not conferred on federal trial courts at the suit of a private party to restrain alleged unfair labor practices, as held in the Amazon Cotton Mill Co. case, likewise compel the conclusion that the nature and purpose of the act preclude state action in the field of the jurisdiction vested in the National Labor Relations Board except to the extent that it has been expressly conferred or ceded, and that this is so whether such action be initiated by an employer or by a labor organization. General language in Park & Tilford Import Corporation v. International, etc., of Teamsters, supra, 27 Cal.2d at page 604 et seq., 165 P.2d at page 894, and Lillefloren v. Superior Court, 31 Cal. 2d 439, 189 P.2d 265, indicating that the state courts might enjoin union activities affecting interstate commerce if engaged in for an unlawful purpose is not controlling here. It is necessarily restricted to the period prior to the effective date of the 1947 Act when no administrative remedy was afforded to prevent unfair labor practices on the part of labor organizations.

[10] Other contentions do not require specific notice. The petitioner makes much of the fact that the defendant unions, as alleged in the complaint in the action, have not filed the required financial reports and affidavits under the 1947 Act which are a prerequisite to the exercise of jurisdiction by the National Labor Relations Board to proceed on a charge of unfair labor practice made by a labor organization. It is claimed that the unions' failure to file such reports and affidavits justifies the present action for injunctive relief against them at the suit of the employer. It is a sufficient observation in this respect to say that here it is the employer who is asserting unfair labor practices on the part of labor organizations. The employer as well as the union is now required by the 1947 Act to proceed before the board to obtain appropriate relief from unfair labor practices affecting interstate commerce. The alleged cause of action for injunctive relief presents matters for the board to determine in the first instance pursuant to the exercise of power vested by the National Labor Relations Act as amended by the 1947 Act. There is nothing in the act as so amended which indicates that these unions may not thus be subject to the appropriate procedure thereby provided. Inasmuch as the filing of the required documents by labor organizations is not made a prerequisite to the exercise of jurisdiction by the board on a charge of unfair labor practices made by an employer, there is no showing of inadequacy of the available administrative remedy.

The alternative writ is discarged and the peremptory writ is denied.

GIBSON C. J., and CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

32 Cal.2d 156

SIMONS BRICK CO., Inc. v. UNITED BRICK, TILE AND CLAY WORKERS OF AMERICA et al.

L. A. 20046.

Supreme Court of California.

June 29, 1948.

Injunction ⚷63

Order for a preliminary injunction against certain labor activities was improper, where order was based on a violation of the invalid Hot Cargo Law. Labor Code, §§ 1131–1136.

Appeal from Superior Court, Los Angeles County; Allen W. Ashburn, Judge.

Suit by Simons Brick Company, Incorporated, against the United Brick, Tile and Clay Workers of America, affiliated with the American Federation of Labor, an unincorporated voluntary association, and others, and the Los Angeles Building and Construction Trades Council, an unincorporated association affiliated with the American Federation of Labor, and Brick

Layers and Stone Masons Union, Local No. 2, an unincorporated association, and others to enjoin certain labor activities of defendants. From an order granting a preliminary injunction, the Los Angeles Building and Construction Trades Council, an unincorporated association affiliated with the American Federation of Labor, and Brick Layers and Stone Masons Union, Local No. 2, an unincorporated association, and others appeal.

Order reversed.

Rosecrans & Emme, Leo M. Rosecrans, Arthur Garrett, Robert W. Gilbert, and Allen L. Sapiro, all of Los Angeles, for appellants.

Hill, Morgan & Farrer and Carl M. Gould, all of Los Angeles, for respondent.

CARTER, Justice.

The trial court ordered the issuance of a preliminary injunction against certain labor activities of defendants in this case in which plaintiff is the employer and defendants are labor unions and members and representatives thereof. An appeal is taken from that order by some of the defendants.

The order is based upon a violation of the Hot Cargo Law. Labor Code, §§ 1131–1136. As stated by the trial court in its opinion: "In each of these cases the complaint charges some form of violation of the Hot Cargo and Secondary Boycott Act, Stats.1941, ch. 623, p. 2079, now constituting sections 1131–1136 of the Labor Code. Appearing defendants, by demurrer and resistence to motion for preliminary injunction, challenge the constitutionality of the statute. Counsel stoutly assert the activities described in the Act and denominated 'hot cargo' and 'secondary boycott' to be constitutionally protected labor activities, but their arguments revolve mainly around the impact of the statute upon picketing and the claim that it is exercise of the right of free speech which the legislature unconstitutionally attempts to restrain. The matter will be examined in both its aspects." Likewise the appellants and respondent devote their attention to the validity of that act. No other basis for supporting the preliminary injunction is suggested. The case is therefore controlled by In re Blaney, 30 Cal.2d 643, 184 P.2d 892, in which this court held the Hot Cargo Act to be invalid.

The order is reversed.

GIBSON, C. J., and EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

32 Cal.2d 131

BACON et al. v. BACON et al.

L. A. 20053.

Supreme Court of California, in Bank.

June 25, 1948.

1. Trusts 🔑236

Where owners of undivided fractional interests in prospective oil-bearing land, title to which was clouded, in order to clear title so that an oil lease could be made, conveyed their titles to one of owners who, as trustee, was to bring suit to partition and quiet title to land and, on successful culmination of suit, enter into an oil lease for benefit of owners and into agreements for operation of land, and trustee quieted title and executed lease for which he received $5,000, operational expenses of trustee were deductible from the $5,000 before owners were entitled to any distributions thereof.

2. Trusts 🔑211

Where owners of undivided fractional interest in prospective oil-bearing land, title to which was clouded, in order to clear title so that an oil lease could be made, conveyed their titles to one of the owners who, as trustee, was to bring suit to partition and quiet title to land and, on successful culmination of suit, enter into an oil lease for benefit of owners and into agreements for operation of land, and trustee quieted title and executed lease, trustee was authorized to enter into a contract with attorney for payment of 5 per cent. of all royalties to attorney for past and future services.

3. Trusts ⚷236

Where owners of undivided fractional interests in prospective oil-bearing land, title to which was clouded, in order to clear title so that an oil lease could be made, conveyed their titles to one of the owners who, as trustee, was to bring suit to partition and quiet title to land and, on successful culmination of suit, enter into an oil lease for benefit of owners and into agreements for operation of land, and trustee entered into agreement with one of the owners that he would convey back to that owner, free from any claims of trustee except payment of $1000, all of that owner's interest in the land, that owner was not relieved from liability for a share of expense incurred by trustee in the suit to quiet title.

4. Attorney and client ⚷140

When trial court is informed of extent and nature of attorney's services, its own experience furnishes it with any element necessary to fix their value.

5. Appeal and error ⚷931(4)

Where court found that $5,000 paid to trustee for oil lease plus additional $184.89 were expended by trustee for court costs, counsel fees, payment for quitclaims, and for traveling expenses of counsel in connection with partition suit and negotiations for clearing of title to land, and that trustee fully accounted for all money received for beneficiaries of trust, further finding could reasonably be implied that attorney fees were necessarily incurred by trustee and were reasonable in amount.

6. Attorney and client ⚷166(3)

Evidence sustained implied finding of reasonablness of attorney fees of $3,500 of attorney who communicated and negotiated with various co-owners of realty, who prosecuted partition-quiet title suit in accordance with terms of trust to a conclusion satisfactory to oil lessees, and who negotiated oil leases in accordance with terms of trust.

7. Trusts ⚷305

In action against trustee for declaratory relief, accounting, and reconveyance of realty, evidence sustained finding that trustee had accounted directly to one of the plaintiffs for his interest in realty located in certain counties.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Joseph C. Bacon and Robert H. Bacon against Thomas P. Bacon and Jos. Wahrhaftig for declaratory relief, an accounting, and reconveyance of certain realty. From a judgment for defendants, plaintiffs appeal.

Judgment affirmed.

Prior opinion 181 P.2d 64.

Siemon, Maas & Siemon, Alfred Siemon, Walter L. Maas, Jr., and Bennett Siemon, all of Bakersfield, for appellants.

Matt Wahrhaftig and McKee, Tasheira & Wahrhaftig, all of Oakland, and Kendall, Howell & Deadrich, of Bakersfield, for respondents.

SCHAUER, Justice.

Plaintiffs, Joseph C. Bacon and Robert H. Bacon, seek declaratory relief, an accounting, and reconveyance of certain real property from defendants, who are plaintiffs' brother Thomas P. Bacon and an attorney, Jos. Wahrhaftig, employed by Thomas. The trial court rendered judgment in favor of defendants and plaintiffs have appealed. Upon the record presented, and for reasons herinafter set forth, we have concluded that the judgment should be affirmed.

For brevity and clarity plaintiffs are hereinafter sometimes referred to as Joseph and Robert, and defendants as Thomas and the attorney. Because plaintiffs contend that the evidence fails in some respects to support the trial court's findings and its construction of the contractual relations and obligations of the parties, it is necessary to relate with some detail the evidence pertinent to the disputed matters.

Robert, Joseph, Thomas and ten others owned various undivided fractional interests in approximately 1920 acres of prospective oil bearing land in Kern County, California. The percentages of ownership are stated as follows: Joseph, 13.96; Robert, 28.04; Thomas, 23.12; divided among ten persons or entities not parties to this suit, 34.88. Title to this land was clouded by various leases and other instruments. Prospective new lessees, R. E. Bering and T. E. Adams, wished to drill for oil on the land, but first required a title which would be insured by a responsible title company. For the purpose of meeting that requirement most of the owners, including Joseph and Robert, conveyed their titles to Thomas, who was to bring a suit to partition and quiet-title to the land and upon its successful culmination was to enter into an oil lease for the benefit of himself and of the other co-owners who had conveyed to him. Controversy over the nature and extent of his authority and of the performance by Thomas under the various powers of attorney, deeds, and so-called "trust agreements" under which he dealt with and held title to the interests of Joseph and Robert in the land, has resulted in the instant suit.

The record discloses the following undisputed events: Bering and Adams, who were associates in the acquiring and developing of oil properties, had spent time and money in unsuccessful efforts to clear title to the Kern County land and to secure an oil and gas lease on it. As a further step toward their goal they entered into a written contract with Thomas, under date of February 20, 1942, by which Thomas "warranted" that he was then the owner of not less than "an undivided 66.43% of all of" the Kern County land, and by which it was agreed, so far as here material, that:

"1. Contemporaneously with the execution of this agreement Bering [and Adams] shall pay [Thomas] Bacon the sum of $5,000.00, and by execution of this agreement Bacon acknowledges receipt of said sum.

"2. Contemporaneously with the execution of this agreement Bacon shall execute and deliver to Bering [and Adams] an oil and gas lease covering all of the right, title, and interest in the [Kern County] real property * * * which Bacon now has or may hereafter acquire, whether undivided, partitioned, or otherwise divided; such * * * lease to be upon the terms and conditions and substantially in the form hereto annexed * * *. If, in Bering's [and Adams'] opinion, other or further leases or agreements upon the same terms and conditions are later necessary to fully evidence * * * [their] interest as such lessee, Bacon agrees to execute and deliver the same.

"3. Bacon shall forthwith, at Bacon's sole cost and expense, institute or take such legal proceedings as may be necessary to:

"(a) Fully and finally partition and divide said real property so that the interest and ownership of Bacon therein shall not be undivided, and so that Bacon shall thenceforth own in fee not less than 66.43% of said real property; and

"(b) Fully and finally quiet title to all of said real property so partitioned or divided to Bacon in fee, or thereafter acquired by Bacon, so that Bacon's said title thereto in fee shall be insurable by a responsible title company * * *; provided, however, that if Bacon can secure the execution of the lease herein referred to by the owners of all of the undivided interests in the said property then the completion to judgment of proceedings to partition the same shall not be required. * * *"

Bering and Adams paid to Thomas the $5,000 mentioned in paragraph one of the above agreement, and Thomas executed the lease provided for in paragraph two, employed attorneys, including defendant Wahrhaftig, and commenced preparation for the partition and quiet title suit (hereinafter sometimes referred to as the suit).

Others of the co-owners in the Kern County land also conveyed their interests to Thomas in trust, and Thomas successfully prosecuted the suit to a court decree, entered December 23, 1943, by which title was quieted in Thomas to an undivided 91.66% ownership in the land. Meanwhile, apparently in anticipation of such decree, Bering and Adams, on December 2, 1943, entered into a written agreement with Thomas for a second oil lease, which the parties agreed was to be a continuation of the lease of February 20, 1942; and which provided for a one-sixth royalty, to be paid, so far as concerned the 91.66% of the land to which Thomas held title, to defendant

Wahrhaftig for the credit of Thomas. Bering and Adams went into possession, and in May, 1944, commenced drilling for oil. At an expense of some $500,000 they drilled to a depth of approximately 11,000 feet and entered oil-bearing sand; but because of a "water problem" then encountered they had not at the date of trial herein (March 25, 1946) "raised or produced" oil and had made no payments of any kind to or for the account of Thomas except the $5,000 initially paid under the agreement of February 20, 1942.

On January 25, 1944 (approximately four months prior to commencement of the drilling), Thomas entered into a written "Operating Agreement" with defendant Wahrhaftig. The agreement recites, among other things, that Thomas "is the owner and/or has under his control under trust agreements wherein he is authorized to lease for development for oil and enter into agreements for the operation of 91.-66% of" the Kern County land, that Wahrhaftig had negotiated the oil and gas lease between Thomas and Adams, and that "the operation of said property under said lease, and the collection of royalties which are payable * * * for distribution to the various fee and trust interests under said lease will require the continuing attention of" Wahrhaftig. The agreement then provides as follows: "[Thomas] hereby authorizes [Wahrhaftig] * * * to deduct from all royalties he receives, 5% of such gross amount, if paid in cash, or 5% of the gross amount resulting from the sale of oil and/or gas if paid in kind as full compensation for his services in supervising the operation under the terms of said lease for the collection and distribution of royalties in cash or in kind.

"[Wahrhaftig] * * * agrees to devote the necessary time and effort to the best of his ability, supervise the operation under the terms of said lease and to collect and distribute the royalties therefrom for the benefit of [Thomas] * * * and the trust interest held by [Thomas] * * * in cash or in kind for said compensation of 5%.

"This Agreement shall be binding upon the executors, * * * assigns or legal representatives of the [parties] * * * if capable of rendering a like service as the parties thereto."

Pursuant to the operating agreement Wahrhaftig made various inspections, inquiries, and reports concerning the drilling operations, but as indicated above up to the time of trial had received no royalties of any nature for distribution to Thomas or to those for whom Thomas held title.

On April 25, 1945, plaintiffs Joseph and Robert filed this suit, asking that defendants, Thomas and the attorney, be required to account to plaintiffs for "all royalties, bonuses, other considerations and things of value which they * * * may have received on and for the execution of" the leases with Bering and Adams "and/or for any other lease, conveyance, agreement or contract arising out of said property" and to pay over to plaintiffs any amounts found owing; that the "operating agreement" between defendants "be declared to be inoperative and without any legal effect as to the interests owned by the respective plaintiffs"; and that "defendants be required to transfer and convey to the respective plaintiffs such interests in said property as may be found by the Court to belong to the respective plaintiffs." It was also asked that Thomas be required to reconvey to Joseph the latter's interest in certain real property in Los Angeles, San Bernardino and Contra Costa Counties theretofore conveyed by Joseph to Thomas.

Defendants, in their answer, allege among other things that no payments whatever had been received on account of the Kern County land except the $5000 paid by Bering and Adams under their agreement of February 20, 1942, with Thomas; that such $5000, plus the additional sum of $184.89, had been expended by Thomas for "Court costs, counsel fees, payment for quitclaims and for travelling expenses of counsel in connection with" the partition suit "and in connection with the negotiations for the clearing of" title to the land; that Thomas had already reconveyed to Robert the latter's interest in the Kern County land, but that Robert owed to Thomas a proportionate (28.04%) share of the $184.89 mentioned hereinabove; that

Thomas was willing to reconvey to Joseph upon payment by Joseph of a proportionate (13.96%) share of such $184.89 plus certain additional sums of money also owing by Joseph to Thomas; that under the "operating agreement" of January 25, 1944, defendant Wahrhaftig was entitled to receive 5% of all royalties accruing under the lease with Bering and Adams, including 5% of the royalties attributable to the interests of Joseph and Robert in the land. Judgment was rendered to the effect that the operating agreement was valid and that plaintiffs' interests in any oil royalties paid under the lease with Bering and Adams were subject thereto; that Thomas had fully accounted for all the money received by him for plaintiffs' benefit; that upon the payment by Joseph to Thomas of $1000* (found to be owing under the terms of an agreement hereinafter more fully discussed) Joseph "is entitled to a reconveyance of his interest in the Kern County" land, but subject to the oil leases and to the operating agreement with Wahrhaftig; that Thomas had accounted for the other lands which Joseph had conveyed to him; that Robert pay to Thomas his proportionate share of the $184.89 expended by Thomas over and above the $5000 paid by Bering and Adams.

As grounds requiring reversal of the judgment plaintiffs contend:

1. That Thomas was without "authority to impose upon the interests of Joseph and Robert [in the Kern County land] the obligation to pay defendant Wahrhaftig five per cent of the royalties which might become due and payable from the production of oil."

2. That Thomas could not properly charge to Joseph any of the expenses of the partition and quiet title suit, but instead was required to credit Joseph with a proportionate share of the $5000 paid to Thomas by Bering and Adams.

3. That certain items included by Thomas in his total expenditures of $5184.89 in connection with the partition and quiet title suit and sought by him to be charged proportionately against the interests of plaintiffs were improper, unnecessary and unreasonable.

4. That Thomas had not fully accounted for Joseph's interest in the lands in Los Angeles, San Bernardino and Contra Costa Counties which Joseph had conveyed to Thomas.

1. *The Operating Agreement with Defendant Wahrhaftig.*

In support of their first contention plaintiffs urge that, properly construed, the written agreements under which Thomas was authorized to enter into oil leases covering the interests of plaintiffs in the Kern County land did not authorize him to bind their royalties "by any contract with the defendant Wahrhaftig."

On November 28, 1938, Joseph executed a power of attorney appointing Thomas his attorney in fact with power to "do and perform all matters and things, transact all business, make * * * all contracts, * * * leases * * * and all other * * * instruments" which Joseph himself might do or make with respect to Joseph's interest in the Kern County land and in certain other parcels of real property situated respectively in Los Angeles, Contra Costa and San Bernardino Counties. On December 17, 1938, Joseph by quit claim deed conveyed title to the same lands to Thomas.

Under the date of March 16, 1942, Thomas and Joseph entered into a written agreement in which it is recited that disputes and differences of opinion had arisen between them "concerning various matters" which they desired to settle and adjust. Thomas agreed that he was holding "in trust for the benefit of" Joseph the land theretofore quit-claimed by Joseph to Thomas and that "upon the termination of the present Partition and Quiet Title suit instituted by [Thomas] * * * as plaintiff in the Superior Court of Kern County" and involving the Kern County land Thomas "will, at any time upon demand, convey back to [Joseph] * * * by good and sufficient deed free from any claim or claims of" Thomas, all of Joseph's "interest in the Kern County property * * * and also convey back to [Joseph] * * * all of his said interest in the real property situated in Los Angeles, Contra Costa and San Bernardino Counties, upon payment by" Joseph to Thomas of one thousand dollars. The agreement further provides that Thomas "may lease said property in Kern County for oil or otherwise for the benefit of all the co-owners of said property including [Joseph] * * *, in which event, [Joseph] * * * shall benefit and be entitled to * * * receive * * * free and clear of any claims of [Thomas] * * *, his proportionate interest in all net bonuses, rents, royalties and other values as his said interest in said real property bears to the whole thereof * * *. It is further agreed by the parties hereto that this agreement settles all of their differences and disputes of every kind and character and this agreement supercedes all other agreements between the parties. * * *"

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* The judgment makes no mention of a charge to Joseph for his share of the $184.89, but this omission, being in favor of Joseph, is not complained of by him.

The "Trust Agreement" between Thomas and Robert was made on December 1, 1943. It recites that Robert had previously deeded to Thomas all of Robert's interest in the Kern County land "so as to facilitate the prosecution of a partition and quiet title suit" and so that Thomas "may conclude oil leases on the whole of" such land. Thomas agrees that he is holding Robert's interest "in trust" for Robert and that "upon the termination of the present partition and quiet title suit" he "will, at any time upon demand, convey back" to Robert "free from any claim or claims" of Thomas, "except the actual costs and legal fees involved in said partition and quiet title proceeding" all of Robert's interest in the land. It is further agreed that Thomas "may lease said property in Kern County, for oil or otherwise and enter into agreements for the operation of said property under such lease for the benefit of all co-owners * * * in which event [Robert] * * * shall * * * be entitled to * * * receive * * * free and clear of any claims of [Thomas] * * * his proportionate interest in all net bonuses, rents, royalties and other values."

The trial court found that the power of attorney given by Joseph to Thomas "was in full force and effect" during all of the times herein involved; that Thomas and the respective plaintiffs made the above agreements "for the purpose of entering into leases with reference to developing the said property and for the purpose of clearing the property from * * * leases and assignments which were an apparent cloud thereon and for the purpose of managing, operating and developing said property by negotiating other leases and by managing the property after the leases had been executed and for the purpose of collecting royalties thereon and for all purposes involved in the management of said property; that the powers and authority vested in" Thomas by such agreements and by the power of attorney from Joseph were "entirely and solely for the use and benefit of" plaintiffs but "subject to the rights conferred upon said defendant Thomas P. Bacon by said agreement[s] and said power of attorney in connection with the management of said property and with the development of the same; that it was the intent of" the agreements that plaintiffs "should be entitled to all net bonuses, rents, royalties, and other values developed after * * * Thomas P. Bacon had reimbursed himself for all costs advanced and for all expenses incurred in the management of said property, including attorneys' fees incurred with reference to the management of said property"; that in making the lease with Bering and Adams, Thomas "was acting pursuant to the authority given to him by the various co-owners and was acting as trustee and as attorney in fact for the various co-owners and so far as" plaintiffs are "concerned was acting pursuant to the authority given him by" the agreements above described "and by virtue of the authority given to him by the power of attorney" from Joseph; that the operating agreement between defendants "was executed by defendant Thomas P. Bacon to defendant Jos. Wahrhaftig pursuant to power and authority received from plaintiff[s] * * * and the other co-owners"; that the operating agreement "was validly executed and entered into and was and is a valid and existing agreement and binding upon the parties hereto; that said agreement was entered into to compensate said defendant Jos. Wahrhaftig for all services rendered and to be rendered under and pursuant to said agreement, including the collection and distribution of royalties * * *; that * * * Wahrhaftig commenced his performance under said agreement immediately after the execution thereof and has performed all obligations imposed upon him by said agreement; that on many times and occasions subsequent to the execution of said agreement he had conferences with the lessees under said lease, kept in touch with all progress in connection with the entrance of the lessees upon said land and their work under said lease and the drilling of the well contemplated by said lease, which well was drilled to a depth in excess of 11,000 feet; that on many occasions and in pursuance of his obligations under said contract, said * * * Wahrhaftig went to Bakersfield and had conferences both there and in Los Angeles with the lessees under said lease and performed all services contemplated by said agreement and expended time, effort and money in his services under said agreement"; that defendant Wahrhaftig "claims and asserts the right to have, take and receive 5% of all sums received as royalties under said lease, including 5% of the royalties which would otherwise be payable to plaintiff[s] * * * and that said claim is a valid claim and is based upon" the operating agreement. The court also made a conclusion of law to the effect that the operating agreement "is a valid and subsisting agreement," and, as stated hereinabove, rendered judgment to that effect and to the further effect that plaintiffs' interests are "subject to" such agreement.

[1] Plaintiffs urge that under both general law concerning the powers of trustees and under the terms of their respective agreements with Thomas, the latter was obliged without compensation of any nature to himself supervise the collection and distribution of royalties under the lease and was entitled to make no deduction of any kind or for any purpose from that portion of gross "rents, bonuses, royalties or other income" attributable to the interests of plaintiffs in the land. We are of the view, however, that in the light of both the language used in the pertinent documents and the surrounding circumstances, including the objects to be attained and the conduct of the parties, the construction placed by the trial court upon this phase of the transactions between plaintiffs and Thomas is reasonable and fair and must be sustained. (See In re Estate of Rule (1944), 25 Cal. 2d 1, 10-11, 152 P.2d 1003, 155 A.L.R. 1319; Transportation Guarantee Co. v. Jellins (1946), 29 Cal.2d 242, 254-255, 174 P.2d 625; Palmtag v. Danielson (1947), 30 Cal.2d 517, 522, 183 P.2d 265; Edwards v. Billow (1948), 31 Cal.2d 350, 188 P.2d 748; Taylor v. J. B. Hill Co. (1948), 31 Cal.2d 373, 189 P.2d 258.

As declared in Taylor v. Selig (1946), 28 Cal.2d 634, 639, 170 P.2d 913, 915, the meaning of the instruments passing between these parties "must be ascertained from a reading of the language contained therein, by reference to the surrounding circumstances, the wording of the [instruments] * * *, the evidence concerning [them] * * *, and the conduct of the parties." Here the court had before it the fact that various of the co-owners, including plaintiffs, had conveyed their interests in the Kern County land to Thomas and that the ultimate purpose of his dealing with the land was to lease it for oil development for the profit of the respective owners. To that end Thomas lent his name and a portion of his time without asking personal compensation therefor, but it is apparent that he did not undertake, nor did his agreements with plaintiffs contemplate, either that he should continue his unpaid services indefinitely or that he could employ assistance only at his sole and exclusive expense and could not look to plaintiffs for proportionate shares of such expense. On the contrary the agreements between Thomas and plaintiffs provide that plaintiffs are to receive their shares of *net* "bonuses, rents, royalties and other values," and thus may be understood to recognize that expenses will be incurred to be charged ratably against the various co-owners. Moreover, so far as concerns Joseph, the power of attorney which he executed to Thomas on November 28, 1938, expressly authorizes Thomas to make all contracts with respect to Joseph's interest in the oil land which Joseph himself might make. Joseph argues that the power of attorney was impliedly revoked by the agreement of March 16, 1942; the trial court, however, found to the contrary and upon the state of the record we cannot disturb its finding in this respect. It should also be noted that the agreement between Robert and Thomas expressly authorizes Thomas to "enter into agreements for the operation" of the land under any lease thereof, and therefore readily admits of the construction that it confers authority to make the operating agreement with Wahrhaftig.

[2] Plaintiffs point to the undeniable fact that defendant Wahrhaftig was aware that Thomas, in handling the Kern County land, was acting on behalf of plaintiffs and other co-owners as well as for himself. Therefore, argue plaintiffs, Wahrhaftig occupied a position of trust and confidence towards plaintiffs and violated that position when he entered into the 5% operating agreement with Thomas. The trial court found no such violation and none is established as a matter of law. As indicated hereinabove, Thomas was authorized to employ assistance in managing the oil land and, corollarially, to give reasonable compensation therefor. The compensation of 5% is made contingent upon the receipt of oil royalties; the evidence shows that up to the time of trial Wahrhaftig had performed various services under the operating agreement and had incurred expense in inspecting and reporting on the drilling operations, for none of which had he received compensation or reimbursement and for none of which is either plaintiff liable to any extent until such time as royalties are paid under the oil lease. There appears to us to be no sound basis for holding that as a matter of law the agreement was unfair, unreasonable, or, as claimed by plaintiffs, presumptively fraudulent as to them, or for disturbing the findings and judgment of the trial court upholding the agreement.

2. *Joseph's Liability for a Share of Expenses of the Suit.*

[3] Joseph urges that under the terms of his agreement of March 16, 1942, with Thomas, the latter was without authority to charge to Joseph any of the expenses of the suit but was obliged upon termination thereof to convey back to Joseph all of the lands theretofore conveyed by Joseph to Thomas, "free and clear of any claim" of Thomas except to the payment of the $1000 provided for in the agreement. Here again, however, we are of the view that the trial court justifiably interpreted the agreement as contemplating that neither Thomas nor the other co-owners should bear that portion of the expenses of the suit which was attributable to Joseph's interest in the land. Certainly Thomas did not undertake to personally finance the suit on Joseph's behalf, and the trial court in charging Joseph with a proportionate share of the expense thereof fairly and equitably construed the agreement involved.

3. *Propriety of Expense Account Items.*

[4-6] As stated hereinabove, Thomas incurred a total expense of $5184.89 in clearing title to the land, including the prosecution of the partition and quiet title suit. Of this amount attorneys for one of the co-owner defendants in that suit were paid $250 fees and defendant Wahrhaftig $3500 for services and $500 as "Pro rata of expense of trip East to see New York and Chicago charities" which also owned certain of the undivided interests in the Kern County land. Plaintiffs complain that the $250 payment was unauthorized and that the sum paid to Wahrhaftig was excessive and should not have been allowed. They urge in particular that the court did not specifically find that the payments to Wahrhaftig were reasonable. It is conceded, however, that "the value of attorney's services is a matter with which a judge must necessarily be familiar. When the court is informed of the extent and nature of such services, its own experience furnishes it with every element necessary to fix their value." (County of Riverside v. Brown (1939), 30 Cal.App.2d 747, 749, 87

P.2d 60, 61, quoting from Spencer v. Collins (1909), 156 Cal. 298, 307, 104 P. 320, 20 Ann.Cas. 49.) The record discloses that the court was informed of the extent and nature of the services rendered by defendant Wahrhaftig, which included communicating and negotiating with various of the co-owners of the Kern County land, the prosecuting of the partition-quiet title suit to a conclusion satisfactory to the prospective lessees, and the negotiating of the oil leases. With that information before it the court found that the whole of the $5000 paid by Bering and Adams plus an additional $184.89 was expended by Thomas "for Court costs, counsel fees, payment for quitclaims and for travelling expenses of counsel in connection with said partition suit and * * * the negotiations for the clearing of" title to the land, and that Thomas had fully accounted for all money received for plaintiffs. Under the circumstances shown we think that the findings made, and the judgment, reasonably imply the further finding that the items of expense complained of by plaintiffs were necessarily incurred and were reasonable in amount. (See Anglo-California Trust Co. v. Oakland Rys. (1924), 193 Cal. 451, 460-461, 225 P. 452; Merner Lumber Co. v. Brown (1933), 218 Cal. 136, 139, 21 P.2d 590; 2 Cal.Jur. 871-873, and cases there cited.) In view of our decision on this phase of the case it becomes unnecessary to discuss other attacks made by plaintiffs upon the trial court's findings with reference to the $5000 paid to Thomas by Bering and Adams.

4. *Joseph's Interest in Property in Los Angeles, San Bernardino and Contra Costa Counties.*

[7] As mentioned hereinabove, Joseph had conveyed to Thomas Joseph's interest in real property in Los Angeles, San Bernardino and Contra Costa Counties. The trial court found that of the property at any time held by Thomas for Joseph the "only property remaining" is the Kern County land and that Thomas had accounted for all the other lands; judgment was rendered accordingly. Joseph complains that the evidence does not support the court's finding and that Thomas is by the finding and the judgment impliedly excused from reconveying to Joseph the Los Angeles, San Bernardino and Contra Costa County lands.

However, upon cross-examination by Joseph's attorney Thomas testified that such properties had been disposed of by "sale or otherwise" and that one piece in San Bernardino County had been "sold for taxes * * * two or three years ago." Upon demand by the attorney for a description of the land in Contra Costa County, Thomas answered: "Well, Joe has the documents, if you want to see them, he has as much knowledge of that property as I have * * *. What is the difference, the property was sold." The record also shows the following question and answer: "Q. [By Mr. Siemon] So far as you are concerned, the only thing you got was this $5,000? A. [By Thomas] That's correct." Whether the quoted question and answer were intended to refer to consideration for anything other than for the oil lease is not clear, but if they do not it would seem that plaintiffs were satisfied with Thomas' general statements on the subject, as above quoted. Joseph did not dispute any of Thomas' statements; he offered no contrary evidence, nor any evidence that such interest as he had had in the mentioned properties in the three counties possessed any value, or that payments on any sales thereof had not been made directly to him, or that Thomas had received any value therefor or retained any interest therein to which Joseph was entitled. Under such circumstances it appears that the trial court was warranted in accepting Thomas' testimony and in inferring and in finding that Thomas had accounted directly to Joseph for the latter's interest in the lands in Los Angeles, San Bernardino and Contra Costa Counties.

For the reasons above set forth, the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

86 Cal.App.2d 428

NEWMAN v. FOX WEST COAST THEATRES et al.

Civ. 16241.

District Court of Appeal, Second District, Division 2, California.

June 29, 1948.

Hearing Denied Aug. 26, 1948.

1. Negligence 🔑32(1)

The landowner or possessor may be liable for failure to exercise ordinary care toward a licensee whose presence on land is known or should reasonably be known to owner or possessor.

2. Negligence 🔑32(1)

Where presence of a licensee is or should be known, there is a duty to carry on activities with reasonable care.

3. Negligence 🔑32(1)

A licensee may recover for active negligence or an overt act of negligence as distinguished from passive negligence.

4. Negligence 🔑32(1)

"Active negligence", within rule authorizing a licensee to recover for active negligence as distinguished from passive negligence, is a dereliction of duty.

See Words and Phrases, Permanent Edition, for all other definitions of "Active Negligence".

5. Theaters and shows 🔑6

Even if one attending theater without ticket with permission of manager was a mere licensee and not a business visitor, she was entitled to presume that premises would remain in a relatively safe condition in which she found them when she entered.

6. Negligence 🔑48

The occupant of a building must compensate for bodily injuries caused to a gratuitous licensee by either a natural or artificial condition if such occupant knows of it and realizes that it is an unreasonable risk to visitor in building and has reason to suspect that visitor will not discover condition or realize the danger.

7. Theaters and shows 🔑6

Patron attending theater without ticket with permission of manager, even though a mere licensee and not a business visitor, was entitled to recover for injury sustained when she slipped on floor of women's lavatory where water was spread over floor after patron had entered theater and her accident occurred some time after theater's manager had learned of condition of floor in women's lavatory and had had time to remove the peril.

8. Master and servant 🔑333

Exoneration of manager of theater from liability for injuries sustained by patron when she slipped on floor of women's lavatory did not necessarily relieve corporation owning theater from liability, where jury could have found that failure to have sufficient personnel efficiently to maintain large theater in safe condition was proximate cause of patron's accident.

9. Appeal and error 🔑1064(1)
Master and servant 🔑332(4)

In action for injuries sustained by theater patron when she slipped on floor of women's lavatory, brought against both owner of theater and manager thereof, where owner could have been found liable to plaintiff notwithstanding exoneration of manager, an instruction that from fact that there were two defendants in the action alone it did not follow that if one was liable both were liable, was neither erroneous or prejudicial to theater owner.

10. Theaters and shows 🔑6

In action for injuries sustained by theater patron when she slipped on floor of women's lavatory, requested instruction on issue of contributory negligence, based on theory that since plaintiff's sister and niece, who accompanied her to theater, had seen water on floor plaintiff also should have looked, and that if she had looked she would have seen it, was properly refused under evidence.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Adelaide Newman against Fox West Coast Theatres, Fox Belmont Theatre Corporation, Scot H. Brown, and others for injuries allegedly suffered by reason of negligent conduct of defendants.

From adverse judgment, the defendant Fox Belmont Theatre Corporation alone appeals.

Affirmed.

Maddox & Vaughn and Arthur Strock, all of Los Angeles (A. Stewart Maddox, Jr., and Arthur Strock, both of Los Angeles, of counsel), for respondents.

Sidney A. Moss, of Los Angeles (Henry F. Walker, of Los Angeles, of counsel), for appellant.

MOORE, Presiding Justice.

Plaintiff sued appellant Fox Belmont Theatre Corporation and its manager, Scot H. Brown, for damages allegedly resulting from personal injuries suffered by reason of the negligent conduct of defendants. The jury returned a verdict against plaintiff in favor of defendant Brown but in favor of plaintiff against the corporation which appeals from the ensuing judgment.

On the night of the accident respondent and her sister, Edith, accompanied June Bachelder, Edith's daughter, to appellant's theater where defendant Brown, a friend of June, was manager. Brown greeted the party and directed the doorman to admit them without tickets. At the 10:29 break between the main features the three women left the auditorium and stood in the foyer, smoking. At the commencement of the second feature, while respondent returned to her seat, Edith entered the ladies' rest room where she encountered two women, one apparently very ill. There were wet paper towels and blood on the floor; also considerable water extending to the lavatory door. Edith returned to the foyer and reported her observations to her daughter. June thereupon visited the washroom and observed the women and the wet floor. One woman requested aid in getting transportation home. June returned to the foyer, thence visited Brown's office by use of an outside stairway, and reported the condition of the lavatory floor, the illness of the woman there and the latter's need for transportation. After dispatching the two women in a taxicab, without looking into the ladies' washroom, Brown and June returned to his office where they visited for abount 45 minutes. Edith had in the meantime joined respondent in the auditorium, but did not mention the two women or the condition of the washroom. Thirty minutes later respondent visited the ladies' rest room and, upon entering, slipped and fell, receiving the injuries complained of.

Appellant contends that (1) respondent having paid no admission to the theater was not a business visitor but at best a licensee; (2) no actionable negligence was established; (3) the exoneration of its manager Brown necessarily relieved appellant of liability; (4) the trial court erred in giving and refusing certain instructions.

[1-3] Appellant contends that respondent as a mere licensee took the premises in the condition in which she found them, and that it is not responsible to respondent as a licensee for injury resulting merely from a condition of the property. It is unnecessary, however, to discuss this question at any length. Even if it is assumed that respondent was a licensee rather than an invitee, appellant's thesis is based upon a general rule of law which has no application to the facts here involved. While a number of California decisions have held that the duty owed by the owner or occupant of premises to a licensee is not much greater than that owed to a trespasser, to wit, that the licensee assumes the risks incident to the condition of the premises, and can recover only for "willful or wanton injury" (Powers v. Raymond, 197 Cal. 126, 239 P. 1069, 1071; Giannini v. Campodonico, 176 Cal 548, 169 P. 80; Means v. Southern California Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann.Cas. 206; Hall v. Southern California Edison Co., 137 Cal.App. 449, 30 P.2d 1013), in Oettinger v. Stewart, 24 Cal.2d 133, 139, 148 P.2d 19, 22, 156 A.L.R. 1221, it was announced that such cases were disapproved, and the court held "that in cases involving injury resulting from active conduct, as distinguished from condition of the premises, the landowner or possessor may be liable for failure to exercise ordinary care toward a licensee whose presence on the land is known or should reasonably be known to the owner or possessor. Rest., Torts, § 341; Prosser on Torts, [1941], 630; 45 C.J. 803–805." Thus where the presence of a licensee is or should be known there is a duty to carry on activities with reason-

able care. In thus holding the Supreme Court revived the rule enunciated as early as 1913 in Lucas v. Walker, 22 Cal.App. 296, 301, 134 P. 374, 377, 379, where it was decided that a licensee may recover for "active negligence" or "any overt act of negligence" as distinguished from a "passive negligence." That rule has been approved in a number of subsequent decisions: Yamauchi v. O'Neill, 38 Cal.App.2d 703, 707, 102 P.2d 365; Gay v. Cadwallader-Gibson Co., 34 Cal.App.2d 566, 570, 93 P.2d 1051; Smith v. Western Pac. R. Co., 36 Cal.App.2d 433, 436, 97 P.2d 863; Dunlavy v. Nead, 36 Cal.App.2d 478, 482, 97 P. 2d 1003, 99 P.2d 1044.

[4, 5] The authorities are not in accord in determining what constitutes "active negligence" and what constitutes "passive negligence," but there can be no doubt that active negligence is a dereliction of duty. In the instant case it may be assumed that respondent, as a licensee, was obliged to accept the premises as she found them when she entered. But she was entitled to presume that the premises would remain in the relatively safe condition in which she found them when she entered. That there was no water or any foreign substance on the floor of the washroom at the time respondent entered the theater is established by the testimony of defendant's usherette who inspected the washroom four times that evening. Admittedly the extent of appellant's obligation to respondent as a licensee was to use ordinary care; but when, after her entrance, there occurred on the premises a new condition involving greater risk of injury to a visiting patron, there also arose a new duty of appellant to rectify that condition or to warn such patron of that condition and the risk involved therein. This is so because appellant, through its agent Brown, knew of the altered condition of the washroom before respondent was injured. Not only did Brown know of the condition of the washroom floor but, having dispatched the ill woman and her companion, he had ample time to mop up the water prior to respondent's injury. Instead he returned to his office where he visited with Miss Bachelder for at least a half hour. By his own testimony he would not have allowed a girl assistant to mop the floor, stating that if it had been done "I would have had to do it myself."

[6] Under the facts disclosed appellant finds itself fettered by principles long established and its liability unavoidable. The occupant of a building must compensate for bodily injuries caused to a gratuitous licensee by either a natural or an artificial condition if such occupant knows of it and realizes that it is an unreasonable risk to a visitor in the building and has reason to suspect that the latter will not discover the condition or realize the danger. Under such conditions it becomes the duty of such occupant to warn the visitor of his peril and risk or reasonably attempt to remove the dangerous condition or to exclude him from the premises. Rest., Torts, sec. 342.

[7] But the decision of this appeal is not dependent upon the rule laid down by section 342 of the Restatement. The washroom was within the area covered by respondent's license. It was therefore incumbent upon appellant to expect that respondent would encounter the danger in the reasonable exercise of her license. Since the water spread over the floor of the lavatory after respondent had entered the theater and her accident occurred some time after appellant's manager had time to remove the peril, appellant's liability was fixed by the rule announced in Yamauchi v. O'Neill, 38 Cal.App.2d 703, 708, 102 P.2d 365 and Oettinger v. Stewart, 24 Cal.2d 133, 138, 148 P.2d 19, 156 A.L.R. 1221, to wit: the duty owed by the licensor is to exercise ordinary care.

[8] Appellant further contends that exoneration of defendant Brown necessarily relieves the corporation. The proof was that although a company rule required that the manager and an assistant be on the floor at all breaks, since one person was not sufficient in case of an emergency, but that on the night of the accident the last of the usherettes had left the theater before the accident leaving only Brown and the projectionist on duty. Thus the announced policy of appellant indicated an awareness of the need for adequate supervisory personnel. The jury therefore could have found that failure to have sufficient person-

nel efficiently to maintain the large theater in a safe condition was the proximate cause of the accident, and a verdict against the corporation and an acquittal of the manager is sufficient to sustain a judgment against the defendant corporation. Ellis v. Owen Roofing Co., Inc., 6 Cal.App.2d 25, 27, 43 P.2d 558.

[9] As a final ground for reversal defendant urges that the court erred in the granting and refusal of certain instructions. He specifies as prejudicial the following: "While there are two defendants in this action, it does not follow from that fact alone that if one is liable, both are liable. Each is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against the other. The instructions given you govern the case as to each defendant, to the same effect as if he were the only defendant in the action, and regardless of whether reference is made to defendant or defendants in the singular or plural form." As already noted, appellant could have been found liable to plaintiff notwithstanding the exoneration of defendant Brown. Presupposing such a contingency the above quoted instruction is neither erroneous nor prejudicial. Nor was it error to deny a directed verdict in defendants' favor. Such a verdict would have been contrary to the applicable law and facts as brought out by the evidence and testimony at the trial.

[10] Appellant also contends that the court's refusal to instruct as requested upon the issue of contributory negligence was error. This is apparently on the theory that since plaintiff's sister and niece had seen the water on the washroom floor plaintiff also should have looked, and that if she had looked she would have seen it. Such a theory overlooks the fact that when plaintiff entered the washroom the ill woman and her companion had departed; and since Edith had not reported to her the floor's condition there was nothing to forewarn plaintiff that anything was amiss. The instruction given (B.A.J.I., No. 140) adequately covered the issue of contributory negligence.

The judgment is affirmed.

McCOMB and WILSON, JJ., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

86 Cal.App.2d 422

In re RANDALL'S ESTATE.

Civ. 16256.

District Court of Appeal, Second District, Division 1, California.

June 29, 1948.

1. Wills 🔑13(1, 4)

The statute relating to testamentary gifts to charities was not intended to completely outlaw charitable gifts in excess of one-third of estate where will is made thirty days before death, and even where will is made within thirty days such gifts are not invalid but are merely voidable at instance of heir of designated class who would have been entitled to take the property had it not been willed to charity. Probate Code, § 41.

2. Wills 🔑13(1)

The section of probate code relating to testamentary gifts to charities confers no additional rights on any person except as therein specifically indicated, and definite provisions of section cannot be ignored in favor of general statements found in other sections dealing with ordinary, non-charitable disposition. Probate Code, § 41.

3. Wills 🔑849, 856, 858(1)

Where charitable gifts in will are voidable under statute imposing limitation on gifts to charity by will, portion of estate represented thereby passes to surviving relative only to extent that such relative takes same under a substantial or residuary bequest or devise, or, if there be no such bequest or devise, under laws of succession if there be no other effective disposition thereof in will. Probate Code, § 41.

4. Wills 🔑16, 849

Under laws of succession and statute limiting charitable gifts in will executed at least thirty days before death to one-third of estate as against designated surviving blood relatives, charities which were given residue of estate, derived entirely from community property, by will executed more than thirty days but less than six months prior to death of testatrix who was survived by certain such blood relatives, were entitled to one-third of residue, and blood relatives were entitled to one-half of two-thirds of residue, and remaining one-half of such two-thirds of residue then went to the charities, where brother of testatrix's predeceased husband survived testatrix. Probate Code, §§ 41, 228, 230.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Proceeding in the matter of the estate of Effie Jarrett Randall, deceased, wherein Howard McConnell filed a petition which involved the question whether Glenn Knox and others, legatees, or Catholic Church of Santa Monica and another, legatees, were entitled to the residue. From the judgment, the first named legatees appeal.

Affirmed.

Raymond E. Parr, of Los Angeles, for appellants, Ralph Jarrett, Stanley Knox and Glen Knox.

Samuel J. Crawford, of Santa Monica, for respondent, Catholic Church of Santa Monica.

Fogel & McInerny, of Santa Monica, and Joseph E. Deering, of Oakland, for respondent, First Christian Church of Santa Monica.

DORAN, Justice.

The decedent, Effie Jarrett Randall, died on March 31, 1945, leaving a will dated January 24, 1945, which was duly admitted to probate. After certain specific legacies the will contains the following provision: "The residue I want the Christian Church of Santa Monica and the Catholic Church of Santa Monica to have to be used to care for worthy sick old people who have no means". It was stipulated that all property of which decedent died possessed was formerly community property of decedent and her predeceased husband, Eugene B. Randall. The trial court found that the decedent left surviving as heirs at law, a brother, Ralph Jarrett, and two nephews, Glenn Knox and Stanley Knox, children of a predeceased sister, who are the appellants herein. The husband's only surviving heir is Ellis E. Randall, a brother.

The balance left in the estate for distribution after payment of administration expenses and specific legacies, was $20,024.41. This balance the probate court distributed by first allotting to the two charities one-third of the net estate. The remaining two-thirds was then divided half and half between decedent's blood relatives, appellants herein, and the charities which are respondents herein.

The present appeal involves an interpretation of Section 41 of the Probate Code and, according to the respondents' brief, presents the following question: "To what extent is a charitable bequest made by a will executed more than thirty days but less than six months prior to the death of the testatrix rendered voidable by Probate Code Section 41 at the instance of decedent's blood relatives, where there is a living heir of decedent's husband eligible to take under Probate Code Section 228, all property involved having been derived from community property".

Section 41 of the Probate Code provides that where a will is executed "at least 30 days before death, such devises and legacies (to charity) shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected. Nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity or in trust for a charitable use, in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will".

Section 228 of the Probate Code, dealing with succession of community property "of one who dies without disposing of it by will", § 200, provides that if the decedent leaves neither spouse, issue, children of the deceased spouse or their descendants, or parents, then such community property descends "in equal shares to the brothers and sisters of said deceased spouse".

Section 230 of the Probate Code, upon which appellants rely, provides that, "If there is no one to succeed to any portion of the property in any of the contingencies provided for in the last two sections, according to the provisions of those sections, such portion goes to the next of kin of the decedent in the manner hereinabove provided for succession by next of kin".

Finding against the present contentions of appellants, the trial court, in a Memorandum Ruling, observes that the bequest to charity "would not, in the language of the statute, have been 'contrary to the provisions' of the section * * * nevertheless it may not be collected by the charities to the extent that the bequest exceeds one-third of the testator's net estate, so long as there are blood relatives of the kind described who could have taken the excess over one-third of the net estate. Here however, these blood relatives (appellants) could not have taken the excess * * * but only one-half of such excess by reason of the fact that a relative by marriage (the husband's brother) survived the testatrix". The trial court was therefore "of the opinion that the words 'contrary to the provisions', refer to such portion only of a bequest or bequests as exceeds one-third of the net estate. That being true it follows that the blood relatives (appellants) may take only one-half of the excess * * * and that the other half of the excess goes to the charities involved". Distribution was ordered accordingly. It may also be noted that Ellis E. Randall, brother of testatrix' predeceased husband, is not a party to this appeal, and it is conceded that this brother, not being a relative of testatrix enumerated in Section 41, is not entitled to share in the estate.

It is the appellants' claim that "any provision of a Will—(where the testator died less than six months subsequent to the execution of the Will)—which attempts to dispose of more than one-third of the net distributable estate to a charitable institution, is 'contrary to the provisions' of said Section 41"; that appellants are the "next of kin" mentioned in Section 230 of the Probate Code, and that therefore appellants should succeed to all of the net distributable estate except a one-third interest which it is conceded that respondent charities may lawfully take.

[1, 2] The disposition contended for by appellants, however superficially plausible it may appear to be, would in fact ignore the direct provisions of Section 41 dealing with charitable bequests. A reading of that section makes it clear that the framers thereof had no intention of completely outlawing all charitable gifts in excess of one-third of the estate where, as in this case, the will was made 30 days before death. Even where the will is made within the 30-day period such gifts are not rendered invalid but as was said in Re Estate of Haines, 76 Cal.App.2d 673, 679, 173 P.2d 693, 696, are merely voidable "at the instance of an aggrieved heir of a designated class; but such heir is not aggrieved unless he would have been entitled to take the property had it not been willed to charity". In the present case appellants would, as the trial court found, be entitled to only one-half of the estate had there been no charitable bequest, the brother of decedent's predeceased husband inheriting the other half of the community property. Section 41 of the Probate Code is obviously intended as a complete exposition of the law of charitable gifts, and except as therein specifically indicated confers no additional rights upon any person. Nor is it permissible to ignore any of its definite provisions in favor of general statements found in other sections dealing with ordinary, non-charitable disposition.

Under the direct provisions of Section 41, the only living persons who can object to the charitable gift here under discussion are a brother and two nephews of testatrix, appellants herein. But such persons, by the language of that section, take the property only "if and to the extent that they would have taken said property as aforesaid but for such devises or legacies (to charity); *otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected.*" (Italics added.) And to make it doubly sure that the language should not be misunderstood, the section then provides that "nothing herein contained is intended to, or shall be deemed or construed to vest any property devised or bequeathed to charity * * * in any person who is not a relative of the testator belonging to one of the classes mentioned herein, or in any such relative, unless and then only to the extent that such relative takes the same under a substitutional or residuary bequest or devise in the will or under the laws of succession because of the absence of other effective disposition in the will".

As noted in respondents' brief, "Prior to the 1937 amendment to Probate Code Section 41, the section applied to a testator who died leaving 'legal heirs'. The 1937 amendment changed 'legal heirs' to read 'as against his spouse, brother, sister, nephew, niece, descendant or ancestor' ". Such limitation, said the court in Re Estate of Cottrill, 65 Cal.App.2d 222, 226, 150 P.2d 214, 216; "enlarged or extended the right of a testator to make testamentary gifts to charity, by decreasing the number or classes of heirs who could object to such disposition of property". In like manner it may be said that Section 41 definitely prescribes the rights of the objecting heirs and the extent to which benefits may accrue to such heirs. It does not give to appellants other or greater property rights than would have been enjoyed had there been no residuary charitable bequest, which in this case means a one-half interest only in the residue remaining after the charitable gift of one-third. The fact that the husband's brother cannot legally take the other one-half of such residue, because not one of the mentioned relatives of testatrix, cannot increase the appellants' share. The remaining one-half of the residue, which the husband's brother would otherwise take, must therefore, as the trial court found, go exactly where testatrix intended it should go,—to the charities. There is nothing in Section 41 to indicate otherwise.

[3] In re Estate of Davis, 74 Cal.App.2d 357, 361, 168 P.2d 789, 792, has been cited by both parties. While the facts in the Davis case are by no means identical with those in the instant case, the following language is applicable to the present situation: "By said language (Section 41) the Legislature has declared that where, as in this case, charitable gifts in a will are voidable, the portion of the estate represented thereby shall pass to a surviving relative only to the extent that such relative takes the same under a substitutional or residuary bequest or devise or, if there be no such substitutional or residuary bequest or devise, under the laws of succession if there be no other effective disposition thereof in the will".

[4] The appellants herein are not mentioned as residuary or substitutional beneficiaries and the testatrix obviously entertained no such intention. Under the laws of succession, as hereinbefore mentioned, appellants would, in the absence of charitable gift, be entitled to succeed to no more than a one-half interest. And so it must be here. After the original, valid, one-third gift to charity, appellants are entitled to receive no more than one-half of the two-thirds residue. The remaining one-half of such residue will then go to the charities under that provision of Section 41 specifying that "otherwise the testator's estate shall go in accordance with his will and such (charitable) devises and legacies shall be unaffected". Any other disposition would, as already indicated, give effect only to such portions of Section 41 as are in appellants' favor, ignoring all else. As said in respondents' brief: "Appellants' argument is based upon an erroneous and forced application of Probate Code Section 230 to facts which do not come under said section. In view of there being a living heir of decedent's previously deceased spouse, under [Probate] Code Section 228 appellants are entitled to only one-half of decedent's intestate property. The lower court's decision gave appellants this one-half."

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

86 Cal.App.2d 263

In re DAVIS' ESTATE.

JOSEPH v. DAVIS.

Civ. 16292.

District Court of Appeal, Second District, Division 1, California.

June 17, 1948.

Rehearing Denied July 1, 1948.

Hearing Denied Aug. 12, 1948.

1. Homestead ⟹140
Husband and wife ⟹276(8)

Probate code sections, authorizing probate court to set apart all or any part of decedent's property exempt from execution to surviving spouse and to select and set apart a homestead for such spouse out of community property or, if none, from decedent's separate property, justifed order setting apart homestead for testatrix's surviving husband and assigning exempt community personal property to him. Probate Code, §§ 660 et seq., 660, 661.

2. Homestead ⟹144

The probate court can set apart homestead for decedent's surviving spouse out of decedent's separate property only for limited period not exceeding such spouse's lifetime, but there is no such limitation of time for which homestead may be set apart out of community property. Probate Code, § 661.

3. Descent and distribution ⟹75
Wills ⟹722

A decedent's property goes to his heirs or devisees subject to administration of his estate, one object of which is to set apart homestead to his family. Probate Code, §§ 300, 661.

4. Wills ⟹721

The power of testamentary disposition of property, as defined by statute, is not paramount, but subordinate to probate court's authority to appropriate property for support of testator's family and for homestead, as well as for payment of testator's debts, and to extent that probate court exercises such power, devisees and legatees take no beneficial interest in property. Probate Code, §§ 300, 660 et seq., 661.

5. Homestead ⟹136

The probate court may set apart decedent's real property as homestead to his family, though such property is specifically devised by his will. Probate Code, § 661.

6. Homestead ⟹136
Husband and wife ⟹273(1)

A married woman's testamentary disposition of her interest in community real and personal property to her daughter by first of two marriages was subject to surviving second husband's rights to have real property set apart to him as homestead and to have exempt community personal property assigned to him. Probate Code, §§ 300, 660 et seq., 660, 661.

◆

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

In the matter of the estate of Lucile Goins Davis, deceased. From orders and judgment setting apart a probate homestead for the benefit of Clifton E. Davis, deceased's surviving husband, and assigning to him certain exempt community personal property, Alice Maria Goins Joseph appeals.

Affirmed.

Chas. S. Darden and J. R. Wilder, both of Los Angeles, for appellant.

No appearance for respondent.

DORAN, Justice.

The record discloses that Lucile Goins Davis died testate on February 28, 1944, leaving a surviving husband, Clifton E. Davis, and a daughter by a previous marriage, appellant herein. The appeal questions the validity of orders and judgments setting apart a probate homestead for the benefit of the husband, and assigning to said husband certain exempt, community, personal property. After decedent's death the daughter, at the age of 19, married and thus attained majority. The surviving husband likewise married and occupied the homestead property. By a testament dated January 26, 1944, deceased willed "my one-half of the community personal property and my one-half of the community real property" to the daughter, Alice Maria Goins Joseph. The order assigning the community personal property to the husband was made conditional upon payment by the husband to the daughter of $320 expended by the daughter as costs of administration.

It is contended in appellant's brief that the deceased had a right to make a will disposing of one half of the community property; that upon death the title to such property, under the provisions of Section 300 of the Probate Code, immediately "passes to the person to whom it is devised or bequeathed by his last will" subject to administration by the probate court. In view of this fact, appellant insists that the probate court was "without power to adjudicate title to property" contrary to the provisions of the decedent's will by setting apart the homestead and assigning the exempt personal property to the surviving husband.

Section 300 of the Probate Code provides that notwithstanding devises and bequests contained in a will, "all of his property shall be subject to the * * * control of the superior court for the purposes of administration, sale or other disposition under the provisions of Division III of this code, and shall be chargeable with the expenses of administering his estate, and the payment of his debts and the allowance to the family, except as otherwise provided in this code."

[1, 2] Sections 660 et seq. of the Probate Code, not referred to in appellant's brief, appear to justify the action of the trial court in respect to the orders made in favor of the surviving husband. Under the provisions of Section 660 "the court, on petition therefor, may in its discretion set apart to the surviving spouse * * * all or any part of the property of the decedent exempt from execution". Section 661 provides that if no homestead has been selected prior to the decedent's death, the probate court "must select, designate and set apart and cause to be recorded a homestead for the use of the surviving spouse and the minor children * * * out of the community property * * * or if there be no community property and no such property owned in common, then out of the separate property of the decedent." If the property is separate property the court can only set it apart for a limited period not more than the lifetime of the surviving spouse; in the case of community property there is no such limitation.

[3-5] In the language of 11a Cal.Jur. 609, "The property of a decedent goes to his heirs or devisees subject to the administration of his estate, one of the objects of which is the setting apart of a homestead to the family". In the Estate of Kennedy, 157 Cal. 517, 522, 108 P. 280, 282, 29 L.R.A., N.S., 428, the court states: "It is thoroughly settled that, as was said in Sulzberger v. Sulzberger, 50 Cal. 385, 'the power of testamentary disposition of property, as conferred and defined by the statute, is not paramount, but is subordinate to the authority conferred upon the probate court to appropriate the property for the support of the family of the testator, and for a homestead * * * as well as for the payment of debts.' And to the extent that this power is exercised by the probate court in any estate the devisees and legatees take no beneficial interest at all. Although real property be specifically devised by a will, the probate court may set apart such property as a homestead to the family, and thus defeat the devise". See also Estate of Gray, 159 Cal. 159, 112 P. 890.

[6] The instant case presents the situation of a married woman willing to a daughter by a previous marriage, the wife's interest in community real and personal property. This disposition of community property was clearly subject to the right of the surviving husband to have the same set apart as a probate homestead and under the code sections relating to exempt personal property.

The orders and judgments complained of are affirmed.

YORK, P. J., and WHITE, J., concur.

86 Cal.App.2d 434

DE LUXE BOX LUNCH & CATERING CO., Inc. v. BLACK et al.

Civ. 16293.

District Court of Appeal, Second District, Division 2, California.

June 29, 1948.

Rehearing Denied July 15, 1948.

Hearing Denied Aug. 26, 1948.

Trade-marks and trade-names and unfair competition ⚷77

Box lunch company's former employee obtaining permission to enter industrial establishment to sell food to employees did not unfairly compete with or misuse trade secrets confidential to box lunch company which had formerly sold food to employees of such industrial establishment and which was thereafter denied permission to enter establishment, where company had no continuing contractual right to enter establishment, and establishment was dissatisfied with company's services, and employees of establishment could buy only from caterers permitted to enter the establishment.

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action for injunction by De Luxe Box Lunch & Catering Company, Inc., against Ben Black, Albert Hollosy, and Lee Williamson, individually and doing business as California Box Lunch & Catering Company, and others. From a minute order for a judgment of nonsuit, the plaintiff appeals.

Order affirmed.

Victor S. Cogen, of Los Angeles, for appellant.

Chase, Rotchford, Downen & Chase, of Los Angeles, for respondents.

MOORE, Presiding Justice.

No judgment of dismissal having been entered, plaintiff brings this appeal from the minute order for a judgment of nonsuit.

For more than twenty-seven years appellant and its predecessors in interest operated a box lunch and catering business and manufactured and sold food products and box lunches to employees of industrial establishments. In September, 1945, it employed respondent Black as one of its driver-salesmen and furnished him with a truck and box lunches wherewith he might call and make sales of such box lunches at factory 'stops' during lunch periods. In September, 1946, appellant employed respondent Williamson who within a month left appellant's employ and became part owner of respondent California Box Lunch and Catering Company. About February 25, 1947, Black joined Williamson in the new enterprise after having terminated his employment with appellant by the service upon it of appropriate notice.

During his seventeen months with appellant, Black serviced the establishments in the area assigned to him, including respondent Pacific Coast Borax Company, which had granted appellant leave to have its trucks with box lunches drive onto the premises of the borax company for the convenience of its employees.

Prior to the commencement of their operations and visits at the plant of the borax company, Black and Williamson obtained permission from the two superintendents to enter the company's premises to sell food and box lunches to the employees. At the same time that company terminated appellant's license to enter its premises for the purpose of selling its wares.

By this action plaintiff sought to have Black permanently enjoined from delivering food products and box lunches to the employees of the borax company and to have the latter and respondents Hollosy and Williamson, suppliers of Black, permanently enjoined from aiding and abetting Black in his sales to the employees of such company. The correctness of the resulting order of nonsuit is demonstrated by the authorities.

There can be no dispute of appellant's basic contention that on appeal from a judgment of nonsuit all the evidence, the intendments and every reasonably favorable inference and the presumptions must be construed most favorably to the appellant

Montgomery v. Nelson, 211 Cal. 497, 295 P. 1034; Fitzpatrick v. Haskell, 117 Cal. App. 684, 4 P.2d 580; W. C. Cook & Company v. White Truck & Transfer Company, 124 Cal.App. 721, 13 P.2d 549. But in this case neither the proofs nor the inferences arising therefrom support appellant's contention that respondents or any of them participated in unfair competition or misused trade secrets confidential to plaintiff.

The testimony of the superintendent of appellant as well as of the borax company establishes that permission to enter the premises of the latter was a prerequisite to selling to its employees. It was within the power of the borax company to give, refuse or retract this license or permission at will. No claim is made by appellant that it had a continuing contractual right to enter the premises, but on the contrary, the proof shows that on two occasions in 1946 plaintiff was excluded therefrom and that at times competitors of plaintiff were permitted to enter. Superintendents O'Brien and Chetlee testified also that as early as 1945 they had concluded to discontinue the services of appellant.

Superintendent O'Brien of the borax company testified: "The quality of the food was down, and we had received complaints from our employees. * * * At times when De Luxe Box Lunch was there, their wagon would be sold out by the time they got to our plant." The same witness testified that permission was granted to Black in February, 1947, to enter the company's premises and serve its employees only on condition that the food be of a greater variety, improved quality and larger quantities than he had brought for appellant; also that service should be made on Saturdays, which had been discontinued by appellant. Both superintendents testified that defendant Black did not request Borax Company to terminate the services of plaintiff company but that Black merely promised better service and was therefore permitted to serve its employees. There was no substantial proof contrary to the foregoing.

Appellant cites many California decisions in which former salesmen had been restrained from soliciting customers of former employers. They are readily distinguishable. In Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 P. 1180, 44 L.R.A.,N.S., 1159, Ann.Cas. 1914C, 628, the contract of hiring contained an express provision that the employee would not solicit customers after termination of his employment. Although the doctrine there expressed is that of trade secrets, the court's rationale of that doctrine is unfair competition. In discussing the same case the court subsequently said: "The employe's conduct, under the facts shown, clearly constituted an unconscionable and unwarranted use of the trade secrets belonging to his former employer, as well as a violation of the contract he had entered into." New Method Laundry Company v. MacCann, 174 Cal. 26, 34, 161 P. 990, 993, Ann.Cas. 1918C, 1022.

In the instant case appellant had, along with other caterers, sold in the area for a number of years, and Black as appellant's employee had sold in open competition with all who might seek to sell a better product. For this reason the names of appellant's alleged customers cannot be deemed a trade secret or constitute confidential information. Continental Car-Na-Var Corporation v. Moseley, 24 Cal.2d 104, 109, 148 P.2d 9. Furthermore, the only names known to appellant consisted of industrial establishments which admittedly were not appellant's customers. On the contrary it was the employees thereof who patronized Black. The evidence shows no listing, actual or mental, of such employees. The proof was that the latter could buy from only those caterers officially admitted to the premises.

In all the California decisions relied upon for a reversal a trade secret or trust had been violated. Lists of customers, whether in writing or in the memory of an employee, were secret, and a trust reposed in the employee because of his relation to his former employer. Such authorities (Empire Steam Laundry v. Lozier, supra; Cornish v. Dickey, 172 Cal. 120, 155 P. 629; New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 P. 990, Ann.Cas. 1918C, 1022; Pasadena Ice Co. v. Reeder, 206 Cal. 697, 275 P. 944, 276 P. 995; Mackechnie Bread Company v. Huber, 60 Cal. App. 539, 213 P. 285; George v. Burdusis, 21 Cal.2d 153, 130 P.2d 399) do not avail appellant. Nor is appellant's action one where the element of secrecy of the customers' identity is either absent or minimized, but is one wherein relief is granted on the doctrines of unfair competition, as in Wallich v. Koren, 80 Cal.App.2d 223, 226, 181 P.2d 682; Dairy Dale Co. v. Azevedo, 211 Cal. 344, 345, 295 P. 10; Scavengers' Protective Ass'n v. Serve-U-Garbage Co., 218 Cal. 568, 570, 24 P.2d 489; Gloria Ice Cream & Milk Co. v. Cowan, 2 Cal.2d 460, 464, 41 P.2d 340. The judgment herein is authorized by the intermediate concept where there is no trade secrecy, no unfair competition. Avocado Sales Co. v. Wyse, 122 Cal.App. 627, 10 P.2d 485; Continental Car-Na-Var Corporation v. Moseley, supra.

Unless some violation of fiduciary relation is definitely in issue there is no equitable principle warranting the use of the injunction as an economic lever against the enterprise of a former employee. The mere fact that the establishment of its business required effort and expense does not of itself entitle the employer to the shield of a legal monopoly.

There is no evidence in the record to substantiate appellant's contention that respondents conspired unlawfully to interfere with, or deprive plaintiff of, its trade and customers, or that the alleged customers' list of appellant was confidential or that it was a trade secret.

The order is affirmed.

WILSON, Justice (concurring).

For the reasons hereinafter stated I concur in the affirmance of the judgment of the trial court.

Elements are present in this action that are not found in the usual customer list cases and those involving unfair competition. In such actions the salesmen or deliverymen visit the homes and places of business of their customers; they have the opportunity of conversing freely with them, of obtaining personal and intimate knowledge of the desires and demands of the customers, and are able to supply their needs, to discuss their complaints and to make changes in the service when requested. Any salesman may, without hindrance, solicit business for his employer from the customers of a rival manufacturer or producer. All this may be done freely and without the necessity of obtaining permission from anyone.

Not so in the instant case. In this case free contact with the consumers of the lunches could not be had. It was necessary for plaintiff or any other vendor to have permission of the borax company in order that his salesmen or deliverymen might enter the plant and sell lunches to the company's employees. Such permission was granted, withheld and terminated at the pleasure of the company, and when granted the company imposed such terms and conditions as it deemed proper. Black's knowledge of the desires of the company's employees was not obtained through unrestricted intercourse with them, as is the case when dealings are had directly with householders or other consumers. Plaintiff did not have a monopoly of the business or an irrevocable permit to enter the plant. Other food vendors than plaintiff and its salesmen had been admitted to the borax company's premises on occasions previous to the granting of permission to plaintiff.

The customers, employees of the borax company, could not cease purchasing from plaintiff at will and patronize another vendor since none other than plaintiff was permitted on the premises until the occurence which led to this action. Thereafter they could not, if they would, purchase plaintiff's lunches, for it was excluded from contact with them.

The superintendent of the borax company's plant was called as a witness on behalf of plaintiff and testified that he had required, as a condition of plaintiff's permit to enter the plant, that hot lunches would be provided for the men and that lunches would be served on Saturdays as on other days; that plaintiff had failed to comply with those conditions; that service was not given on Saturdays; that hot food was not always provided; that the employees complained that the quality of the food furnished by plaintiff was not good; that frequently when plaintiff's truck reached the plant the food would be sold out. For these reasons the witness revoked plaintiff's permit to enter the company's plant.

At the same time Black and his new employer were granted permission to enter the plant and to serve the employees on condition that the food provided would be better in quality and variety than that which had been served by plaintiff and that other conditions which plaintiff had not complied with would be fulfilled. Black told the superintendent that he was leaving the employment of plaintiff and going into business for himself or with another vendor. The superintendent of the plant, testifying as plaintiff's witness said that Black asked permission to serve the employees but that he did not request that permission be denied to plaintiff. As far as Black's request went, plaintiff was to be left in competition with him and his new employer. However, the assistant superintendent notified plaintiff that its permission to enter the plant was terminated.

Although through his service of food to the company's employees Black obtained knowledge of their desires, his information was not of such a confidential nature as it would have been if it had been acquired in the free contact with them in the open market that is had in the ordinary "route" cases since he and plaintiff were circumscribed in their dealings with their customers by the fact that permission of the borax company was a prerequisite to the solicitation of the employees. There is no evidence that Black's entry into the employment of another caterer injured plaintiff since the superintendent and assistant superintendent of the borax company testified that they had long contemplated severing the company's relations with plaintiff for the reasons above outlined. There is no evidence that Black solicited service in his new employment in any place of business other than that of the borax company.

This case is not governed by the rules found in the "route" cases wherein customers are regularly served by a deliveryman with milk, ice and other commodities. In such cases a business relationship is established between the customers and the owners of the business through the latters' employees and it will be assumed that such relationship will continue. In the instant case there was no such certainty of plaintiff's retention of its customers by reason of the fact that the permission of the borax company could be revoked at will and by reason of the continuing possibility that it would be revoked. Upon the happening of such contingency plaintiff's contact with its consumer-customers would be terminated and as to them its market would be lost without any intrusive act of its former employees.

The "route" cases are different from the instant case in another particular: the names and addresses of customers in such cases have been held to be valuable and confidential trade secrets of the employer whenever an employee has attempted to make use of them for the benefit of himself or of any person other than his employer. This is so for the reason that the customers are visited and served by the employee at their homes and places of business. In the instant case the knowledge of the names and addresses of the borax company's employees who purchased lunches was of no value whatsoever to plaintiff since such employees were visited only at the plant where they were employed and then only by permission.

Nothing said in Gloria Ice Cream & Milk Co. v. Cowan, 2 Cal.2d 460, 41 P.2d 340, is contrary to the view herein expressed. That was a "route" case differing from the cases cited in the opinion of the Presiding Justice only in respect of the service rendered. In those cases retail delivery routes were in question, while in the Gloria case the plaintiff sold in wholesale quantities to restaurants, grocery stores, markets and like establishments. Although the names of the Gloria company's customers were not trade secrets, since they were listed in classified directories and their places of business could be observed by any person who traveled on the streets of the city, nevertheless the knowledge of their desires and requirements as to quantities, quality and varieties of milk, ice cream and other dairy products which the defendant had obtained through his daily delivery of his employer's commodities to them, was a trade secret and information of a valuable and highly confidential character belonging to his employer which an employee had no right to use for the benefit of himself or of his new employer.

The evidence produced by plaintiff furnishes defendant's defense to the action.

McCOMB, Justice (dissenting).

I dissent. I regret that I find myself unable to agree with the conclusions of my learned brethren. It appears to me that in substance both of the foregoing opinions are identical, the only difference being in verbiage. The point stressed in an effort to differentiate the instant case from the rule announced in Gloria Ice Cream, etc., Co. v. Cowan, 2 Cal.2d 460, 464, 41 P.2d 340; Wallich v. Koren, 80 Cal.App.2d 223, 226, 181 P.2d 682, and George v. Burdusis, 21 Cal.2d 153, 130 P.2d 399, is that in the instant case the consumer was dissatisfied with the merchandise being supplied by plaintiff, and this fact in some way is a palliative for the wrongful conduct of defendant; while in the cited cases the customers were satisfied with the merchandise furnished by the respective defendants' competitors.

In my opinion the gist of the cause of action in this and the cited cases is the wrongful act of defendant which is not cured and cannot be cured or obviated by the fact that the customer is pleased or displeased with the merchandise furnished him. I am also of the view that the opinions prepared by my illustrious associates fail to give full recognition to the present rule applicable upon the granting of a motion for a nonsuit. The evidence in the present case being viewed, as we must on a motion for a nonsuit, pursuant to the rules set forth in Frederickson v. Kepner, 82 Cal.App.2d 905, 187 P.2d 800, discloses that defendant Ben Black for more than one year prior to February 25, 1947, had been employed by plaintiff to solicit, sell and deliver perishable catered foods and box lunches daily to plaintiff's retail customers, some of whom were employees of the Pacific Coast Borax Company which is located at Wilmington, Calfornia.

Plaintiff furnished said defendant with a truck and box lunches which he was to sell and deliver to plaintiff's customers on the private premises of the Borax Company. Plaintiff paid for the entire upkeep and maintenance of the truck used by Mr. Black, who received a salary and commissions in excess of $100 per week during the time he was employed by plaintiff. The truck bore the sign, "DeLuxe Box Lunch," and labels on the sandwiches were, "DeLuxe Box Lunch & Catering Co."

During this period, plaintiff obtained permission for defendant Black to solicit, sell and deliver plaintiff's foods and box lunches on the premises of the Borax Company at times that coincided with the recess and lunch periods of plaintiff's customers. During said period defendant Black made the personal acquaintance of the customers, obtaining information as to their likes and fancies, and the varieties, quantities and types of perishable catered foods and box lunches consumed. This information was of a highly confidential nature. Such information, as to the quantities of food, types and varieties thereof, and the preferences of the customers for the catered foods and box lunches, could be obtained only by actually soliciting and catering to them, and was a trade secret of great value to plaintiff, essential to the normal operation of its business.

On February 22, 1947, defendant Black was an employee of plaintiff and paid by plaintiff, and on such date he secured permission from the Pacific Coast Borax Company to enter upon their private premises and to solicit and sell, and to deliver to its employees box lunches and catered foods prepared by defendants Lee Williamson and Albert Hollosy, doing business as the California Box Lunch and Catering Company, and to refuse permission to plaintiff to sell such foods on the premises.

Immediately thereafter, defendant Black sold and delivered to plaintiff's customers, employees of the Borax company, box lunches and other catered foods prepared by the California Box Lunch and Catering Company. Defendants will continue such practice unless restrained by order of the court.

This is the sole question presented for determination:

Do the foregoing facts constitute a prima facie case entitling plaintiff to an injunction restraining defendants from using the trade secrets obtained by defendant Black while in plaintiff's employ, and from soliciting the customers of plaintiff?

This question must be answered in the affirmative and is governed by these pertinent rules:

An employee who has acquired trade secrets or valuable information of a confidential nature relating to his employer's business will be restrained from using such knowledge for the purpose of injuring his employer, and he will also be enjoined from soliciting his former employer's customers relative to whom he has obtained confidential information while acting as agent. (Gloria Ice Cream etc. Co. v. Cowan, 2 Cal.2d 460, 464 [41 P.2d 340;] Wallich v. Koren, 80 Cal.App.2d 223, 226, 181 P.2d 682.

Discussing this rule Mr. Presiding Justice Moore in summarizing the decision in George v. Burdusis, 21 Cal.2d 153, 130 P. 2d 399, accurately says in Wallich v. Koren, supra [80 Cal.App.2d 223, 181 P.2d 684], "that in such cases the wrong to the former employer lies not only in the knowledge of the identity of the customers but also in the former employee's personal acquaintance with and knowledge of the customers and of their 'places of residence, their peculiar likes and fancies and other characteristics,' all of which mightily aids a solicitor to secure and retain the business of those he visited while in the service of his former employer." Mr. Justice Wilson likewise concurred in this statement.

Applying the foregoing rule to the facts in the instant case it is apparent that defendant Black used confidential information pertaining to the customers of plaintiff which he had obtained while in plaintiff's employ for the purpose of soliciting said customers after he severed his contract of employment with plaintiff and entered into the employ of his codefendants. Therefore his acts fall squarely within the rule stated above, and plaintiff's evidence made a prima facie case in its favor entitling it to a denial of defendant's motion for a nonsuit, and an opportunity to have the case tried upon its merits.

In my opinion the judgment should be reversed.

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86 Cal.App.2d 277

SAFEWAY STORES, Inc. v. CITY COUNCIL OF CITY OF SAN MATEO et al.

Civ. No. 13457.

District Court of Appeal, First District, Division 2, California.

June 18, 1948.

Hearing Denied Aug. 12, 1948.

1. Municipal corporations 🔑601

"Spot zoning", by which a specific parcel of property is placed in a different zone from that of neighboring property, is accomplished by amendment of general zoning ordinance.

See Words and Phrases, Permanent Edition, for all other definitions of "Spot Zoning".

2. Municipal corporations 🔑601

Non-conforming uses which antedated zoning and around which framers of zoning ordinance drew boundaries of residential districts so as to direct future development of city, uses which were permitted within zone with a permit from city council, and uses within provisions of zoning ordinance for variances in harmony with general purpose and intent of ordinance, could not be relied upon to establish indiscriminate spot zoning, so as to require city council to grant petitioner's application to spot zone its property to permit a purely commercial use in a fourth residential district.

3. Municipal corporations 🔑626

Proof of three instances of spot zoning for commercial use within residential districts did not establish discrimination against petitioner in its application for a spot zone to use its property for operation of a grocery store, where first instance a block from petitioner's property, while technically zoned as commercial, use was actually residential in appearance, second instance, across the street, was actually within terms of ordinance for the surrounding residential district and third instance was in an altogether different neighborhood.

4. Trial ⚷375

In mandamus proceeding to compel the rezoning of a particular parcel of property, where it was stipulated that judge might view the territory involved and he did so, his observations on such tour became evidence in the case.

5. Municipal corporations ⚷122(2)

A property owner asserting that zoning ordinance is unreasonable as applied to his property or that change in conditions has rendered application of ordinance unreasonable must produce sufficient evidence from which court can make such findings as to physical facts involved as will justify court in concluding as matter of law that ordinance is unreasonable and invalid, and property owner must show abuse of discretion of zoning authorities and that there has been unreasonable exercise of police power.

6. Municipal corporations ⚷63(1)

Where trial court found that neither petitioner's site nor surrounding property was commercial in character, it properly concluded that although there were in residential districts, islands zoned for commercial use, question of policy of enlarging such islands was for proper city officials and that court should not substitute its judgment for theirs unless no other reasonable conclusion could be arrived at than that the action denying a commercial use to petitioner was unreasonable and arbitrary.

7. Municipal corporations ⚷601

A municipal legislative body can determine whether business island permitted by zoning ordinance in residential district should be enlarged, and mere fact that owner may enjoy greater benefits or that his property will be enhanced in value if size of islands is increased cannot entitle him to compel allowance of such increase in size.

8. Appeal and error ⚷1056(1)

Exclusion of documentary evidence, consisting of minute entries of city council, which added nothing to what was already before the court in much clearer shape and form, was not error.

9. Administrative law and procedure ⚷115, 331
Municipal corporations ⚷601

Statement of chairman of planning commission with respect to spot zoning could not bind city council, which was the granting authority with reference to rezoning, and could not even bind a future planning commission.

10. Evidence ⚷344
Mandamus ⚷168(3)

In mandamus by property owner against city to compel the rezoning of his property for commercial use, exclusion of unauthenticated copy of minutes of planning commission, which document was indefinite and inconclusive was not error.

11. Evidence ⚷157(8)
Mandamus ⚷168(3)

Evidence in mandamus to compel city to change zone of petitioner's property to permit commercial use, transcript of proceedings before council two evenings before trial, showing statements of two members of planning commission and a councilman to effect that street on which petitioner's property was located was going to become commercial, was properly excluded, since testimony of officials themselves would be best evidence and, in any event, such evidence was not relevant.

12. Municipal corporations ⚷121

In mandamus by chain store to compel city to rezone a particular parcel of property to permit commercial use thereof, store could not contend that zoning ordinance, as applied to such parcel, created a monopoly for business already existing where three of its stores were among businesses already existing in city at time of trial.

13. Mandamus ⚷168(2)

The fact that population of San Mateo would normally warrant more than five grocery stores did not justify resort to mandamus to compel the rezoning of a particular parcel of land in a residence district to permit a commercial use by chain store in the absence of a showing that districts or zones in which stores may be operated have been so constricted as to show an intent to shut out newcomers.

14. Mandamus ⟜87
Municipal corporations ⟜601

A municipality cannot be held responsible for economic conditions with which it has nothing to do which might prevent a prospective store operator from securing a desirable location in a commercial zone and, in any event, such conditions do not justify such prospective proprietor in demanding by mandamus that a particular location in a residence district be opened up for commercial use.

15. Municipal corporations ⟜626

Normally, the question of whether there is discrimination in operation of a zoning ordinance cannot be determined by question of whether property can be acquired at an equitable price within zone permitting contemplated use.

◆

Appeal from Superior Court, San Mateo County; Andrew R. Schottky, Judge.

Mandamus by Safeway Stores, Incorporated, against the City Council of the City of San Mateo and Claude J. Hirschey and others, as members thereof, and V. O. Davis, as Building Inspector of the City of San Mateo, to compel the reclassification of certain property within a fourth residential zone to commercial status. From a denial of the writ petitioner appeals.

Affirmed.

Hoffmann & Draper, of San Mateo, for appellant.

Arthur J. Harzfeld, City Atty., City of San Mateo, of San Mateo, for respondents.

GOODELL, Justice.

The appellant owns a piece of property on the southwesterly corner of San Mateo Drive and Poplar Avenue in the City of San Mateo. It is within a fourth residential zone, wherein stores are not permitted. Appellant's application to respondent Council for a reclassification of its property to commercial status was denied. A writ of mandate to compel the reclassification was then sought and denied, and this appeal was taken.

The central business district of San Mateo extends from El Camino Real on the west to and beyond the Southern Pacific on the east, a distance of about 5 blocks, and from the city park on the south to above Baldwin Avenue on the north, a distance of about 5 blocks. It is zoned commercial and its fringes, here and there, are similarly zoned. Commercial zoning also extends along El Camino Real, along the strip facing the railroad near the station, and along Bayshore Boulevard.

A large area south of the central business district, extending lengthwise for over three-quarters of a mile and about two blocks in width is residential in character, and a still larger area to the north, over three-quarters of a mile in length and four or five blocks in width, is residential in character, and by zoning as well with a few minor exceptions.

In 1937 the Council adopted a zoning ordinance dividing the city into eight districts, namely, first, second, third and fourth residential; commercial; light industrial; heavy industrial, and unclassified. First residential districts are limited to single-family dwellings and public buildings, and their accessories, with churches allowable by permit. Second residential districts are limited to all uses permitted in the first, plus two-family dwellings or duplexes, and by permit community clubhouses. Third residential districts are limited to all uses permitted in the second, plus apartment houses. Fourth residential districts are limited to all uses permitted in the third, plus churches and railroad stations, with the following allowable by permit: bungalow courts, clubs, court apartments, hospitals, philanthropic institutions, private schools, sanitariums, and gasoline service stations.

San Mateo Drive runs in a general northwesterly-southeasterly direction and approximately parallels El Camino Real, which is a few blocks to the west, and the Southern Pacific tracks, a few blocks to the east. It is a busy street, 60 feet wide, and carries a large volume of traffic, including an interurban electric railway, automobiles, buses, stages and trucks in large numbers and at all hours. Excepting El Camino Real it is the only artery connecting San Mateo with Burlingame and the country to the north.

The zone within which appellant's property lies is a long, narrow strip extending for about 8 blocks northerly from the central business district. In width it extends about a half block easterly and a half block westerly of San Mateo Drive. Just above Poplar Avenue, Leadley Terrace, zoned as second residential, cuts into one block of its length and about a half block of its width.

Flanking this strip on the east is a long, narrow area of third residential extending to the railroad tracks, while flanking it on the west (except for one block zoned as third residential) is a long area of second residential extending almost to El Camino Real. Thus both sides of the fourth residential district are bounded by zones of higher rating.

Appellant contends that the zoning ordinance as applied to its property "is unreasonable and arbitrary in that this property clearly is commercial in character" and that its change in character from residential to commercial has been brought about by "spot zoning". It claims that the "frequent and indiscriminate 'spot zoning' amendments of the ordinance established a clear administrative determination that any property on San Mateo Drive—except appellant's—is commercial, but they have completely and finally destroyed any boundary which may have existed between commercial and residential zones."

[1, 2] Spot zoning is accomplished by the amendment of a general zoning ordinance. Rubin v. Board of Directors, 16 Cal.2d 119, 124, 104 P.2d 1041. Appellant's arguments call for an examination (with this definition in mind) of the ten "islands" which it claims have commercialized its property and the environs thereof. They include places away from the Drive as well as places on it, and places outside the zone in which appellant's property lies as well as within it, and are as follows:

1. A block north of appellant's property, and at the northwest corner of San Mateo Drive and Bellevue Avenue, there is a grocery store.

2. A block east of appellant's property, on Poplar Avenue, there is a florist shop and nursery.

Both establishments were there many years before the city was zoned and come within section 12 of the ordinance which provides that "Any use forbidden by this ordinance but which is lawfully existing at the time this ordinance becomes effective, may be continued" as a non-conforming use.

3. On Ellsworth Avenue between Santa Ines and Monte Diablo, over two blocks from appellant, there is another grocery store which presumably falls into the same category.

None of these properties was "spot zoned" and none comes under any variance provision. All three of them antedate all zoning, and the framers of the ordinance drew around them the boundary lines of what they defined as *residential districts* "with the purpose of directing the present and future development of the city and no attempt was made to remold its past development." Zahn v. Board of Public Works, 195 Cal. 497, 512, 513, 234 P. 388, 395.

4. Directly across San Mateo Drive from appellant's property there is a gasoline service station.

5. A block south, on the northeast corner of San Mateo Drive and Santa Ines, there is another.

6. Three blocks west of appellant's property, at Poplar Avenue and El Camino Real, there is still another, in a fourth residential district.

The section of the ordinance defining fourth residential districts enumerates eight "uses permitted with a permit from the City Council" and one of them is "Gasoline Service Stations". Obviously the framers of the ordinance considered that these stations belong in such a district and that they would not destroy its residential character, a decision clearly within their own province. Such stations require no amendment, consequently they are not spot zoned. Rubin v. Board, supra.

7. On the corner diagonally across from appellant's lot, in Leadley Terrace (which is second residential) there are two new professional offices, one a physician's, the other a dentist's. All the buildings in this Terrace are of residential type, and these offices come squarely within the provisions for variances and exceptions in any zone "in harmony with the general purpose and intent of the ordinance." Appellant concedes that these offices were not zoned but are under the permissive variance provision.

This brings us to two "islands" which are admittedly zoned as commercial.

8. One block north of appellant's property, at the southeast corner of San Mateo Drive and Bellevue, there is a group of professional offices. This might well have been brought under the permissive variance provision (for it is in the same category as the Leadley Terrace offices) but it was nevertheless zoned as commercial. However, the offices are situated in houses of residential appearance as shown by the photographs.

9. Three long blocks—almost a third of a mile—south of appellant's property, on the margin of the central business district and practically an extension of it, there are three new dental offices and a clinic, all rezoned as commercial. The southerly line of this property is but 200 feet north of said district, which is zoned solidly commercial, while the northerly line of the property is 1,700 feet southerly of appellant's site. The three blocks lying between, on the west side of the Drive, *including the block within which appellant's property lies,* are residential in fact as well as by zoning, with no "island" therein except one church. The proximity of these new offices to the main business zone would seem to put it in an altogether different neighborhood from that surrounding appellant's property. The fact that, as testified by the chairman of the Planning Commission, it was deemed proper "after a great deal of study and debate" to alleviate a serious problem by locating *professional offices* on San Mateo Drive can hardly be used by appellant as an argument that it was the victim of discrimination as to its proposed *grocery store* 1,700 feet away.

10. Next to the gasoline service station at San Mateo Drive and Poplar is some kind of a structure called the San Mateo County frozen food locker. At the trial neither side attempted to describe its appearance or to show by whom it is operated, or whether it is merely a public utility for the accommodation of all residents or a private enterprise. All the record shows is that it is built on the lot next to the gasoline station. The record with respect to the gas station (par. 4 above) is not at all clear. It is susceptible of the view that it was zoned as commercial. One of appellant's maps shows that one lot was "zoned" prior to the adoption of the ordinance, and that the next lot, on Poplar, was zoned commercial on January 15, 1940. Even if the gas station had been zoned to commercial, the fact remains that it is actually within the terms of a permitted use within a fourth residential district.

[3] Appellant's assertion that "'spot zoning' has run rampant, and resulted in a shotgun pattern of commercial activities about appellant's property" is not substantiated. Nor was spot zoning either frequent or indiscriminate. At most there are but three sites. One of them, a block from appellant, while technically zoned as commercial, is *actually* residential in appearance. Another across the street, while technically zoned as commercial, is *actually* within the terms of the ordinance for fourth residential. The third is 1,700 feet away from appellant and in an altogether different neighborhood.

This phase of the discussion would be incomplete without reference to a business district to the north of appellant's property. Three blocks north there is the Bowie Tract directly east of San Mateo Drive, and an area a block long and a half block wide directly west of it, all zoned as commercial. This area runs up to the Burlingame line. The Southern Pacific tracks curve westerly beside the Bowie Tract and the Drive veers likewise, paralleling the tracks, and this area is exclusively commercial and industrial (with spur tracks serving it) and never has been anything else. It ends abruptly, however, at State Street on the west side of the Drive and at Villa Terrace on the east side, and a distance of 1,500 feet separates it from appellant's property.

The record shows that many of the homes in the neighborhood in question are very old, some as old as 60 or 70 years; that their average age is about 30 years; that this neighborhood was one of the first subdivisions of the city; that there are about 10 vacant pieces of property in the 8 blocks along the Drive from the business district north, indicating that new homes are not being built. It also shows that the traffic is extremely heavy, dangerous, and noisy along the Drive. Poplar Avenue likewise carries heavy east-west traffic because it is the only street with an under-pass at the Southern Pacific tracks.

A protest against reclassification was filed, signed by 140 property owners.

[4] While both the recommendation of the Planning Commission and the vote of the Council were unanimous, there were differences of opinion among the nearby property owners. Several testified that San Mateo Drive was commercial, while others, including the chairman of the Planning Commission and a Councilman, testified that it was residential. These were but individual opinions. The physical and other facts were all before the court. Several maps were introduced; photographs of residences and of other property were introduced; moving pictures were shown. It was stipulated that the judge might view the territory, and he did so. His observations on such tour became evidence in the case. See authorities cited in Wilkins v. City of San Bernardino, 29 Cal.2d 332, at page 348, 175 P.2d 542, at page 553; see also 24 Cal.Jur. p. 921.

[5] It will be remembered that appellant's attack is not made on the zoning ordinance as a whole, but only as applied to its property. With respect to such an attack the court said in the Wilkins case, 29 Cal.2d 332, 338, 175 P.2d 542, 547: "Where it is claimed that the ordinance is unreasonable as applied to plaintiff's property, or that a change in conditions has rendered application of the ordinance unreasonable, it is incumbent on plaintiff to produce sufficient evidence from which the court can make such findings as to the physical facts involved as will justify it in concluding, as a matter of law, that the ordinance is unreasonable and invalid. It is not sufficient for him to show that it will be more profitable to him to make other use of his property, or that such other use will not cause injury to the public, but he must show an abuse of discretion on the part of the zoning authorities and that there has been an unreasonable and unwarranted exercise of the police power. See Rehfeld v. City, etc., of San Francisco, 218 Cal. 83, 85, 21 P.2d 419."

[6] The trial court found that neither the appellant's site nor the surrounding property was commercial in character, and in announcing its decision said: "The question of policy is one to be determined by the proper public officials of San Mateo and the Court should not substitute its judgment for that of those officials unless no other reasonable conclusion can be arrived at upon the facts and the evidence than that the action * * * was unreasonable and arbitrary. As the Court views the matter, the question is fairly debatable and the Court is not justified in overruling the decision of the City officials."

This is substantially what the Supreme Court of the United States said in the Zahn case. In its opinion in the Wilkins case, supra, 29 Cal.2d at page 339, 175 P.2d at page 547 our Supreme Court said: "In affirming the judgment of this court in Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388, where the city council concluded that the public welfare would be promoted by restricting a certain district which included the plaintiff's property, the United States Supreme Court said, 'it is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary, or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.' Zahn v. Board of Public Works, 274 U.S. 325, 328, 47 S.Ct. 594, 595, 71 L.Ed. 1074."

[7] In the instant case appellant, claiming that there already exist "islands" which commercialize its neighborhood and that it, too, is entitled to commercial zoning, seeks by this proceeding to compel an enlargement of the commercial zone. With respect to this the court in the Wilkins case 29 Cal.2d at page 341, 175 P.2d at page 549, says: "It is clearly within the discretion of the legislative body of the city to determine whether such an 'island' should be enlarged or not, and the mere fact that the owner may enjoy greater benefits, or that his property will be enhanced in value, if the size of the island is increased, *cannot entitle him to compel the allowance of such increase in size.* [Citations.]" (Emphasis added).

[8] The appellant contends that "The trial court erred in refusing to admit evidence conclusively establishing gross discrimination against appellant in the administration of the zoning ordinance."

Three pieces of documentary evidence were offered and rejected. The first was a certified letter from the City Clerk to appellant's counsel, quoting excerpts from the minutes on six zoning matters other than appellant's. Counsel stated to the court that it was offered "for the purpose of establishing that all applications for rezoning to commercial use on San Mateo Drive, except * * * two applications of Safeway Stores, have been granted * * * and that only the application of Safeway Stores has been denied." In rejecting it the court remarked that all this had been already proved or admitted. Appellant had introduced several maps showing graphically all ten sites which it claimed had been spot zoned (discussed herein under paragraphs 1 to 10) and there had been other evidence respecting them. There was no error in the ruling. The minute entries added nothing to what was already before the court in much clearer shape and form. The fact that in each instance, save appellant's, the application was granted (either by rezoning, by permit, or under the variance provision) had already been proved for whatever it was worth.

[9, 10] Another document offered was an authenticated copy of minutes of the Planning Commission of May 28, 1936 and of the City Council of June 1, 1936. This showed that in the "rezoning" of the property across from appellant for "establishing an oil station thereon" the chairman of the Planning Commission stated "* * * that if the owners of the opposite corner desired a similar rezoning that the board would grant it." It shows further that a Mr. McCurdy "spoke on behalf of Mr. Poss" saying: "Mr. Poss would assist any one to secure a similar permit for the opposite corner." In one place the document speaks of *similar "rezoning"*, in another of a *similar "permit"*. Either way, a *similar* change would mean one for another "oil station". The meetings were held a year before the present ordinance was enacted (the terms of the old ordinance were not before the court) and over five years before appellant bought its property. The Planning Commission was not the granting authority, hence the statement of its chairman could not bind the Council, which *was* the granting authority, nor could such statement bind even a future Planning Commission. The offer of assistance by one citizen on behalf of another was of course binding on nobody. The document is equivocal as to whether the site was then being *rezoned* or a *permit* was being issued. We are satisfied there was no error in rejecting this unauthenticated, indefinite, inconclusive document.

[11] The third document offered and rejected was the transcript of proceedings before the Council on May 20, 1946, two evenings before the trial. The Planning Commission had recommended to the

Council that several properties on San Mateo Drive, zoned as commercial, should be restored to fourth residential status. The Council by a three-to-one vote declined to do so. What the appellant sought to introduce were the statements of two members of the Planning Commission and a Councilman. One said "it is going to become a commercial street, and we can't stop it", another said that "for us to say that we are going to keep that residential is just being silly * * * because there is no question that it is going to be commercial". The court in rejecting the evidence remarked that "If they want to testify here, that is a different matter". Obviously that would have afforded cross-examination as to whether they meant it was *now* commercial.

Appellant did not see fit to call any of them.

The Council denied the recommendation. Appellant argues from this that it hereby reaffirmed the commercial character of San Mateo Drive. All it did was to refuse to disturb a decision or decisions theretofore made. Certainly the best available evidence would be the personal attendance at the trial of the officials who were quoted in the transcript, but, even so, their evidence would not have been relevant or material.

[12] Lastly the appellant contends that the evidence "establishes that the ordinance, as applied to appellant's property, creates a monopoly for business already existing, and is therefore invalid".

In the first place, among "business already existing" in San Mateo there were at the time of trial three of its own Safeway Stores. It was then expected that one of its stores would have to be discontinued on the expiration of appellant's lease on November 30, 1946. Whether this came about does not appear.

Appellant cites two cases under this head, In re White, 195 Cal. 516, 520, 234 P. 396 and Wickham v. Becker, 96 Cal.App. 443, 447, 274 P. 397, neither of which is in point. The first is the Atherton case where there were but two zones, a residential district and an unrestricted district. Of an area of 2,500 acres in the City they left but one and one-tenth acres unrestricted which had a street frontage of but 436 feet and at the time of the enactment of the ordinance this small area was wholly occupied by a gasoline service station and a restaurant "to the exclusion of other business." The case turned on the point that the ordinance had in effect granted a monopoly to the business establishments already located in the one and one-tenth acre area, and had prohibited all other business. It is clear that the two cases are not comparable.

The second is one of the Piedmont cases where, at 96 Cal.App. at page 447, 274 P. at page 399, in following the Atherton case, the court says: "The situation presented here, with respect to the creation of a business monopoly, is to all intents and purposes the same as the one existing there."

[13, 14] The fact that the population of San Mateo would normally warrant more than five stores, as testified by appellant's manager, does not prove anything in the absence of a showing that the districts or zones in which stores may be operated have been so constricted (as in the Atherton and Piedmont cases) as to show an intent to shut out new-comers. Nothing like this appears. The municipality cannot be held responsible for economic conditions with which they have nothing to do which might prevent the appellant from securing desirable locations. In any event, it does not justify appellant in demanding (by mandamus) that this particular location be opened up for it.

The finding "That the commercial districts established * * * by said zoning ordinance were at said times sufficient to permit petitioner to acquire property at an equitable price elsewhere in said City for operation as a grocery store" is attacked by appellant as unsupported by the evidence.

[15] This finding, in our opinion, may be disregarded. Whether there is discrimination in the operation of a zoning ordinance cannot be determined by the question whether property could be acquired at an equitable price. In such extreme instances as in the Atherton and Piedmont cases price might, combined with other

circumstances, enter into the consideration, but there is nothing in the instant case to bring the factor of price into play. The present case is just another illustration of what has been said repeatedly in zoning cases, that "Every exercise of the police power is apt to affect adversely the property interest of somebody". Wilkins case, 29 Cal.2d 332, 338, 175 P.2d 542, 547.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., dissenting.

86 Cal.App.2d 266

GATTIAN et al. v. COLEMAN et al.

Civ. 16111.

District Court of Appeal, Second District, Division 2, California.

June 17, 1948.

1. Vendor and purchaser 🔑185

Generally, where parties have stipulated to make time of payment the essence of contract, equity cannot relieve vendee who has made default. Civ. Code, § 3275.

2. Contracts 🔑318

Statute permitting relief from forfeiture, upon making full compensation to other party, is qualified by statute permitting untimely offer of performance if time has not been expressly declared to be of essence of obligation, so that generally, where time is made the essence of agreement a party may not obtain relief under the first statute. Civ.Code, §§ 1492, 3275.

3. Vendor and purchaser 🔑185

Inexcusable failure on part of vendee to make payment according to terms of contract terminates his rights and precludes him from enforcing contract, in absence of waiver.

4. Contracts 🔑318

Law does not favor forfeitures and party should not be divested of valuable rights by forfeiture for default in complying with contract by which those rights have been acquired unless other party to contract has suffered or will suffer serious detriment or damage by reason of such default or unless default was intentional or wilful. Civ.Code, §§ 1492, 3275.

5. Vendor and purchaser 🔑185

Where purchasers, after urgings by vendors to pay larger amounts than required by contract, sought to refinance loan, and within six days after installment became due vendors were notified of opening of escrow and were requested to file their demand with escrow holder, delay in payment of installment did not result in forfeiture, in absence of evidence of wilful, fraudulent, or gross negligence, notwithstanding time was specifically declared to be of essence of agreement. Civ.Code, §§ 1492, 3275.

6. Vendor and purchaser 🔑104

If vendee claims waiver by vendor of right of forfeiture and such waiver does not appear from complaint, vendee must plead it in his answer, and under statute, if vendee desires to be relieved from forfeiture, he must plead ability and willingness to make payment of amount due, but where there was no question of waiver and vendees pleaded their ability and willingness to pay, procurement of loan and opening of escrow for that purpose and failure of vendors to execute deed and to make demand for unpaid balance, as requested by escrow holder, pleading provided sufficient basis for granting of relief from forfeiture. Civ.Code, § 3275.

◆

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Roy G. Gattian and another against Kenneth N. Coleman and another, to cancel a contract of purchase and obtain possession of premises. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Richard A. Haley, of Los Angeles, for appellants.

Lewis, Signer & Burns, of Los Angeles, for respondents.

WILSON, Justice.

Appellants, as vendors, and respondents, as vendees, entered into an option agreement on November 1, 1944, for the sale of appellants' equity in certain real property in Los Angeles County for the sum of $4,000. Respondents paid $1500 upon the execution of the agreement under the terms of which they assumed a prior encumbrance upon the property of $1770.25, payable in monthly installments of $24 or more and agreed to pay appellants the balance of $729.75 in monthly installments of $25.50 plus interest. Time was specifically declared to be of the essence of the agreement which provided that should the vendees fail, neglect or refuse to carry out any of its terms and conditions, the contract was to become null and void and all payments thereon were to be retained by the vendors as liquidated damages.

Pursuant to the terms of the contract respondents went into possession of the property and made monthly payments upon both obligations until the payment due December 1, 1945. By agreement between the parties, payments could be made either to Mr. Willhoit, the first lien holder, or to the Long Beach Federal Savings & Loan Association which acted as collection agent for Mr. Willhoit, who in turn remitted to appellants. On or before December 6, 1945, respondents applied to the Bank of America at Hawthorne for a loan for the purpose of refinancing the property and paying in full the balance remaining unpaid to appellants and Mr. Willhoit. On December 6, 1945, the loan was approved and on the same date respondents opened an escrow at the Bank of America, Hawthorne Branch. The following day the escrow officer of the bank wrote appellants, informing them that an escrow had been opened in connection with the property which respondents were purchasing from them and asking for their demand. On the same day, a similar letter was sent by the bank to the Long Beach Federal Savings & Loan Association and Mr. Willhoit. Appellants did not reply to the letter from the bank and on January 3, 1946, they notified respondents that the contract was cancelled and demanded possession of the premises. Other letters were subsequently directed to appellants by the bank asking for their demand, to none of which appellants replied. Respondents were advised by either the escrow officer or another officer of the bank to make no further payments on the property while it was in escrow and acting upon that advice no payments were made until March, 1946, when they paid $200 to the Long Beach Federal Savings & Loan Association to cover all delinquent payments due to appellants and Mr. Willhoit. Subsequent payments were made monthly, all of which appellants have refused to accept.

The sole question to be determined is whether under these circumstances relief from forfeiture should have been granted.

Section 3275 of the Civil Code provides as follows: "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

[1, 2] The general rule is that "where the parties have so stipulated as to make the time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default." Pomeroy, Equity Jurisprudence, 5th Ed., sec. 455. The provisions of section 3275 of the Civil Code are necessarily qualified by section 1492 so that generally in a case where time is made the essence of an agreement a party may not obtain relief under that section. Henck v. Lake Hemet Water Co., 9 Cal.2d 136, 143, 69 P.2d 849; Collins v. Eksoozian, 61 Cal.App. 184, 196, 214 P. 670.

[3] The law is settled in this state that an inexcusable failure on the part of a vendee to make a payment when the same should be paid according to the terms of the contract terminates his rights and makes it impossible for him to enforce it in the absence of a waiver. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 9, 55 P. 713, 43 L.R.A. 199, 69 Am.St.Rep. 17; Skookum Oil Co. v. Thomas, 162 Cal. 539,

544, 545, 123 P. 363; Champion Gold Mining Co. v. Champion Mines, 164 Cal. 205, 213, 128 P. 315. Darter v. Schuyler, 47 Cal.App. 457, 459, 190 P. 827.

[4] However, as stated by the court in Collins v. Eksoozian, supra, 61 Cal.App. at page 198, 214 P. at page 676: "The law does not favor forfeitures, and a party should not be divested of valuable rights by way of forfeiture for default in complying with the provisions of a contract by which those rights have been acquired, unless it is clearly made to appear that the other party to the contract has suffered or will suffer serious detriment or damage by reason of such default, or unless it is made to appear that the default was intentional or willful." See also Bedell v. Barber, 80 Cal.App.2d 806, 182 P.2d 591.

[5] Appellants assert that respondents, having willfully breached their contract, have forfeited all their rights thereunder. Their position is not sustained by the evidence. On the contrary, the evidence shows that prior to the opening of the escrow appellants had been urging respondents to pay larger amounts than required by the terms of the contract and that respondents were endeavoring to comply that request by procuring the loan from the bank in order to pay the balance in full. Within six days after the payment became due on December 1, 1945, appellants were notified of the opening of the escrow and were requested to file their demand with the escrow holder.

Mrs. Gattian testified that she did not receive the letter from the Bank of America dated December 7, 1945; that she had received only two letters from the bank, one dated January 14, 1946, and the other dated a few days later; that she did not reply to the letters because the matter was in the hands of her attorney. That she knew of the escrow is obvious from her testimony as to what occurred when she called at the Long Beach Federal Savings & Loan Association's office on December 28, 1945, and again on January 2, 1946. She was asked whether on those occasions anyone in Mr. Willhoit's office told her about "an escrow that had been opened at the Bank of America in Hawthorne." She answered: "Never mentioned that to me, and told me they knew nothing of it, even on the 2nd; that they had no word give to them." She offers no explanation as to why she was told that "they knew nothing of it" [the escrow] if the escrow had not been discussed by the loan company's officers with her. Mr. Willhoit, the holder of the first lien on the property, testified that he had a conversation with Mrs. Gattian with reference to the escrow and that "she knew about it."

Respondents acted in good faith. There was no deliberate or intentional breach of their contract and no evidence of wilful, fraudulent or gross negligence. They were making an endeavor to comply with appellants' request for payment of more than was called for by the contract. Such effort excused the short delay made necessary by the procurement of the loan and the handling of the matter through escrow. Appellants have suffered no loss or damage for which they will not be compensated by payment in full of the balance unpaid on the contract plus interest.

[6] There is no merit in appellants' contention that the court is powerless to grant relief from forfeiture under the pleadings, and the case cited does not so hold. The rule as stated in Clifford v. Fleshman, 65 Cal.App. 762, 769, 770, 225 P. 45, is that if the vendee claims a waiver by the vendor of the right of forfeiture and such waiver does not appear from the complaint the vendee must plead it in his answer, and under section 3275 of the Civil Code, if the vendee desires to be relieved from forfeiture, he must plead ability and willingness to make payment of the amount due. There is no question of waiver in the instant case and respondents have pleaded their ability and willingness to pay, the procurement of a loan and the opening of an escrow for that purpose and the failure of appellants to execute a deed and to make demand for the unpaid balance as requested by the escrow holder.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concur.

85 Cal.App.2d 253

PEOPLE v. SHAPIRO.

Cr. 2064.

District Court of Appeal, Third District,
California.
April 29, 1948.

1. Criminal law ⚷641(1)

Where court asked defendant if defendant wanted an attorney, and the defendant replied that he did not want an attorney, and that he understood all the law connected with the charge, defendant was sufficiently informed of his legal rights and waived his right to be represented by an attorney.

2. Poisons ⚷9

Evidence sustained conviction of unlawful possession of marijuana cigarettes. Health and Safety Code, § 11500.

3. Criminal law ⚷998

On motion by defendant who was convicted on plea of guilty to unlawful possession of marijuana cigarettes, to set aside a judgment of conviction on ground that he was induced to waive counsel and to plead guilty by fraudulent representations of narcotic officers that if he did so he would be imprisoned in county jail, only, for period of 90 days and would not be sentenced to state prison, evidence sustained finding that there was no fraud or inducement on part of officers in order to procure plea of guilty. Health and Safety Code, §§ 11500, 11712, 11715.

4. Criminal law ⚷980(1)

On plea of guilty by defendant to charge of possession of marijuana cigarettes, it was the sole province of the trial judge to determine whether defendant's penalty should be imprisonment in county jail or state prison. Health and Safety Code, §§ 11500, 11712, 11715.

5. Criminal law ⚷260(11)

District Court of Appeal may not usurp trial court's power by determining the credibility of witnesses or weight to be given their testimony, and unless there appears to have been a clear abuse of discretion on part of trial court, judgment should stand.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Abraham Shapiro was convicted, on a plea of guilty of the unlawful possession of marijuana cigarettes, and he appeals from an order denying his motion to set aside judgment of conviction.

Order affirmed.

Burt W. Busch, of Lakeport, for appellant.

Fred N. Howser, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was charged, under section 11500 of the Health and Safety Code, with the unlawful possession of marijuana cigarettes. He pleaded guilty, and was sentenced to state prison. He subsequently claimed that he was induced to waive counsel and to plead guilty by the fraudulent representations of the narcotic officers that if he did so he would be imprisoned in the county jail, only, for a period of 90 days, and not be sentenced to state prison. He moved to set aside the judgment of conviction on that ground. The motion was denied. From that order this appeal was perfected.

After a preliminary hearing, an information was filed in Lake County, charging the defendant with unlawful possession of marijuana. The information was filed on the same day the defendant was held for trial by the magistrate. The arraignment was also had on that day. The defendant appeared at the arraignment without counsel. He was definitely informed by the court of his rights, including his right to be represented by an attorney. He then waived time to plead, and to his right to an attorney. The following colloquy occurred between the judge and the defendant at the arraignment:

"The Court: Now, this matter is on for arraignment. Do you want an attorney?

"The Defendant: I don't feel it will be necessary.

"The Court: Do you have an attorney?

"The Defendant: I don't have one.

"The Court: Do you want one?

"The Defendant: No, your Honor, I don't. "The Court: As I state to you, you are entitled to time in which to plead to the charge set forth in the information, and you can either do that or enter your plea at this time.

"The Defendant: I would like to plead guilty to this charge.

"The Court: You understand what you are doing, do you?

"The Defendant: I fully understand all the law on this.

"The Court: That is what the law requires, that you be fully informed."

Moreover, the defendant testified at the hearing of the motion to set the judgment aside, that "the Judge told me my rights—that I could have an attorney, and * * * I said no, I didn't think * * * that I needed one."

Thereupon the defendant entered his plea of guilty to the charge and asked for probation. The pronouncing of sentence was continued and the matter was submitted to the probation officer who filed her report 15 days later, recommending that probation be denied. That report reads in part:

"Statement of Defendant,—'I came along to Lake County for a vacation on May 10, 1947, and stayed three weeks at Loch Lomond, and Hoberg's Resorts. I registered under the name of Daniel Sorel. I brought marijuana cigarettes with me solely for my own personal use, but did not keep my supply with my other personal belongings because I am well aware of the laws involved, so hid them on the grounds near by. I never sold any cigarettes to other guests or juveniles because I knew that that is a very serious offense. I am definitely a gentleman smoker, and use marijuana merely because I like the effects.'"

The probation officer also reported that "The defendant has cooperated in every respect, and has given information as to location of supplies of marijuana," and that the officer was informed of no previous violations of the narcotic laws, or other offenses, by the defendant.

Based on that report, probation was denied and the defendant was sentenced July 12, 1947, to imprisonment in San Quentin for the term prescribed by law.

Subsequently, the defendant employed an attorney and filed an application in said court and cause, on October 2, 1947, supported by affidavits, to set the judgment aside as void, on the grounds previously stated. The motion was heard by the court on the last-mentioned date. The defendant and his attorney participated in that hearing. Oral and documentary evidence was adduced. The defendant, the probation officer, and two narcotic enforcement officers were sworn and examined. The motion was denied.

[1, 2] There is no merit in the contention that the defendant was not informed of his legal rights at the time of arraignment, as the previously-quoted record clearly shows. He waived his right to be represented at the trial by an attorney, and to a continuance for the purpose of his plea. There is adequate proof of the fact that the defendant was knowingly possessed of marijuana cigarettes at the time and place charged in the information. People v. Gory, 28 Cal.2d 450, 456, 170 P.2d 433. Mr. Armstrong, a state narcotic enforcement officer, with many years of experience as such, testified that when he arrested the defendant at Hoberg's Resort he was actually smoking a marijuana cigarette. He said, "When I entered the cabin he was in the act of smoking a marijuana cigaret. * * * He said it was a marijuana cigaret." The witness testified that the defendant sent for him the day after he was placed in jail, and told him "He wanted to make a clean breast of this thing and get it over with and get away from this stuff. And he said, 'If you want me to, I'll go on back and show you where the rest of it is hid.' So, we went back and found some more marijuana."

Another officer corroborated the fact that they returned to Hoberg's Resort and recovered other marijuana cigarettes from the place where the defendant had concealed them. The report of the probation officer also discloses the fact that the defendant told her he "brought marijuana cigarettes * * * for my own personal use, but did not keep my supply with my other personal belongings because I am well aware of the laws involved, so hid them on the grounds near by." He also told the officers where he had more marijuana stored in his trunk at Los Angeles. This furnishes satisfactory evidence that the defendant was in the unlawful possession of marijuana at the time and place charged, and that he knowingly violated the statute against possession of narcotics.

Upon the issue as to whether the defendant was fraudulently persuaded to plead guilty to the charge by the alleged misrepresentations of the narcotic enforcement officers, there is a conflict of evidence. The defendant testified that he was induced by the alleged fraudulent statements of the narcotic enforcement officers to waive representation by an attorney and to plead guilty to the charge. He said the narcotic officers came to the sheriff's office and talked with him about pleading guilty to the charge; that one of them had "a legal pamphlet," and that Mr. Armstrong entered his cell and talked with him for about 30 minutes. The defendant stated that "just he and I" were then present; that Armstrong said, "'Now, we want you to turn up this stuff you got buried. * * * If you plead guilty and cooperate fully you'll have to do ninety days in the County Jail. * * * With good time off—with time off for good behavior—you'll only have to do seventy-five days. * * * Well, [in that way] you'll beat San Quentin. * * * Why don't you plead guilty, it is the best thing; and uncover this stuff.'" The defendant denied having "anything at all" concealed or buried. But he later admitted having cigarettes concealed at Hoberg's Resort, and in his trunk in Los Angeles. The defendant testified that the narcotic officers left, but that Armstrong returned in about 20 minutes and said to him, "Let's go get this stuff." When asked if he did go and procure the cigarettes for them, he said, "Yes, I went to a point about three hundred yards in back of my cabin; it was in a forest. And I had about eight or ten cigarets in a bottle, and I dug—dug the bottle up and said, 'Here they are.'" The defendant stated that he thought that "everything was cut and dried," and relying on the officers' assurance that he would be imprisoned in the county jail only, for 90 days, he agreed to and did plead guilty. There was some discussion about a more serious offense of furnishing other persons with marijuana. In explanation of his agreement to plead guilty to the mere possession of marijuana, the defendant said, "I—it was just a simple possession; that is, it's—I'm—definitely I was smoking it; that is, I'm not involved in any way [with furnishing marijuana to others]."

Mr. Armstrong testified that: "The defendant sent for me. The sheriff's office called me and asked me if I wanted to go up there, and I said I would. * * * And he said he wanted to make a clean breast of this thing and get it over with and get away from this stuff. And he said, 'If you want me to, I'll go on back and show you where the rest of it is hid.' So, we went back and found some more marijuana; then we came back here. Then again he sent for me. * * * And I went up and he said, 'Still I haven't told you everything.' * * * 'As long as it is going to go this way and I'm going to get away from this stuff, I also have a considerable amount hid somewhere else.' And he told me where this was hid and we eventually got it. It was in Los Angeles."

Regarding the alleged inducements of the officer for the defendant to plead guilty, and the alleged misrepresentations regarding the penalty, the following colloquy occurred in Mr. Armstrong's testimony:

"Q. What did you say to him? A. I asked him to turn up his supply of narcotics. * * *

"Q. Did you tell him * * * that he would only receive a County Jail sentence if he entered a plea of guilty? A. I did not.

"Q. Did you offer him anything if he turned up the narcotics for you? A. No, I did not.

"Q. Tell him it would go better for him if he did? A. No. * * *

"Q. Mr. Armstrong, as I understand your statement, when you were at the County Jail the night of the defendant's arrest, he asked you about the penalty in this case. * * * What case was he discussing? How did you know what sections to refer to? A. He wanted to know what he was going to be booked on; I told him. * * * Section 11500 of the Health and Safety Code.

"Q. Did you tell him what that was? A. I did.

"Q. Then he asked you what the penalty was for that? A. He asked at least three or four times before we reached the County Jail, and again after we got in there; and I told him what the penalty was.

"Q. Well, when did you tell him? A. I told him enroute from Hoberg's and I told him at the jail. He seemed to doubt my word.

"Q. What did you tell him? I thought you didn't tell him at all, you let him read it? A. I did.

"Q. What did you tell him the penalty was? A. I told him it was nothing to six years in the penitentiary, or ninety days in the County Jail. * * * He said, 'I don't believe you.' So I went and got the Act and showed it to him.

"Q. You showed him the sections which he read, did you? A. Yes, sir.

"Q. What section did you show him? A. Showed him 11500 and I showed him the penalty section, whatever that is. I don't recall what that is. * * *

"Q. Didn't you tell him, Mr. Armstrong, something about a County Jail sentence if he pleaded guilty? A. No, sir, I did not.

"Q. Didn't you tell him at any time that if he entered a plea of guilty that he would beat San Quentin, if he pleaded guilty to simple possession? A. No, sir."

Mr. Fred L. Stem, another state inspector, who assisted Mr. Armstrong in the investigation of this offense, and who was present at the time of the arrest and conveyance of the defendant to the county jail, fully corroborated the latter in his denial that the defendant was induced to plead guilty by any coercion, threats or misrepresentations regarding the penalty for the offense, or otherwise. He testified that when they were taking the defendant from Hoberg's Resort to the county jail he believed Mr. Armstrong and the defendant sat in the front seat of the automobile, and that he sat in the rear seat. He said in that regard, "If I remember rightly, he [the defendant] was riding in the front seat with Mr. Armstrong. * * * I wouldn't be positive of that." The witness said, that during that trip "there was quite a bit of conversation relative to the case. * * * We were both asking him as to the source of marijuana"; that the defendant insisted he was not smoking marijuana, and denied his guilt of any violation of the narcotic law, but he was asking what charge was to be filed against him, and what the penalty was for that offense. The witness said "I explained to him personally that the penalty on possession of marijuana was anything from ninety days to six years." He said the defendant "was doubtful; he didn't think that it would come under a felony classification." The morning after the defendant was placed in jail, the inspectors went to see him "at the request of the defendant. * * * He asked for us to—on several occasions—to come to his cell." Mr. Stem said that, on one of those occasions, the defendant expressed doubt as to their statement of the penalty, and that, at defendant's request, Mr. Armstrong went out and got the pamphlet from his car and pointed out to the defendant the section applicable to the penalty for possession of marijuana. The witness said he thought that section was 11715 of the code. But he was evidently mistaken as to the penalty section. He said Mr. Armstrong handed defendant the pamphlet, and that "Mr. Shapiro read it himself." Mr. Stem testified that the defendant inquired what would be the effect on his sentence if he disclosed the source of his marijuana. To that question the witness said that "He was told that if he would assist in divulging the source of his marijuana that whatever he did the facts would be told to the district attorney, and in turn the district attorney would usually inform the judge; that those facts would be taken into consideration when sentence was pronounced." The record shows that the fact of the defendant's disclosure of his remaining stock of marijuana was made known to the court. The report of the probation officer favorably mentioned the defendant's disclosure of his possession of other marijuana which had been secured by the officers. There was no misrepresentation in that regard.

Concerning the defendant's charge of alleged fraudulent inducements for him to plead guilty, on the part of the officers, Mr. Stem emphatically denied those allegations. He further testified in that regard:

"Q. At any time during that ride from the resort to the County Jail here in Lakeport, did you tell Mr. Shapiro that you could be influential in getting him off easier if he plead guilty? A. No.

"Q. At no time did you promise him that if he plead guilty he would receive a lesser sentence? A. No. * * *

"Q. At that time [in the County Jail] did you or Mr. Armstrong make any representations to Mr. Shapiro that if he plead guilty he would get a lesser sentence? * * * A. No promises or representations, no."

The defendant could not have been misled regarding the penalty for the offense with which he was charged. If he was shown section 11715, as Mr. Stem thought that he was, it was not applicable to this case for it applies only to obtaining narcotics upon forged or fictitious prescriptions. But the penalty for such offenses is specifically fixed at "imprisonment in the county jail for not less than six months nor more than one year, *or in the State prison for not more than six years.*" The statute which applies to this case is the first paragraph of section 11712 of the Health and Safety Code, which must have been the section pointed out to the defendant, at his request. It reads in part: "Any person convicted under this division [division 10] *for having in possession any narcotic,* or of violating the provisions of Sections 11530 or 11557 shall be punished by imprisonment in the county jail for not less than 90 days nor more than one year, *or in the State prison for not more than six years.*" (Italics added.)

That is exactly what the inspectors testified that they told the defendant regarding the penalty. Regardless of which section was read by the defendant, he could not have been misled into believing that the penalty for having possession of marijuana, was a mere misdemeanor punishable only by imprisonment in a county jail, for both sections include penalties in state prison. If the defendant was deceived regarding the penalty for the offense, he must have deceived himself. It seems clear that the defendant was well informed regarding the violation of the narcotics laws. He evidently speculated on receiving a mere sentence to the county jail in the event of disclosing the location of the other marijuana which he had concealed, and in pleading guilty to the charge. He was plainly told and he must have fully realized that it was discretionary with the trial judge to determine whether a county jail or state prison penalty would be imposed.

[3-5] We are convinced that the record on appeal sustains the order denying defendant's motion to set aside the judgment on the ground of alleged fraud or inducement on the part of the officers. We are of the opinion the defendant was not deceived with respect to the penalty imposed by law as punishment for the unlawful possession of marijuana. It was the sole province of the trial judge to determine whether the penalty should be imprisonment in the county jail or in the state prison. We may not interfere with that sound discretion. Nor may we usurp the power of the trial court by determining the credibility of witnesses or the weight to be given their testimony. Unless there appears to have been a clear abuse of discretion on the part of the trial court, the judgment should stand. People v. Brahm, 98 Cal.App. 733, 277 P. 896; People v. Lamb, 64 Cal.App.2d 409, 412, 148 P.2d 873; 8 Cal.Jur. 582, § 579.

The order denying defendant's motion to set aside the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

86 Cal.App.2d 243

DALAKIS v. PARAS.

Civ. 13674.

District Court of Appeal, First District,
Division 1, California.
June 17, 1948.

1. Executors and administrators ⚷431(2)

Statute relating to presentation of claims against estate of a decedent was not applicable in action to enforce a trust against personal representative of deceased trustee. Probate Code, § 714.

2. Witnesses ⚷167

Statute disqualifying claimant from testifying against representative as to matter occurring before decedent's death did not control in action to enforce trust against personal representative of deceased trustee. Code Civ.Proc. § 1880, subd. 3.

3. Appeal and error ⚷1009(2)

Whether evidence measures up to standard required to constitute a trust should be determined by trial court, and reviewing courts should not interfere except where there is apparent legal deficiency in evidentiary support.

4. Trusts ⚷102(1)

Friendship is sufficient to show a fiduciary relationship for purpose of establishing a trust.

5. Trusts ⚷358(1)

Fact that a greater amount was found in particular bank account in name of defendant's decedent than plaintiff claimed to have intrusted to defendant's decedent did not prevent money from being sufficiently traced for purpose of establishing a trust.

6. Trusts ⚷110

Evidence, showing relationship of trust and confidence between plaintiff and defendant's decedent and deposit of $2,350 by plaintiff with defendant's decedent under oral agreement that it was to be held for plaintiff's benefit, established a voluntary trust in which decedent was voluntary trustee, and, upon death of decedent, defendant, as administratrix of his estate, would be held accountable to plaintiff.

7. Trusts ⚷102(1)

Widow of one who held money under oral trust for benefit of another, in her individual capacity, would be unjustly enriched by personal retention of the fund and was an "involuntary or constructive trustee" of the fund for benefit of owner. Civ. Code, § 2223.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trustee" and "Involuntary Trustee".

8. Trusts ⚷244

Upon death of one holding property under oral trust, title of property passes, in case of real estate, to trustee's heir, and in case of personalty to his executor or administrator, but right to administer the trust appertains to the individual and is not descendible, devisable, or alienable, and trustee's successor is not to be held responsible on theory that he assumed duties of administration, but rather he is in position of an "involuntary trustee".

◆

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by John Dalakis against California Paras, executrix of last will of William Paras, deceased, and California Paras, individually, to enforce a trust. From a judgment for plaintiff, the defendant appeals.

Affirmed.

David Rubeinstein and Carroll B. Crawford, both of San Francisco, for appellant.

Chas. N. Douglas and John A. Hodges, both of San Francisco, for respondent.

WARD, Justice.

This is an action to enforce a trust. Defendant California Paras individually, and as the executrix of the estate of her husband, William Paras, appeals from a judgment in favor of plaintiff John Dalakis for $2,350, plus interest and costs. Primarily the appeal involves the question of the sufficiency of the evidence to uphold the findings, and a determination of the nature and character of a trust.

The complaint alleges that prior to the death of William Paras, plaintiff and the deceased were friends and that great confidence existed between them "and plaintiff trusted deceased implicitly and as a result thereof delivered to said William Paras money and other properties, to wit: Ten (10) One Hundred Dollars ($100.00) War Bonds; a watch with a gold chain, and the sum of * * * ($2350.00) in cash, to be cared for by said William Paras for plaintiff." The return of the bonds and watch is alleged, but defendants' failure to return $2,350, although demand was made repeatedly after the death of William Paras, is also set forth.

Answers of California Paras as executrix and individually were filed, setting forth "That on or about the 16th day of August, 1944, plaintiff filed with this answering defendant as Executrix * * * his claim for * * * ($2,350.00), which plaintiff alleged was due him from said estate; that on September 15, 1944, said claim was rejected by this defendant in her capacity of Executrix because it was unaccompanied by proper vouchers or proof of its validity * * *" and "that said cause of action is barred by the terms of Section 714 of the Probate Code of the State of California." Defendant, individually, denied "that at any time or place or at all this defendant ever had or now has possession or control of any money * * * belonging to plaintiff, or that she has ever been a party to the withholding of plaintiff's money and/or personal property by others."

[1, 2] Defendants do not urge that Probate Code, sec. 714, as to suits on rejected claims is applicable, and the propriety of plaintiff's testimony in view of the provision of Code of Civil Procedure sec. 1880(3) is not mentioned on appeal although certain objections based thereon appear in the record. These questions may be disregarded. Probate Code sec. 714 is not involved, Elizalde v. Elizalde, 137 Cal. 634, 66 P. 369, 70 P. 861, and Code of Civil Procedure, sec. 1880(3) does not control where it is sought to establish a trust. Holland v. Bank of Italy Nat. T. & S. Ass'n, 115 Cal. App. 472, 1 P.2d 1031; Coombs v. Minor, 60 Cal.App.2d 645, 141 P.2d 491.

William Paras, known as Bill, and his three brothers ran a grocery store and butcher shop under the name of "Cosmopolitan Market." George Dyer who was acquainted with both plaintiff and Bill, stated that he knew the latter was holding money for his countryman, and that plaintiff offered him the use of a sum of money which "was in the keeping of Mr. Paras." Charles Small, accountant for the Cosmopolitan Market, testified that the market kept an account at the Market and Geary Street branch of the Bank of America, but that for a short time there had been another account in the name of William Paras. The latter account was opened in November of 1943; when the statement came in Small discussed the matter with the deceased as follows: "The statement came in with the statement of the Market at the end of the month and I handed the statement to him. Later on that afternoon, he gave me the statement back and he asked me if I would keep it in my office for him, that he was holding some money for some people." Similar testimony was brought out upon questioning by the court. Plaintiff's pass book for his bank account with the Bank of America served to support his testimony concerning his financial practices. It was opened August 7, 1941, and thereafter periodical deposits of $40 or $50 were made. On January 20, 1943, it amounted to $1,393.63. No further deposits were made until May 18, 1944. Plaintiff testified that in the interim period of about 15 to 16 months "I have been working and here is the receipts of the moneys I have been receiving from my employer, plus the tips that I was making. All this money I was leaving with this gentleman that died, my friend, Mr. Paras." The withdrawal of $393.63 which appeared in the pass book under date of February 23, 1943, he explained as enabling him to purchase some of the War Bonds which Bill held for him. He testified that he resumed making deposits in the bank on May 18, 1944, as at that time Bill was "out for a couple of weeks, I think, so at that time I was compelled to go to the bank, because I don't want to carry that money in that neighborhood, so I put it in the bank. Then ten days after that, the gentleman died." The date of death is May 27, 1944. Prior to making the deposit of May 18, 1944, and when Bill went on his vacation, plaintiff gave Nicholas Paras an envelope containing $100, saying, "This is $100, Nick, and I want you to give it to Bill, if you please." Nicholas admitted the receipt of an envelope from Dalakis which was delivered to Bill, but the envelope was sealed and Nicholas testified: "I don't know what they had in it and I don't know what they had in the safe."

Plaintiff testified that the day before his death Bill Paras discussed the amount Dalakis had delivered to him for safekeeping; that there was a misunderstanding whether the sum amounted to $2,300 or $2,350 and that Bill had promised to check the amount. Dalakis testified that his money was safer in the hands of Bill than in a bank. Dalakis assumed that Bill had deposited the money in a bank as he had said that he would give him a check on the bank to get it out. Dalakis further testified that it was not safe in the part of town that Paras and Dalakis worked to leave the neighborhood at night with money on the person. Dalakis worked as a waiter and claimed that tips averaged in one place $5 and in another $10 a day in addition to his salary and various amounts he won playing cards. A cousin of plaintiff testified that Bill admitted to him that he was holding war bonds and money for Dalakis.

Plaintiff testified that thirty-nine days after Mr. Paras' death he called Mrs. Paras and asked, "'Do you happen to know that Mr. Paras, your husband, left any money in there, any receipts, or anything, to show, did he ever notify you about holding any money for me, because he is holding $2350 for me and some bonds and a watch * * * I got the bonds and watch, but the money they told me they don't know anything about it down there, and I am asking you if you please look around and see if you find any receipt that shows he holds money for me.'" She answered, "'I have heard of this. I have looked everywhere, trying to locate something, under carpets and everywhere, but I didn't find anything at all.'" Plaintiff testified that he told her that Small knew something about the matter and that she answered, "'If Mr. Small knows anything about this, statemçnt come from the bank to show he did hold money for you, we will see about that.'"

California Paras was called under Code of Civil Procedure, sec. 2055. It was stipulated that at her husband's death there was an account at the Bank of America, Market and Geary Branch, in his name, showing a balance of $2,732.76. In her own behalf Mrs. Paras testified that after her husband's death she received two telephone calls from plaintiff. On the first call he told her that "he gave my husband some bonds, his watch and the amount of around a thousand dollars to hold it for him." She recounted their conversation; that she told him "he should have put his money into the bank," and "I asked him if he has any note with my husband's signature on it to prove Mr. Dalakis did really gave money to my husband, and the watch and the bonds"; that Mr. Dalakis replied "'I gave him that money and bonds and watch, to put it in the safe.'" The second call occurred just before plaintiff filed suit and this time plaintiff used the figure $1,600 as the amount claimed. She testified that she never knew of nor received from her husband prior to his death any of the funds plaintiff claimed were deposited with him. He never told her he held money for anybody.

The objections to the findings are based on rather technical grounds. The findings appear by reference to the pleadings. The complaint alleges: "* * * and in this connection, plaintiff alleges that said defendants cooperating with the defendant California Paras took possession of the personal property of plaintff herein described and have ever since May 27, 1944, refused to deliver the said property of plaintiff to the plaintiff herein." It is true that California Paras took possession of the property, but that she co-operated with other defendants is surplusage. The other defendants were fictitious. Two "Does" were mentioned in the complaint, but at the outset of the trial a dismissal was entered as to fictitious defendants. The evidence shows that other sums than $2,350 were mentioned by Dalakis covering statements made to certain witnesses. These statements covered different periods of time, but there is substantial evidence that the amount was $2,350. Defendants object to other findings (following the exact language of the complaint) on the ground that there is no evidence or no credible evidence to sustain them. The findings are certain in that $2,350 was delivered by Dalakis to William Paras to be held in trust. These two findings sufficiently support the complaint.

[3, 4] Whether evidence measures up to the standard required to constitute a trust should be determined by the trial court. Reviewing courts should not interfere except where there is an apparent legal deficiency in evidentiary support. In the present case a fiduciary relationship was pleaded and the trial court found such allegation true. The record reveals corroboration for plaintiff's testimony of friendship between himself and William Paras, and a relationship of confidence is disclosed. That friendship is sufficient to show a fiduciary relationship. 25 Cal.Jur., pp. 129, 130, 162–164; Coombs **v.** Minor, supra, 60 Cal.App.2d 652, 141 P.2d 491. There is other evidence which the trial court believed which is sufficiently convincing to establish a trust in the absence of legal deficiency in the evidence.

[5] The present case does not involve the question of the rights of creditors or of a mingling of separate property with community property or the conversion of trust funds into other kinds of property. The trust fund in this case was sufficiently identified by the accountant of the Cosmopolitan Market. The circumstances by uncontradicted evidence point to the particular fund wherein Paras deposited the money of Dalakis. The fact that a greater amount was found in the particular fund than Dalakis had entrusted to Paras does not negative the conclusion that $2,350 of the whole amount was the property of Dalakis. The fact that a greater amount was found in this particular bank account supports the conclusion that the trust fund was intact. Elizalde **v.** Elizalde, supra. The money was sufficiently traced, Byrne v. McGrath, 130 Cal. 316, 62 P. 559, 80 Am.St.Rep. 127; Mitchell v. Dunn, 211 Cal. 129, 294 P. 386, and therefore the beneficiary is not a general creditor.

[6-8] The necessary proof of a relationship of trust and confidence having been made with respect to William Paras, and there being the additional proof of plaintiff's deposit of $2,350 with Paras under an oral agreement that Paras was to hold it for plaintiff's benefit, it must be concluded that the evidence establishes a "voluntary trust" in which William Paras was "voluntary trustee," and plaintiff, beneficiary. Upon the death of William Paras, California Paras as administratrix must be held accountable to plaintiff in the amount of $2,350. See Humes v. Humes, 56 Cal.App.2d 126, 133 P.2d 39. In her individual capacity California Paras, as one who would be unjustly enriched by the personal retention of the fund, is an involuntary or constructive trustee of the fund for the benefit of the owner John Dalakis. Civil Code, sec. 2223. "On the occurrence of death of the trustee, the title of the property passes, in the case of real estate to the trustee's heir, and in the case of personalty to his executor or administrator. The trustee's successor holds the property in the same manner as did the decedent, and hence it is not to be considered as assets of the latter's estate. But, while the title thus passes to the trustee's successor, the right to administer the trust appertains to the individual; it is not descendible, devisable or alienable, and the successor is not to be held responsible on the theory that he assumed the duties of administration. He is, it seems, in the position of an involuntary trustee." 25 Cal.Jur., p. 331.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

86 Cal.App.2d 326

In re MORAMARCO'S ESTATE.

MORAMARCO et al. v. MORAMARCO et al.

Civ. 16261.

District Court of Appeal, Second District,
Division 3, California.

June 22, 1948.

Rehearing Denied July 8, 1948.

Hearing Denied Aug. 19, 1948.

1. Wills ⚷303(3)

In proceeding to revoke probate of lost will, witness who allegedly signed will was competent to identify alleged copy as a true copy of last will, though witness admittedly never read will at time she signed it. Probate Code, § 350.

2. Wills ⚷386

In proceeding to revoke probate of lost will, whether alleged copy of lost will was clearly proved to be a true copy of the lost will was a fact question for trial court. Probate Code, § 350.

3. Wills ⚷302(8)

Statutory requirement that no will shall be proven as a lost or destroyed will, unless its provisions are clearly and distinctly proved by at least two credible witnesses, is for the guidance of the trial court and has relation entirely to the weight of the evidence. Probate Code, § 350.

4. Appeal and error ⚷1012(1)

A rule, statutory or otherwise, that evidence to prove a given fact must be "clear and convincing" or free from doubt, means that the trial court ought to be governed by the rule in weighing evidence and reaching conclusion as to the facts, but does not mean that absolute certainty is to be required in the trial court, but only that degree of proof which produces conviction in an unprejudiced mind, and does not mean that evidence must be clear and convincing to an appellate court.

5. Wills ⚷386

Presumably trial court in proceeding to probate lost will proceeded in accordance with statutory rule that no will shall be proven as a lost or destroyed will unless its provisions are clearly and distinctly proved by at least two credible witnesses, and, where court's finding that provisions of will were proved by two credible witnesses had support in the record, it was not for appellate court to pass on the weight of the evidence and to determine whether it appeared to be clear and convincing to the appellate court. Probate Code, § 350.

6. Wills ⚷290

Where evidence shows that a missing will was in testator's possession and that he was active physically and mentally, a presumption arises that he has destroyed the will with intention of revoking it, and statutory presumption of continued existence of a given condition, with proof of existence of will at some time prior to death, is not sufficient to overcome presumption of revocation. Probate Code, § 74; Code Civ.Proc. § 1963, subd. 32.

7. Wills ⚷290

In proceeding to revoke document which had previously been admitted to probate as lost will, evidence was sufficient to overcome presumption that testator destroyed the lost will. Probate Code, §§ 74, 350; Code Civ.Proc. § 1963, subd. 32.

8. Wills ⚷302(8)

Proof that lost will was not revoked by testator was not proof that it was in existence at the date of his death, but fact that will was not revoked would be a patent circumstance tending to show that it was in existence at date of testator's death.

9. Wills ⚷386

If it was a reasonable inference that missing will had been lost, but not destroyed, appellate court was bound by trial court's finding that will had been lost, even though it would have been, in opinion of appellate court, equally or even more reasonable to believe that will had been destroyed. Probate Code, §§ 74, 350.

10. Wills ⚷302(8)

Where a will cannot be found, and circumstances strongly indicate that testator did not destroy will, and that it could not have been destroyed by those who would have profited by its destruction, no great amount of evidence should be required to justify a finding that will has not been destroyed but has been lost. Probate Code, § 350.

11. Wills ⚿290

If there is no evidence pointing toward destruction of missing will, other than presumption that testator destroyed it, and there is circumstantial evidence of substance tending to prove that will was not destroyed, a court may properly find that will was in existence at time of testator's death. Probate Code, §§ 74, 350.

12. Wills ⚿302(8)

A court may not hold, as a matter of law, that proof that a will cannot be found is also proof that the will has been destroyed. Probate Code, §§ 74, 350.

13. Wills ⚿302(8)

Code section providing that no will shall be proven as a lost or destroyed will, unless its provisions are clearly and distinctly proved, does not require high degree of proof of the existence of a missing will at time of testator's death, and circumstantial evidence and inferences drawn therefrom may be sufficient. Probate Code, § 350.

14. Wills ⚿322

In determining whether a missing will was in existence at testator's death, court should proceed as in the trial of any other question of fact to which general rules of evidence apply. Probate Code, § 350.

15. Wills ⚿302(8)

In proceeding for revocation of a document previously admitted to probate as testator's lost will, evidence sustained finding that will was in existence at time of testator's death and had not been destroyed by him. Probate Code, §§ 74, 350.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Proceeding in the matter of the estate of Antonio Moramarco, also known as A. Moramarco, deceased, wherein Teresa Moramarco and others filed a petition against J. Moramarco, individually, and others for revocation of a document which the court had previously admitted to probate as the will of the deceased. From a judgment denying the petition for revocation, the plaintiffs appeal.

Judgment affirmed.

Louis Ferrari, of San Francisco, and J. V. McDermott, of Los Angeles, for appellants.

Earl Malmrose, of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

This is an appeal by nieces and nephews of Antonio Moramarco, deceased, namely, children of his deceased brother, Frank, from a judgment denying their petition for revocation of a document which the court had previously admitted to probate, upon findings that it was the will of decedent which had been duly executed by him, was in existence at the time of his death but had been lost or unintentionally destroyed.

The grounds of the amended petition for revocation were that the will, if executed by decedent, had been destroyed by him with the intention of revoking it, and that the proof offered and considered by the court and upon which the will was admitted to probate was insufficient to comply with the requirements of law for proof of a lost or destroyed will. Joe Moramarco, brother of decedent, and nephews and nieces, children of Nick Moramarco, deceased, brother of Antonio, answered the amended petition, denying the allegations thereof and asserting as a separate defense that the terms of the will and the due execution thereof had been clearly proven on the petition for probate, that the time for appeal from the order admitting it had expired, and that the order had become final. The findings were sufficient to support a judgment admitting the document to probate as a lost will.

[1] The contention of the appellants is that only one of the witnesses produced by respondents purported to know the contents of the alleged lost will, whereas section 350 of the probate code states, "no will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed fraudulently or by public calamity in the lifetime of the testator, without his knowledge; nor unless its provisions are clearly and distinctly proved

by at least two credible witnesses." Other provisions of the section are not pertinent to the case. In its essential provisions the will read: "after all my lawful debts and funeral expenses are paid and satisfied I give and bequeath to my brothers, Joe and Nick, all that I have to be divided by them equally share and share alike"; it appointed Joe Moramarco executor to act without bond, and revoked all former wills. It was dated the 27th day of June, 1938, bore a line for the signature of the testator, lines for the signatures of two witnesses, and an attestation clause with two other lines for signatures, following each of which were the words, "residing 353 So. Hoover St. Los Angeles." Julius Pollock, who conducted a steamship and insurance business and had known decedent since 1912, testified that he prepared the will upon instructions of decedent, who stated that he wished to leave all of his estate to his two brothers and did not want to include his brother in Italy or any relations there, "because Mussolini is going to take it away from him"; that he wrote the will on his typewriter, making a carbon copy; that the will was signed by Antonio in his presence and the presence of his wife, Olga Pollock; that he and Mrs. Pollock signed as witnesses; that he, Pollock, asked Antonio to sign the copy also but that Antonio said he was going to take it along and sign it later; that Antonio put the original and copy in his pocket and said goodbye, and that he, the witness, had never seen the will thereafter. The foregoing testimony was given as a witness on behalf of the contestants. On cross examination the witness testified that the document presented to him for inspection was the one he had referred to as a carbon copy of the original will he had prepared. He testified that he read the will to Antonio and made an X on the line where he was to sign, and that the X is impressed upon the copy; that he signed on the first line for the signature of witnesses and that his wife signed on the second, and that the events to which he testified took place on June 27, 1938, in the office of the witness, 308 West Second Street. The witness testified that he was a notary and that he made a notarial record of the date of the will; also, that he had worked for Antonio as general manager of his winery for over two years. Mr. Pollock also testified that soon after Nick died Antonio came to him and asked him whether it would be necessary to make a new will and was told that it would not be necessary, that Nick's children would get their father's share, to which Antonio made no response. The witness saw Antonio frequently thereafter and attended to insurance and transportation matters for him. (He could not recall when Nick died.) Olga Pollock was called by the contestants and testified that she had known Antonio for at least 15 years, that she saw him at her husband's office on or about June 27, 1938, that she assisted her husband in his work, recalled the typing of the will by her husband; she testified that she was asked to sign it and did sign the original of the will but that she did not have her hands on it and did not read it; that it was on the desk when she signed it, that she did not pick it up, nor pick up the copy and when asked if at that time she had knowledge of the contents, replied:

"Well, the only knowledge that I had was that Mr. Moramarco came in and told me * * * all I know is that Mr. Moramarco asked Mr. Pollock to make a Will, that he wants to have a will made and Mr. Pollock —[interpretation]

"Q. At that time you had no knowledge of the contents of the Will? A. I paid no attention to the will, the contents.

"Q. As I understand it, you never read it? A. No, I did not.

"Q. You merely signed it? A. I signed it.

"Q. Did you ever see that Will again? A. No, I did not.

"Q. Did you ever see the copy again during the lifetime of Mr. Moramarco? A. No, I did not, as he took it with him."

On cross examination by counsel for respondents the following testimony was elicited:

"Q. I show you what is entitled 'Last Will and Testament' and ask you if you have seen that document before? A. Yes, I have.

"Q. When did you see that? A. At the time Mr. Moramarco was in the office.

"Q. At that time was there also another copy of that same Will? A. There was a copy and an original. There were two."

She also testified that although she heard Mr. Moramarco state that he wished to have a will prepared and that he gave Mr. Pollock the particulars, she did not pay any attention to it and did not remember what he said about how he wanted his will made out, that the will was read over before it was signed and that Moramarco stated that it was the way he wanted it. When questioned as to where Moramarco had signed the will she indicated the line where there was an X mark, stating that she believed a similar mark was on the original but was not sure of that; that Moramarco signed first, then Mr. Pollock on the first witness line, and also on the first line in the attestation clause, and that she signed in each place under her husband's signature.

As appellants construe section 350 it would mean that the provisions of a lost or destroyed will cannot be proved except by the testimony of two persons who have read the will and have a clear recollection of its contents. We do not doubt that this is an indispensable requirement where the proof consists wholly of the testimony of the witnesses as to their knowledge and recollection of contents of the writing. Such, however, is not the situation here. The question was whether the carbon copy that was exhibited to the witnesses was identified by them as a duplicate of the original will. If it was proved to be a true copy, the terms of the will were thereby established. The code would require in that case that the identity of the copy be proved clearly and distinctly by the testimony of two credible witnesses. There was no uncertainty in the testimony of Mr. Pollock as to the provisions of the will and the sufficiency of his testimony is not questioned by appellants. Their contention is that Mrs. Pollock could not be a competent witness as to the provisions of the will when she had no knowledge of its contents, and we understand their argument to be that never having read the will, and having no recollection as to the contents, she was incompetent to identify the copy as a true copy. We cannot agree with the latter proposition. It was not her competency to identify the copy, but the strength of her testimony, that was in question. Her examination and cross examination on this point was surprisingly meager but her testimony was direct and certain, as far as it went.

The unusual feature of the document was that it contained four lines for the signatures of the witnesses, two above and two at the end of the attestation clause. This was convincing evidence that the will was drafted by a person who understood that witnesses were required to sign in both places, as Mr. and Mrs. Pollock testified they did sign, and since the copy conformed to the original in this respect, it is quite evident that the copy was prepared by the same person who wrote the original, namely, Mr. Pollock. The trial court would have been at liberty to disbelieve all the testimony of the two witnesses respecting the execution of the will, but if they had been disbelieved it would have meant that the copy was a spurious document prepared by Mr. Pollock to be offered as a copy of a lost will, and to be proved by the false testimony of himself and his wife. This we think would have been an unwarranted conclusion from the evidence. There was nothing whatever to suggest any motive on the part of Mr. or Mrs. Pollock to prepare a false document. Their testimony bears the imprint of truth. It is quite apparent that Mrs. Pollock was unwilling to testify to facts of which she had no clear recollection. It is true, as emphasized by appellants in their oral argument, that Mrs. Pollock was not asked a direct question whether the copy shown to her was an exact copy of the will, but this evidently was considered unnecessary in view of her testimony that it was a carbon copy and the one she had seen before. It is urged also that Mrs. Pollock's testimony carried no weight because she stated no reasons for her belief that the document exhibited to her was the one she had seen at the time of the execution of the will, and which decedent took away with him. She was not asked on direct or cross examination what reason she had for testifying that the document was one she had previously seen. No objection was made to the question whether she had seen the documents before, and it cannot be assumed now that she had no sufficient reasons, or that she may not have had very good reasons for her identification of it. There were, as we have said, distinguishing features of the writing which might have enabled the witness to gave satisfactory testimony that the document was a true copy, even though she had never read the original. She was questioned closely as to whether she had knowledge of the provisions of the will but it does not appear to have occurred to counsel on either side to question her as to the means by which she identified the document.

The authorities upon which appellants rely are not cases in which copies of the alleged lost will were produced and identified. No useful purpose would be served in discussing the cases cited in which proof as to the provisions of the wills depended entirely upon the recollection of the witnesses.

[2-4] The question whether the document was clearly and distinctly proved to be a true copy of the original will was one of fact for the decision of the trial court. The statutory requirement of clear and distinct proof is for the guidance of the trial court and has relation entirely to the weight of the evidence. A rule, statutory or otherwise, that the evidence to prove a given fact must be clear and convincing or free from doubt, means that the trial court ought always to be governed by this rule in weighing the evidence and reaching the conclusion as to the facts. Mahoney v. Bostwick, 96 Cal. 53, 30 P. 1020, 31 Am.St. Rep. 175. The rule does not mean that the evidence must be clear and convincing to an appellate court. Wadleigh v. Phelps, 149 Cal. 627, 637, 87 P. 93. Nor does it mean that absolute certainty is to be required in the trial court, but only that degree of proof which produces conviction in an unprejudiced mind. Freese v. Hibernia Savings, etc., Soc., 139 Cal. 392, 73 P. 172; Couts v. Winston, 153 Cal. 686, 96 P. 357.

[5] It must be presumed that the trial court proceeded in accordance with the rule, and since the finding that the provisions of the will were proved by two credible witnesses has support in the record, it is not for us to pass upon the weight of the evidence and to determine whether it appears to us to be clear and convincing. Brison v. Brison, 90 Cal. 323, 27 P. 186; Sherman v. Sandell, 106 Cal. 373, 39 P. 797; In re Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L.R.A.,N.S., 1092; Mead v. Mead, 41 Cal.App. 280, 182 P. 761; Bollinger v. Bollinger, 154 Cal. 695, 99 P. 196; Steinberger v. Young, 175 Cal. 81, 165 P. 432; Steiner v. Amsel, 18 Cal.2d 48, 112 P.2d 635.

It is earnestly insisted that there was insufficient evidence to prove that the will was in existence at the time of Antonio's death. It was in the possession of the testator, he was competent, and active in his business from the date of the will, June 27, 1938, to the date of his death, November 11, 1944. A diligent search was made for the will by Joe Moramarco, who would have been interested in finding it, but nothing was found except the copy.

Destruction of the will fraudulently or by public calamity during the lifetime of the testator and without his knowledge was not suggested. The evidence, including the presumption hereafter mentioned, which was pertinent to the question of its existence at the time of death, was therefore to be considered with reference to several possible conclusions, (1) that Antonio had revoked the will in writing or by destroying it or having it destroyed with the intention of revoking it (Probate Code, sec. 74), (2) that it had been destroyed in some other manner during his lifetime, either with or without his knowledge, or (3) that neither of events (1) nor (2) occurred, or in other words, that the will had been lost by Antonio or deposited by him in some out of the way place that cannot be located.

[6] We shall consider first the question of possible revocation. Where the evidence shows that a missing will was in the possession of the testator and that he was active physically and mentally, a presumption arises that he has destroyed it with the intention of revoking it, and the presumption of the continued existence of a given condition declared in subdivision 32 of section 1963, Code of Civil Procedure, with proof of the existence of the will at some

time prior to death is not sufficient to overcome the presumption of revocation. In re Estate of Ross, 199 Cal. 641, 646, 250 P. 676.

[7] The immediate question is whether the evidence was sufficient to overcome the presumption that Antonio destroyed the will. The following evidence was material on that issue. Antonio came to California from Italy in 1905; he wrote to his brother Joe in Italy requesting him to come to California and sent him money for his passage. Joe came to California in the following year, and his brother Nick soon thereafter. Antonio and Joe were admitted to citizenship. The three brothers engaged in business together, operating vineyards, a winery, and marketing their wine. Joe and Nick married and had children. Antonio did not marry. A fourth brother, Frank, remained in Italy and died some 14 or 15 years before the death of Antonio, although neither Joe nor Antonio heard directly from Frank's children in Italy concerning his death. When the children of Joe and Nick became old enough they worked in the vineyards and the winery. The three brothers devoted all their time to the business and invested all their money in it. No money was ever received from Frank and he never came to this country. Antonio visited in Italy in 1922, but neither he nor Joe heard from Frank's family or communicated with them after that time. Joe and his family, consisting of his wife and eight children, lived on Yale Street in Los Angeles. The winery was on Mission Road, not far distant. Antonio and Joe lived together from the time they came to California. For some 25 years, ever since the house was built, Antonio lived in Joe's home, paying nothing for room or board. Nick died in January, 1943. About 15 years before Antonio's death additional vineyard property was acquired near Fontana, title being taken in Antonio's name, although it was purchased with money earned in the business.

The three brothers had little money when they came to California, but at the time of Antonio's death owned approximately 1000 acres of vineyard land. It was estimated that the estate in probate was worth between $300,000 and $400,000. The Moramarcos produced and sold "Old Mission Wine" from their own grapes, and transacted all of their business in Antonio's name. In 1944 the winery was sold, together with most of the office equipment, including a safe. All the papers that had been kept in the winery were moved to another location a short distance away. It was among papers enclosed in a large envelope, stored in a closet, that a copy of the will was found. Antonio maintained a safe deposit box in a branch of the Bank of America. The key to the box could not be found but it was empty when opened after Antonio's death. Antonio died suddenly while driving to the ranch in San Bernardino County.

We have already referred to the instructions given Mr. Pollock for the preparation of the will. He took care of Antonio's personal affairs until the time of the latter's death. Shortly after the death of Nick, Antonio came to Mr. Pollock's office and asked whether it would be necessary to make a new will in view of the death of Nick, and Pollock replied, "I don't know, Tony, but I think that the children would inherit everything that Nick was supposed to get." Antonio made no response, said "goodbye" and left. He had never expressed to Mr. Pollock or his two brothers any intention to leave anything to his heirs in Italy. He came to Pollock's office frequently, sometimes several times a week. William L. Henry, accountant and manager for Antonio, worked for him from February, 1936, until the time of his death. He testified that the three brothers worked together and that the children of Joe and Nick worked when they became of sufficient age, all without compensation except Theresa, who worked in the office and received a salary. Antonio, when he spoke of his estate to Mr. Henry, always said that the children here would eventually inherit it and he never mentioned the heirs in Italy. A few days before Antonio's death he discussed with Mr. Henry how his affairs might be conducted in event of his death, and Henry suggested that the estate might be incorporated and the stock distributed as he wished. Antonio remarked that as soon as the busy season was over they would go down to an attorney's office "and arrange to do something about that." Mr. Henry asked him at that time if he had a will and he stated that he did have, and the witness, when questioned further, stated that he was positive that Antonio made that statement about four days before his death. He also testified that the papers when moved from the winery were packed in boxes, wine cases, and whatever was available to pack them in, and represented the accumulation of 15 or 20 years. Mr. Henry also testified to a statement made by Antonio to a man who was preparing data for a book, that all the children had contributed to his business and eventually would receive his estate. Michael Moramarco, son of Joe, testified to the work the children did on the ranch and in the winery and in answer to a question whether Antonio mentioned what he intended to do with his property, stated, "well, he mentioned it offhand once in a while. He did say he was going to leave it to us kids, that is about all. He said the ones that worked for him," and he testified that the children never asked to be paid. After he graduated from high school he worked on the ranch for a year for his father and uncle. Joe Moramarco further testified that a few days before Antonio's death at the family home, his, Joe's, wife had asked Antonio what would happen to the property if he should pass away and Antonio replied, "Joe take care of everything." Although Antonio was at the head of the business and the property stood in his name, it was in every respect a family affair and the business was conducted in all respects as if a partnership had existed among the three brothers. By their combined efforts and the reinvestment of their earnings they had accumulated the property which now represents the estate of Antonio. The terms of the will expressed not only Antonio's wishes with respect to the division of his estate, but they recognized a moral, if not legal, obligation to leave to his two brothers the shares of the estate which they had earned by their labor and other contributions. It was most natural that they should be preferred to the relatives in Italy as to the remainder of the estate. Also, it was reasonable to suppose that Antonio would not have revoked the will without making another one, and that if he had intended to make another will he would have gone to Mr. Pollock, or to his attorney. The circumstances furnished every reason to believe that Antonio was fully satisfied with the will and had no intention other than to leave his estate to his brothers, Joe and Nick, and their families. The evidence was ample to justify a finding that Antonio did not revoke the will.

[8] Proof that the will was not revoked by the testator was not proof that it was in existence at the date of his death. See dissenting opinion of Mr. Justice Traynor in Re Estate of Bristol, 23 Cal.2d 221, 231, 143 P.2d 689. However, the fact that it was not revoked would be a patent circumstance tending to show that it was in existence at the date of death. There were additional circumstances, to be mentioned later, tending toward the same conclusion.

[9] It was entirely reasonable for the trial court to believe that the will had not been destroyed by any person intentionally. None of the heirs who were not remembered was in this country, and no one who could have had access to the will had a motive to destroy it. We therefore come to the question whether the court was required to infer, from the fact that the will had been lost, that it had been destroyed. If it was a reasonable inference that it had been lost, but not destroyed, we are bound by the finding of the trial court, even though it would have been, in our opinion, equally or even more reasonable to believe that it had been destroyed.

[10-15] We are influenced by a practical view of the situation. Where a will cannot be found, where the circumstances strongly indicate that the testator did not destroy it, and that it could not have been destroyed by those who would have profited by its destruction, no great amount of evidence should be required to justify a finding that it has not been destroyed. This is true because of the practical difficulty of proving, except by circumstantial evidence, what has become of a lost will, or that it has not been destroyed. If there is no evidence pointing toward destruction of the will, other than the presumption previously

mentioned, and there is circumstantial evidence of substance tending to prove that it was not destroyed, we are satisfied that the court may properly find that it was in existence at the date of the testator's death. Certainly we may not hold, as a matter of law, that proof that a will cannot be found is also proof that it has been destroyed. The court's finding under attack was required to be based upon the reasonable probabilities. Section 350 does not relate exclusively to wills that are shown to have been lost after the death of the maker, nor does it require a high degree of proof of the existence of the will at the time of the testator's death. Circumstantial evidence and inferences drawn therefrom may be sufficient. In re Estate of Bristol, supra, 23 Cal.2d 221, 143 P.2d 689. There is no requirement that the existence of the will at the time of death must be proved by some witness who saw it after the death of the testator, and we cannot write into the statute a requirement for direct proof. It therefore follows that in determining whether a will was in existence at the death of the maker, the court should proceed as in the trial of any other question of fact to which the general rules of evidence apply. The statute should be read as an admonition that the court should proceed with extreme care in the matter of proving a lost will, and should be thoroughly satisfied that no fraud is being attempted, but if the provisions are proved with certainty and the court is satisfied that the weight of the evidence is in favor of existence of the will at the time of the death of the testator, it has a duty to so declare. The ultimate question here was whether it was more probable that the will had been merely lost or had been destroyed. Antonio's declarations furnished circumstantial evidence on that point. His statements, made a few days before his death, that he had a will and that if anything happened to him Joe would take care of everything indicated his belief, if not his knowledge, that the will was then in existence. For the reasons previously stated, it was fair to assume that he was referring to the will that was prepared by Mr. Pollock. The fact that the original will was not found with the copy indicated that it had been put away for safe keeping. It is customary for people who make wills to take good care of them. The trial court may have believed that if the two papers had been kept together and that the original had been destroyed, either accidently or intentionally, the copy also would have been destroyed. It is our opinion that when evidence was produced showing that it was entirely improbable that the testator had revoked the will in any manner, and when it satisfactorily appeared that no one who had access to the will would have had a motive to destroy it, it became as reasonable to believe that it had been lost as that it had been destroyed accidentally. Accordingly, we must abide by the finding of the trial court.

We do not find in the cases cited on either side any factual situation that resembles in material particulars the facts of our case. It would be idle to point out their distinguishing features for the purpose of showing their inapplicability to the question of the sufficiency of the evidence to prove that the will of Moramarco was in existence at the date of his death.

The judgment is affirmed.

WOOD, J., and McCOMB, J. Assigned, concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

86 Cal.App.2d 299

FAVRETTO v. FAVRETTO.

Civ. 7424.

District Court of Appeal, Third District, California.

June 18, 1948.

Hearing Denied Aug. 12, 1948.

1. Dismissal and nonsuit ⚷60(1)

The statute providing for dismissal of action not brought to trial within five years after filing of complaint, unless counsel extend time by stipulation, is mandatory, but is not arbitrarily designed to close proceeding in all events on termination of such period. Code Civ.Proc. § 583.

2. Dismissal and nonsuit ⚷60(3)

To relieve plaintiff of mandatory statutory provision for dismissal of action not brought to trial within five years after filing of complaint, in absence of sufficient stipulation extending time, he must show defendant's absence from state or impossibility of proceeding to trial whether because of defendant's obstructive acts or not. Code Civ.Proc. § 583.

3. Dismissal and nonsuit ⚷60(6)

An action not brought to trial within five years after filing of complaint was properly dismissed on defendant's motion as against contention that trial became futile because of negotiations resulting in compromise settlement or understanding that defendant would not avail himself of statutory provisions for such dismissal, where settlement was incomplete and defendant's attorney stated, at time of entering into stipulation for postponement of trial, that he did not waive right to move for dismissal if case were not brought to trial within such time. Code Civ.Proc. § 583.

◆

Appeal from Superior Court, Shasta County; James M. Allen, Judge.

Action by Angelo Favretto, Jr., as guardian of the person and estate of Erminia Favretto, an incompetent person, against Angelo Favretto, Sr., to establish a trust for the incompetent in realty to which defendant held title, require accounting for rents, issues, and profits thereof, and require defendant to convey such title to the incompetent and pay her certain sums per month for support. From an order granting defendant's motion to dismiss the action, plaintiff appeals.

Affirmed.

Albert Picard, of San Francisco, and Carlton & Shadwell, of Redding, for appellant.

Glen D. Newton and Carr & Kennedy, all of Redding, for respondent.

PEEK, Justice.

This is an appeal by plaintiff from what we conclude to have been a proper order granting defendant's motion to dismiss the action under the provisions of section 583 of the Code of Civil Procedure on the ground that it had not been brought to trail within five years.

The record discloses that the complaint which was filed on December 15, 1941, was followed by an amended complaint filed on June 10, 1942. By the latter pleading plaintiff, as guardian of the person and estate of his mother Erminia Favretto, an incompetent person, sought to have it determined that defendant, the former husband of the incompetent and father of the guardian, held title to certain real property in trust for her; to require an accounting for the rents, issues and profits thereof; to require defendant to convey to the mother the title to said property and to require defendant to pay to her certain sums per month for support during her lifetime. Defendant's answer, which denied generally the allegations of the amended complaint and affirmatively alleged that the action was barred by sections 318, 337, 338, sub. 4, and 343 of the Code of Civil Procedure, was filed October 1, 1942, and the cause was then at issue. On January 3, 1944, defendant moved to dismiss the action for failure to bring the same to trial within two years.

After hearing, the motion was denied on June 19, 1944. The court in justification of its action stated that by reason of the entry into the armed services of the original plaintiff and because of the substitution of counsel for plaintiff, the motion would be denied. Shortly thereafter, in accordance with the admonition of the trial court the cause was set for trial on September 12, 1944. Because of the illness of defendant the case did not go to trial on the date set but was continued upon written stipulation of the parties to be reset by stipulation of counsel or upon motion of either party. It appears that during most of this time efforts were made by both counsel to compromise and settle the action. These negotiations culminated in a final letter by defendant's counsel to plaintiff dated January 4, 1946, wherein it was stated that defendant offered the sum of $11,250 in full settlement and in accordance with their previous understanding that defendant would be released from all liability and support of plaintiff, which offer was accepted by plaintiff's guardian. The facts and circumstances subsequent to such offer and acceptance, as appears from the various affidavits of counsel, are both contradictory and conflicting. Particularly is this true in regard to the drafting of the necessary documents for filing in the probate court in order to obtain approval of said compromise.

Thereafter on February 2, 1947, pursuant to the provisions of section 583 of the Code of Civil Procedure, defendant filed his motion to dismiss the action for failure to bring the same to trial within five years, which motion was granted and this appeal followed.

[1, 2] The pertinent portions of section 583 as it then read provided for the mandatory dismissal of the action either upon the motion of counsel or the court where such action had not been brought to trial within five years after the filing of the complaint, except upon the written stipulation of counsel extending the time or where the defendant has been absent from the state or has concealed his whereabouts if within the state.

There can be no question but that such section is mandatory whenever it is applicable (Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665), but by reason of the permissive wording of the statute allowing the extension of the time therein set forth upon written stipulation, our courts have held that said section was not arbitrarily designed to close a proceeding in all events upon the termination of the five year period. Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153. However, to relieve a plaintiff of the obvious mandatory provisions thereof it has been consistently held that in the absence of a sufficient stipulation (Miller & Lux Inc. v. Superior Court, 192 Cal. 333, 219 P. 1006) there must be a showing that the action should not be dismissed either by reason of the absence of the defendant from the state thereby bringing the case within the specific exemption of the statute (Ojeda v. Municipal Court, 73 Cal.App.2d 226, 166 P.2d 49) or because of the conduct or action of the defendant (Judson v. Superior Court, 21 Cal.2d 11, 129 P.2d 361) or where, although defendant was not guilty of acts of obstruction, nevertheless it would have been impossible for plaintiff to proceed to trial. (Pacific Greyhound Lines v. Superior Court, supra; Christin v. Superior Court, supra.)

[3] While it is contended to a degree that the alleged acts of defendant's counsel in failing to prepare the necessary documents for filing in the probate court contributed to the failure to proceed, it is not contended that such acts were the sole cause of delay. Rather it is plaintiff's contention that because of the negotiations which had resulted in what he contends was a complete agreement on the terms of the compromise that therefore it became both futile and impracticable for him to try the case, arguing that in so doing he thereby would have refuted the settlement. Respondent, however, argues that the settlement was not complete, which construction was likewise accepted by the trial court and formed one of the reasons for its denial of the motion.

Plaintiff relies primarily upon the Christin and Pacific Greyhound Lines cases, apparently because the court therein referring to the case of Kinard v. Jordan, 175 Cal. 13, 164 P. 894, stated that in that opinion the court had set reality above artificiality, and that likewise there should be excluded from the statute those cases "* * * where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile," [9 Cal.2d 526, 71 P.2d 208.] However, it does not necessarily follow that what might be shown to be impracticable and futile under the specific provisions of the Soldiers and Sailors Relief Act, 50 U.S.C.A.Appendix, § 521, as in the Pacific Greyhound Lines case also might be impracticable and futile in the absence of such a statute as in the present case. Nor does it follow that the admitted negotiations herein constituted such an impossible, impracticable or futile situation so as to create a further exception to the statute. Elmhurst v. Superior Court, 46 Cal.App.2d 648, 116 P.2d 487; Los Angeles v. Superior Court, infra.

Nevertheless what is impossible, impracticable or futile must be determined in light of the facts of the particular case. From the record before us it is readily apparent that from a factual standpoint the cases relied upon by plaintiff are entirely different from the present. In Christin v. Superior Court, supra, it was impossible to bring the case to trial because of the pending appeal of an order changing the venue of the trial. In the Pacific Greyhound Lines case the court concluded that by reason of one of the defendants being absent and in the armed services it was, as alleged by plaintiff in his affidavit, impossible, impracticable and futile to proceed with the trial and therefore the plaintiff was held to be entitled to a stay of proceedings under the provisions of the Soldiers and Sailors Act. To the same effect is the case of Rauer's Law etc. Co. v. Higgins, 76 Cal. App.2d 854, 174 P.2d 450. In the final case cited by plaintiff (Ojeda v. Municipal Court, supra) the order of the trial court denying a motion to dismiss on the ground that defendant had been absent from the state for the most part of the five year period was affirmed by the reviewing court.

Nowhere in the record before us is it shown that plaintiff was precluded in any way from bringing the case to trial, either because of any of the situations set forth in the cited cases or by reason of any understanding with defendant, express or implied, that the defendant would not avail himself of the provisions of said section 583. Los Angeles v. Superior Court, 185 Cal. 405, 197 P. 79. To the contrary it appears in the affidavit of counsel for defendant in support of the motion, which averment is not denied, that at the time the written stipulation was entered into postponing the trial of the case it was expressly stated by said attorney to plaintiff's counsel that in signing the stipulation the defendant did not waive nor did he intend to waive any right to move for dismissal of the case if it was not brought to trial within the five year period.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER, J., not participating.

86 Cal.App.2d 308

PEOPLE v. AL. G. SMITH CO., LIMITED, et al.

Civ. 3679.

District Court of Appeal, Fourth District, California.

June 18, 1948.

Hearing Denied Aug. 12, 1948.

1. Eminent domain 🔑202(1)
Evidence 🔑524

Opinion evidence of value of land before and after taking was proper mode of proving damage resulting from impairment of access to land by construction of state highway.

2. Eminent domain 🔑220

Where jury viewed premises involved in condemnation proceeding and made its own observation, such observation was independent evidence supporting verdict that defendants were not entitled to damages for obstruction of access.

3. Eminent domain 🔑262(3)

On appeal in condemnation proceeding, presumptions are indulged in favor of trial judge's determination, on motion for new trial, of sufficiency of evidence to support findings.

4. Eminent domain ⚿106

A property owner abutting upon public street has a property right in nature of easement of ingress and egress, which cannot be damaged nor taken away from him without due compensation.

5. Eminent domain ⚿141(1), 145(1)

The only way to measure injury done by invasion of right of access to highway is to ascertain depreciation in market value of the physical property from construction and operation of public improvement, and in so doing benefits accruing by reason of the improvement cannot be disregarded.

6. Eminent domain ⚿221

Whether land abutting highway was depreciated in value by construction of highway improvements allegedly impairing access to highway was for jury under conflicting evidence, including evidence of benefits to the tract from the improvement. Code Civ.Proc. §§ 1248, 1249.

7. Eminent domain ⚿131

Market value is the yardstick for estimating actual value or compensation in eminent domain proceedings. Code Civ. Proc. § 1249.

8. Eminent domain ⚿202(4)
Evidence ⚿488, 501(7), 524, 555

Value of property may be determined in condemnation proceedings from opinions of well-informed persons, based upon purposes for which the property is suitable. Code Civ.Proc. § 1249.

9. Evidence ⚿501(7), 555

Persons testifying as to value in eminent domain proceedings, as well as the owner, may give reasons for their opinions and explain various factors, if proper, that they have considered in reaching opinions. Code Civ.Proc. § 1249.

10. Eminent domain ⚿203(1)

Where jury viewed premises allegedly damaged by being deprived of access to highway as result of highway improvement and witnesses testified as to value of such property before and after the improvement, and may have considered factor of expense of constructing road on the premises, and owner testified as to necessity of such road and as to difference in value, evidence of probable cost of building such road was properly excluded as attempting to impose an additional element of damage. Code Civ.Proc. § 1249.

11. Eminent domain ⚿262(3)

Reviewing court must assume, in support of verdict denying compensation for impairment of access of abutting land to highway by construction of highway improvements, that any damage to such tract that was legally established was offset by benefits resulting from the improvements.

◆

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by the People of the State of California, acting by and through the Department of Public Works, against Al G. Smith Company, Limited, and others, to condemn right of way and access rights. From an adverse judgment, defendant Curtis I. Sawday and another appeal.

Affirmed.

Horton & Knox and George R. Kirk, all of El Centro, for appellants.

Holloway Jones, Lincoln V. Johnson, George C. Hadley, Joseph F. DeMartini and Jack M. Howard, all of San Francisco, for respondent.

GRIFFIN, Justice.

Appellants Sawdays are the owners of a tract of land lying west of and adjacent to State Highway 99 north of the City of El Centro. This property consists of 600 acres and has approximately 2000 feet frontage on the highway. Respondent sought to condemn a right of way in fee and access rights for freeway purposes affecting the property over which an easement for a public highway already existed and which, for many years, had been used as a public road. There was reserved to appellants, as owners of the abutting lands, the right of access to the freeway at three separated 30-foot sections.

Appellants answered the complaint, alleged the value of the fee sought to be taken as $5,000 and the damage done to the remainder of the property by the taking as $10,000. Neither appellants nor respondent offered any evidence as to the value of the fee for freeway purposes which was sought to be condemned. All of the evidence related to the value of appellants' 600 acres for either industrial or commercial purposes, or any increase or decrease in value thereof by reason of the freeway improvement.

[1] As we construe appellants' contention at the trial, they based their entire claim upon their right to receive an award as compensation for damages to their abutting land allegedly resulting from the impairment of access to their property by the construction of the freeway. They properly attempted to prove such damage through opinion evidence as to the value of such land before and after the taking. Apparently appellants did not seek, and there is no evidence supporting a claim for compensation for the value of the nominal interests condemned.

Southern Pacific R. Co. v. San Francisco Savings Union, 146 Cal. 290, 79 P. 961, 70 L.R.A. 221, 106 Am.St.Rep. 36, 2 Ann.Cas. 962. There is evidence that the value of appellants' land as acreage for farm purposes was $500 per acre, and for commercial purposes, $1500 to $2000 per acre. It was argued that 15 5-acre tracts could be carved out of appellants' land along the highway and that by the taking of the access rights it would be necessary for appellants to construct a road inside of their property line.

According to respondent's evidence, the highway, before the new improvements, consisted of two lanes with a "borrow pit" outside of and parallel to appellants' boundary line, over which driveways were constructed with culverts giving access to the abutting land. Appellants had three such openings onto their property. The new proposed openings compared favorably in alignment with the existing ones. The new improvement would have a 23-foot traffic lane with an 8-foot shoulder and the roadway would be leveled off and the present drop eliminated along the edge of the pavement.

Expert witnesses produced by respondent testified that in their opinion there was no damage by the taking of the access rights and that full access would be given to the abutting property by the construction of three other entrances near the three entrances now available to appellants, and considering the size of appellants' tract the benefits from the new highway would offset any possible damage.

[2, 3] The jury viewed the premises and made its own observation, which is independent evidence supporting its verdict that defendants were not entitled to recover damages thus claimed. City of Oakland v. Adams, 37 Cal.App. 614, 174 P. 947; Southern California Edison Co. v. Gemmill, 30 Cal.App.2d 23, 85 P.2d 500. The trial judge passed upon the sufficiency of the evidence to support the findings of the jury on a motion for new trial, to which ruling certain presumptions are indulged. Urbina v. McLaughlin, 24 Cal. App.2d 615, 75 P.2d 616.

The sole issue tried and the jury found "That by reason of the taking by the plaintiff of certain access rights * * * and the construction of the improvement by the plaintiff, the damage, if any, which will accrue to the remainder of said property * * *" is "$ none."

[4] It has been recognized that a property owner abutting upon a public street has a property right in the nature of an easement of ingress and egress to and from his property and that right cannot be damaged nor taken away from him without due compensation. Lane v. San Diego Electric Ry. Co., 208 Cal. 29, 33, 280 P. 109; Bacich v. Board of Control, 23 Cal.2d 343, 349, 144 P.2d 818.

Rose v. State of California, 19 Cal.2d 713, 737, 123 P.2d 505, quotes the general rule that (1) "Where private property is taken for a public use, it is universally agreed that the compensation required is to be measured by the market value of the property taken." (2) "Where private property is taken for a public use and damage results to the remaining property of the landowner, compensation for such damage must be awarded which is measured by the diminution in value of that property which remains." (3) "If the state is required to make compensation for damage to private property resulting from a public use, where no property is actually taken, the measure of damages generally applied is also the diminution in the value of the property caused by the public use."

[5] It appears to us that the facts here related bring appellants within the second rule above mentioned and the only way to measure the injury done by an invasion of that right is to ascertain the depreciation in market value of the physical property from the construction and operation of the public improvement. In so doing, it is impossible to disregard the item of benefits accruing to such land by reason thereof. Collier v. Merced Irrigation Dist., 213 Cal. 554, 571, 2 P.2d 790. If the abutting land is not depreciated in market value, there is no legal injury and consequently no right to compensation. Bohm v. Metropolitan El. Ry. Co., 129 N.Y. 576, 29 N.E. 802, 14 L.R.A. 344; United States v. Welch, 217 U.S. 333, 30 S.Ct. 527, 54 L.Ed. 787, 28 L.R.A.,N.S., 385, 19 Ann.Cas. 680; 29 C.J.S., Eminent Domain, § 167, note 27, p. 1038; 18 Am.Jur. 888, sec. 250; Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 620, 37 P. 750, 42 Am.St.Rep. 149.

[6] As we view it, the evidence on this issue, in the instant action, shows nothing more than a conflict to be determined by the jury and upon which no question of law arises.

The only remaining question involves a ruling of the court pertaining to an objection to a question propounded by counsel for appellants to their witness (a construction-work contractor) as to the probable cost of building a 25-foot highway or roadway on the Sawday property inside of their fence line for a distance of 2000 feet for the purpose of service to their property if used for commercial purposes. The objection was sustained. Appellants argue that they were entitled to show by this witness the cost of such construction as a possible element of damages, citing Colusa County v. Hudson, 85 Cal. 633, 637, 24 P. 791. The rules governing the method of determining the value of the property sought to be condemned or damages for such taking are summarized in People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799. Sec. 1248, C.C.P., provides that the court must hear legal testimony and ascertain and assess: "1. The value of the property sought to be condemned * * *." (In the instant case no evidence was offered as to the value of any particular property right, including the right to ingress and egress.) "2. If the property sought to be condemned constitutes only a part of a larger parcel," the court must ascertain and assess all "damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement * * *." Paragraph 3 provides the manner in which the question of damages and benefits may be offset against each other.

[7-10] The market value is the yardstick in this state for estimating actual value or compensation in eminent domain proceedings. Sec. 1249, C.C.P.; Sacramento, etc., R. Co. v. Heilbron, 156 Cal. 408, 414, 104 P. 979. Of necessity "value" must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. San Diego Land, etc., Co. v. Neale, 78 Cal. 63, 20 P. 372, 3 L.R.A. 83; 10 Cal.Jur. p. 358, sec. 68; 10 Cal.Jur. p. 362, sec. 70. Such persons, as well as the owner, may give their reasons for their opinions and explain the various factors, if proper, that they have considered in reaching their opinions. Long Beach City High School District v. Stewart, 30 Cal.2d 763, 773, 185 P.2d 585, 173 A.L.R. 249. In the instant case the owner Curtis I. Sawday testified fully on direct examination as to the adaptabilities of the property and that to preserve the value for commercial use it would be necessary to construct a cement road inside of the property line. He also gave his opinion as to the difference in value of the land for farming and commercial purposes before and after the construction of the improvements. To allow appellants to prove as a collateral fact the cost of constructing a roadway for a special use would be to impose a purported additional element of damage, upon a "before and after" theory of depreciation in market value, necessarily embracing all the component parts.

[11] The physical condition of the entire property and its relation to the improvements contemplated were well known to the witnesses testifying as to value. The jury viewed the premises. Those witnesses, as well as the jury, may have considered this factor. It would have been improper to claim and prove this additional damage by direct evidence. We must assume, in support of the verdict, that any damage to appellants' 600 acres that was legally established, was offset by benefits accruing to it by virtue of the improvements. The objection to the question, as propounded, was properly sustained.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., pro tem, concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

WILSON v. WILSON. *

Civ. 13697.

District Court of Appeal, First District, Division 1, California.

June 18, 1948.

Hearing Granted Aug. 12, 1948.

1. Divorce 🔑286

On question of liability of husband for wife's purchases during period of separation and while husband was complying with his agreement for wife's support during separation, whether purchases were extravagant was a factual question for trial court and was not a proper issue on appeal.

2. Divorce 🔑228

Determination in divorce action that wife should be "held harmless" for certain bills of community incurred by wife after separation, but before filing divorce action, meant that wife was not to be required to pay the bills and did not contemplate that husband could hold wife harmless from bills by pleading statute of limitations with resulting loss of wife's credit.

3. Limitation of actions 🔑12(1)

Where it was determined in divorce action that husband was to pay certain bills of community incurred by wife after separation but before filing divorce action, defense of limitations with respect to such bills was personal to wife and could not be advanced by husband. Code Civ.Proc. § 337, subd. 2, § 338, subd. 1, § 339.

4. Divorce 🔑255

Determination in divorce action that husband should pay certain community bills incurred by wife during a specified period of time, which determination was affirmed on appeal, was res judicata.

5. Divorce 🔑221

Generally, in cases involving dissolution of marriage, trial court may order payment of attorney fees during pendency of, and necessary for prosecution of, action.

6. Divorce 🔑222

Where husband had been ordered by divorce decree to pay community bills incurred by wife after separation but before filing divorce decree, which order was affirmed on appeal, court had power to make an award of attorney fees in favor of wife's attorneys for their services in hearing of an order to show cause, after remittitur to determine the specific bills and amounts thereof to be paid by husband.

7. Divorce 🔑286

Exercise of discretion of trial court in awarding attorney fees in a divorce action is reviewable only for abuse.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Action by Barbara Wilson against Francis A. Wilson for divorce, wherein an order directing defendant to discharge all community bills not to exceed a specified sum was affirmed on appeal. From a judgment, after hearing on an order to show cause, after remittitur, directing defendant to pay specified bills, and from a judgment awarding attorney fees to plaintiff's attorney for services in connection with order to show cause, defendant appeals.

Affirmed.

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* Subsequent opinion 199 P.2d 671.

A. B. Dunne and Dunne & Dunne, all of San Francisco, for appellant.

Hallinan, MacInnis & Zamloch and James Martin MacInnis, all of San Francisco, for respondent.

WARD, Justice.

Defendant appeals from two judgments: (1) A judgment after hearing an order to show cause arising from a proceeding reviewed by this court between the same parties, Wilson v. Wilson, 76 Cal.App.2d 119, 172 P.2d 568; and (2) A judgment for counsel fees for services rendered on the hearing to show cause.

The appeal in the above cited case was from an interlocutory decree of divorce in favor of the wife, in which she was awarded, 76 Cal.App.2d page 122, 172 P.2d 570, "an undivided one-half interest in the former residence of the parties, together with the sole right to the use and occupancy of the same, awarded her all the furniture and contents of the home, awarded her certain art objects created by her after marriage, awarded her $500 a month alimony, ordered the husband to discharge all community bills contracted prior to the filing of the complaint in the amount of $4,829, ordered the husband to pay all federal and state income taxes levied against the wife up to January 1, 1945, and granted to the wife's lawyer attorney's fees in the sum of $1,500." The order provided, 76 Cal.App.2d pages 132, 133, 172 P.2d 376:

"Justice will best be served by striking from the decree all words presently disposing of the community property and inserting words to the effect that in the final decree the parties are entitled to have assigned to the parties specified the portions of the community property enumerated in the decree. Prout v. Prout, 73 Cal.App.2d 715, 167 P.2d 1. The plaintiff's right of occupancy pending this appeal is not challenged and is not affected by this modification.

"For the foregoing reasons finding No. V is stricken from the findings; the interlocutory decree is modified by striking therefrom all words presently disposing of the community property and inserting words to the effect that upon the entering of the final decree the parties are entitled to have assigned to them the portions of the community property mentioned in the decree. As so modified the judgment is affirmed as of the date of its entry; plaintiff to recover her costs on this appeal."

There may be some confusion as a result of certain orders made by judges of the superior court subsequent to filing the remittitur in the cited case, but the only matters pertinent on the present appeals are the two subjects heretofore stated. After the remittitur was filed, a final decree and subsequently a "nunc pro tunc" final decree appear of record. The merit of any other order, from which a separate appeal is pending, may not be passed upon in the present appeal. The question of the other orders is mentioned because at the outset of the present hearing defendant objected: "We make the objection again for the record so that there can be no question of waiver or estoppel; that the Court, in view of that final decree, is not justified in going into these matters at this time. I am merely saving my position on that, and that is the same objection I made, as your Honor will recall, when I paid that money in the Court. We want to save our rights in that respect under the final decree."

In the body of the cited opinion it was stated, 76 Cal.App.2d pages 127, 128, 172 P.2d 573:

"The next contention of appellant relates to the finding in reference to the community bills. In reference to these bills, the court found that upon the date the complaint was filed there were community debts totaling $4,829 and that such community debts should be paid by defendant.

"The facts in reference to the bills did not come to light until the last day of the long trial. At that time the trial judge was making an oral announcement of his conclusions. Counsel for plaintiff called the attention of the court to the fact that his client was being harassed by creditors of the community, and that certain utility and repair bills that the court had ordered defendant to pay had not been paid. He also called attention to the fact that his client was being sued for repairs to the house, that defendant had evaded service in that action, and that there was danger the house might be sold to satisfy a small mechanic's lien. These bills were ordered paid by the defendant and no challenge is made as to that portion of the decree.

"Defendant does not contend that he is not liable for the bills incurred by the parties before the date fixed in the findings, nor does he urge that the trial court did not have the power to make an order requiring him to pay such bills. The sole point urged by him as to these bills is that there is no evidence in the record as to the amount of such bills, to whom they are owed, or their nature.

"It is true that the list of such bills, although discussed in open court, was not formally introduced into evidence, but this failure to introduce such a list does not require a reversal or modification. The defendant can suffer no injury because of this fact. As between the husband and wife the court determined that the wife should be held harmless for such bills not to exceed $4,829. Before the defendant can be held liable on these bills so far as the wife is concerned she must show that the debts were incurred prior to January 19, 1942, and that the total amount does not exceed $4,829. If disputes arise between the parties in the future over whether a particular bill was a community bill, and whether it was incurred prior to the date the action was filed, such disputes may be easily determined by the trial court."

After hearing an order to show cause the trial court in the present proceeding made certain findings and conclusions of law and entered judgment "covering certain bills" as follows: "Ordered, adjudged and decreed as follows: 1. Defendant shall fully pay and discharge all of the debts or obligations hereinafter set forth, and also set forth in paragraph 1 of the Findings of Fact heretofore rendered, made and filed, to the persons or business associations named hereinafter, upon receipt from said persons or business associations named, of a full release and discharge running to defendant and releasing defendant from any and all obligations to said persons and business associations, and defendant shall file satisfactory proof with this Court of such payment or such tender of payment, within thirty days from the date of the entry of this Judgment. Said debts or obligations mentioned above, and the persons or business associations mentioned above, and set forth in paragraph 1 of the aforesaid Findings of Fact, are as follows:

Claire Brown	$ 177.64
Otis Elevator	165.75
John Frederics	20.69
Geneves	20.34
Marie Celeste	67.50
Maison Mendessolle	769.48
Mr. and Mrs. Baldwin	750.00
Livingston Bros.	229.15
I. Magnin	1690.93
Ransohoffs	417.54
White House	62.56
Nelly Gaffney	22.61
Dr. Westbay	150.00
H. Liebes	103.17
Freidlander	67.38
Leon Salomen	29.19
Rosary	67.85
Red Poppy	3.71
Podesta and Baldocchi	5.41
Jorgensen's Pharmacy	2.33
Freiling and Ingraham	3.88"

A separate judgment was filed whereby the attorneys for Mrs. Wilson "have and recover" $500 "for services performed between the filing of the remittitur from the [previous] appeal * * * up to and including June 1, 1947."

Defendant heretofore has charged plaintiff with failure to pay certain income taxes, a bill of Boscus for repairs, and a claimed obligation of $302. It appears that defendant had previously paid the Boscus and the $302 obligations.

[1] Defendant places the following questions before this court: "A wife and husband separate and live separate and apart for more than a year. During that year, he fully complies with his agreement for her support during separation. She then files for and obtains a divorce. Can he be held responsible for the extravagant purchases made by her during the period they were living separate and apart?" Whether the purchases were "extravagant" is a factual question that was or should have been argued before the trial court. It is not a proper issue on this appeal.

The only matter before the trial court on the order to show cause was whether the bills heretofore referred to in the judgment were (1) such bills as were contemplated in the interlocutory decree and in 76 Cal.App.2d 119, 172 P.2d 568, by reference only to the total amount, and (2) whether such alleged obligations are now enforceable.

Whatever expression—"community bills" or "community debts"—may have been used in this case, the defendant was directed to pay a community bill if it was in fact a community debt (Wilson v. Wilson, supra, 76 Cal.App.2d pages 127, 128, 172 P.2d page 573), and if any disputes arose they should be determined by the trial court.

Plaintiff testified on direct examination as to the existence of the listed debts. They were all incurred during a period of separation. Plaintiff also testified that defendant did not send her money after the separation and that she borrowed money for her maintenance and incurred the listed debts because she had no funds. Whether the expenditures were extravagant presents a question of fact. Defendant testified that he had notified some of the listed creditors that he would no longer be responsible for Mrs. Wilson's accounts.

[2-4] In respect to the last contention defendant seeks to invoke the provisions of the statute of limitations. Code Civ.Proc., secs. 337(2), 338(1) and 339. Defendant calls attention to the use of the words "hold harmless," and suggests that in the event the creditors should sue Mrs. Wilson she should be held harmless by pleading the statute of limitations. "Hold harmless," as used, means that under no circumstances was the wife to be required to pay the bills. The interlocutory decree provided, and it was held in 76 Cal.App. 2d 119, 172 P.2d 573, "that upon the date the complaint was filed there were community debts totaling $4,829 and that *such community debts should be paid by defendant.*" (Emphasis added.) These bills were incurred by Mrs. Wilson. It does not appear that she desires to raise the statute of limitations, with its resultant adverse effect upon her credit. The defense is personal to her and may not be advanced by defendant. Moreover, the prior decision of this court directing the defendant to pay the bills accruing during a specified time is res judicata that those bills should be paid and may not be relitigated. The affirmance of the judgment in so for as it directed that defendant should pay the bills which accrued within a specified period is res judicata.

[5-7] The general rule is that in cases involving the dissolution of marriage the trial court may order payment of attorney fees during the pendency of and necessary for the prosecution of the action. Attorney fees have been allowed in proceedings to collect alimony provided by the divorce decree. Gebhardt v. Gebhardt, 69 Cal.App. 2d 723, 160 P.2d 177. In the present case it may be asssumed that the final disposition of the case rested upon the question whether certain "bills" were in fact "debts," and who was responsible for their payment. The proceedings were not at an end. If plaintiff was liable it made a difference in the amount of alimony placed at her disposal. In the Gebhardt case, supra, 69 Cal.App.2d page 728, 160 P.2d 180, the court said: "The last remaining point raised on this appeal is whether, as urged by appellant, the court abused its discretion in allowing additional attorney fees in the sum of $100. In McClure v. McClure, supra, 4 Cal.2d [356] at page 362, 49 P.2d [584] at page 588, 100 A.L.R. 1257, we find the following: 'Where the divorced husband has not been released permanently from the obligation to pay alimony, the court may allow the wife costs and attorney's fees to prosecute or defend an appeal from an order of modification * * * on the theory that where the power to modify continues, the action is still pending under section 137 of the Civil Code, which authorizes the court to require the husband to pay money to enable the wife to prosecute or defend the action.' We believe the principle there stated is broad enough to cover the situation presented in the instant case, and in Wilder v. Wilder, 1932, 214 Cal. 783, page 785, 7 P.2d 1032, 1033, where the court refused an allowance, we find the court stating, '* * * the whole matter rested

in the sound discretion of the trial court. [Case cited.] * * * A clear abuse of discretion only will justify its [the reviewing court's] interference with the judgment of the trial court.'"

The judgments are and each of them is affirmed.

PETERS, P. J., and BRAY, J., concur.

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86 Cal.App.2d 256

WATTS et al. v. MOHR et al.

Civ. 16196.

District Court of Appeal, Second District,
Division 1, California.
June 17, 1948.

1. Specific performance 🔑121(11)

Evidence warranted denial of specific performance sought by purchasers on grounds that purchasers neglected to deliver note and trust deed to escrow holder as required by escrow agreement, thereby making it impossible for vendor to procure title insurance policy required by the agreement, and that purchasers did not act in good faith but vendor completely performed. Civ.Code, § 3392.

2. Escrows 🔑5

Provision in escrow agreement that purchasers would "deliver to you any instruments which this escrow requires shall be executed by me, all of which you are instructed to use, provided that [by specified date] you hold a policy of title insurance showing [title in purchasers free of encumbrances except as specified]", meant that, when all necessary documents were in hands of title company, it should issue title policy in accordance with escrow instructions, transmit it to escrow company, and upon final instructions from escrow company place the documents of record.

3. Escrows 🔑9

Doctrine of substantial compliance is inapplicable to escrow agreements, and compliance must be full and to the letter.

4. Escrows 🔑9

Ability of party to pay in cash the amount called for by escrow agreement is immaterial, where such party simply deposits check instead of cash, so far as right of depositary to thereupon deliver the deed is concerned.

5. Escrows 🔑9

Terms and conditions of fulfillment of escrows must be strictly performed.

◆

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action for specific performance by L. O. Watts and another against Anna Mohr and another of an escrow agreement. From an adverse judgment, the named defendant appeals.

Reversed.

Howland & Prindle and Clayton L. Howland, all of Los Angeles, for appellant.

Rowland P. Fontana, of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an appeal by defendant Anna Mohr from a judgment in favor of plaintiffs decreeing specific performance of an escrow agreement.

On October 5, 1945, respondents deposited with one Harry E. Clem, a real estate broker, $250 as an initial payment and agreed to purchase certain realty owned by appellant for the sum of $7,500: payable $1,250 in cash and the balance by deed of trust and note for $6,000. Thereafter certain events occurred which are hereinafter recited in chronological order:

1945

Oct. 8: Written escrow instructions, containing a limitation of time of thirty days, were executed naming Liberty Escrow Company as escrow agent, whereby appellant agreed to sell and respondents agreed to purchase certain realty therein described for a total price of $7,500, $1,500 thereof to be in cash and the balance of $6,000 to be secured by a note and trust deed from respondents, payable in installments of $60 per month beginning December 1, 1945, with interest at 6% from October 8th;

Oct. 18: Appellant's grant deed to respondents was delivered to Liberty Escrow Company and Title Insurance & Trust Co. ordered to make a preliminary search of title;

Nov. 8: Report of Title Insurance & Trust Co. dated November 7, 1945, delivered to Liberty Escrow Company, after preliminary search had been made, which showed the following encumbrances outstanding against the title of the escrowed property: Taxes 1945–46; easement across the rear 5 ft. for pole lines; covenants, conditions and restrictions of record; a deed of trust and a lease;

Nov. 15: Appellant's deed conveying the escrowed property was forwarded to Title Insurance & Trust Co., together with a deed from Beatrice Mohr to appellant;

Nov. 26: Liberty Escrow Company forwarded to Title Insurance & Trust Company a reconveyance of the outstanding trust deed, statement of identity of appellant, and an affidavit by appellant, with respect to the outstanding lease;

Prior to Nov. 26: Title Insurance & Trust Co. had the deed from Mohr (appellant) to Watts (respondents) abstracted in its file for recordation, but it had not received from Watts the trust deed and note for $6,000;

Nov. 28: Appellant delivered to Liberty Escrow Company late in the afternoon her letter cancelling the escrow, at which time neither the deposit of $1,500 nor the trust deed and note from Watts had been received by Liberty Escrow Company;

Nov. 28: Respondents had a telephone conversation with the manager of Liberty Escrow Company and at five o'clock that afternoon they delivered their check for $1,500 to said Company;

Nov. 30: Respondents received written notice of cancellation of the escrow;

Thereafter, said $1,500 check was returned to Liberty Escrow Company by the bank upon which it was drawn marked "Not Sufficient funds";

Dec. 20: Said check was redeposited;

Around Dec. 25: Respondents received from appellant a cashier's check for $250, which they declined to accept and returned it to her by registered mail.

Dec. 13: Instant action was filed.

The escrow instructions signed by respondents and addressed to Liberty Escrow Company, recite as follows: "I will hand you $1250—I have paid $250.00 outside of escrow to seller—and will deliver to you any instruments which this escrow requires shall be executed by me, all of which you are instructed to use, provided that on or before Nov. 8th, 1945, you hold a policy of title insurance with the usual Title Company's exceptions, with a liability of not less than $7500.00 covering Lots 18, 19 and 20 in Block 4 of Tract 6460, City of and County of Los Angeles, State of California, showing title vested in L. J. Watts, a married man, L. O. Watts, a married man, free of encumbrances, except all General and Special taxes, including all levies therein for fiscal year 1945–46. * * * Conditions, restrictions, reservations, easements and right of way of record and in deed to file (if any) affecting the use and occupation of said property.

"Trust Deed—executed by vestees to Liberty Escrow Company, a corporation, Trustee, to secure one note for $6000.00, dated Oct. 8th, 1945, Principal and interest payable in installments of $60.00 or more on the 1st day of each month commencing Dec. 1st, 1945, including interest at six per cent per annum from date hereof, * * * payable monthly in favor of Anna Mohr.

"Buyers agree to accept property in its present condition. Prorate taxes to date of recording Deed. * * * If above encumbrance is part of purchase price endorse interest on note paid to date of recording deed. * * * Party electing to cancel this escrow promises and agrees to pay your cancellation expenses. I/we agree to pay my respective charges.

"In the event conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same at the earliest date possible thereafter unless we or either of us shall have made written demand upon you for the return of the money or instruments deposited by either of us; in which case you are instructed to return all instruments and/or cash to the respective parties hereto and this escrow will without further notice be considered as terminated. * * *."

Appellant Anna Mohr signed the following approval which appears on the same page with the foregoing instructions:

"All conditions and demands above are hereby approved and I will hand you the necessary documents called for on my part to cause title to be shown as above, which you are authorized to deliver upon payment to you for my account the sum of $1250.00 and herein described Trust Deed within the time as above provided. Pay your escrow charges and my proper recording fee, also charges for evidence of title called for above (whether or not this escrow is consummated), except the buyer's fee, and you are hereby authorized to pay any bonds, assessments and/or taxes and any encumbrances of record to show title as called for, or necessary to comply with same. Pay Harry E. Clem, as commission, the sum of $375.00."

As heretofore stated, appellant's deed to the property here in question was in the hands of the escrow company on October 18, 1945. Appellant testified that after the title company's report was received by the escrow company and previous to November 15th, she executed a reconveyance of a trust deed, and that at a slightly later date, she made an affidavit with respect to the lease of record which was shown in the title company's search. She also testified that her son had formerly owned the property and she was unaware that the lease had been recorded, because the tenants had stayed but a few months.

Mr. P. J. Horsch, an officer of the Title Insurance & Trust Company, testified that on November 13, 1945, his company received from Liberty Escrow Company two grants deeds, i. e., (1) Mohr to Mohr and (2) Mohr to Watts, with instructions "Please abstract and hold for further filing instructions"; that on November 26, 1945, certain other papers were received from the escrow company, to wit: a reconveyance, a statement of identity of Anna Mohr and an affidavit by her with respect to the lease of record; that these documents were requested by his company before it could issue a certificate of title; that in the handling of these escrow orders, the title company receives from the escrow company what are known as final instructions, filing instructions, as to how to issue its policy; that it is necessary for the title company to have the documents referred to in the escrow agreement in order that its policy of title insurance when issued in the names of the buyers, as required by the escrow agreement, shall reflect the true condition of the title to the property being conveyed; further, that his company would be in no position to record these documents until it had received final instructions from the escrow company.

That the trial court construed the escrow agreement as requiring the escrow company to have possession of a policy of title insurance before it was necessary for the respondents to deposit the $1500 and the trust deed and note for $6,000, is evidenced by certain of its findings of fact to the following effect: that the deposit of the money and the delivery of the instruments into escrow "were dependent upon, or were to coincide with the deposit by the defendant, Anna Mohr, of certain instruments * * * and the delivery to * * * Liberty Escrow Company of a policy of title insurance"; that respondents were not required to deposit the cash or the trust deed until appellant "had performed or was ready, able and willing to perform the terms, covenants and conditions of the escrow instructions on her part required to be done and performed, and had delivered into said escrow a policy of title insurance."

[1] The evidence in this case clearly establishes the fact that before the Title Insurance & Trust Company could issue its policy of title insurance, in the form

required by the escrow agreement, it was necessary that the trust deed and note be in its possession awaiting final instructions from the Liberty Escrow Company.

The escrow agreement recites: "I will hand you $1250.00 * * * and will deliver to you any instruments which this escrow requires shall be executed by me, *all of which you are instructed to use,* provided that on or before Nov. 8th, 1945, you hold a policy of title insurance * * * showing title vested in (respondents) free of encumbrances except" (1) taxes (2) conditions, etc., of record, (3) trust deed for $6,000.

[2] This instruction can only mean that when all necessary documents are in the hands of the title company, it issues its policy of title insurance in accordance with the escrow instructions, transmits it to the escrow company, and upon final instructions from the latter places the documents of record in the county recorder's office.

It was also found by the court that the lots here in question "were still subject to a cloud of record on the said 28th day of November and that said plaintiffs had on the said 28th day of November, 1945, performed and done all things on their part to be done or performed."

This finding is not supported by the evidence. To the contrary the evidence clearly establishes that respondents have never executed the note and trust deed required of them, and also that it was not until after appellant served her notice of cancellation of the escrow upon the escrow holder that the respondents delivered their check for $1500, which was later returned to the escrow holder marked "Not sufficient funds." The conduct of respondents throughout this transaction shows a complete lack of good faith.

On the other hand, the evidence clearly shows that appellant had completely performed her part of the agreement and that the so-called clouds, i. e., an old trust deed and a lease, had been removed from the title when she procured a reconveyance of the trust deed and made an affidavit regarding the lease.

[3, 4] It is aptly stated in 19 Am.Jur. p. 438, sec. 20: "In the law governing performance of escrow agreements, there is no doctrine of substantial compliance to be found. Compliance must be full and to the letter, or else it constitutes merely non-compliance. Strict and full performance only can discharge a condition precedent to a valid delivery by the escrow holder. The question involved is one of performance of the escrow agreement, and not of the ability of the parties to perform the agreement, since such ability, without full performance, cannot amount to compliance. Accordingly, it has been held that the ability of a party to an escrow agreement to pay in cash the amount of cash payment called for by the agreement is immaterial, where such party simply deposits his check instead of the cash, so far as the right of the depositary to thereupon deliver the deed is concerned, since such ability without full performance cannot amount to a compliance."

[5] "It is one of the cardinal principles of law applicable to escrows that the terms and conditions of their fulfillment must be strictly performed." Shreeves v. Pearson, 194 Cal. 699, 711, 230 P. 448, 452. It is undisputed in the instant case that respondents never complied with the terms of the escrow instructions.

With respect to specific performance of an obligation, section 3392 of the Civil Code reads: "Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default."

In the circumstances presented herein, specific performance cannot be enforced, because when respondents neglected to perform the conditions precedent required of them by the escrow agreement, i. e., the execution and delivery to the escrow holder of their note for $6,000 and the trust deed securing same, they thereby made it impossible for appellant, to procure a policy of title insurance showing title to the property being conveyed by her vested in respondents subject to such trust deed.

For the reasons stated, the judgment is reversed.

DORAN, and WHITE, JJ., concur.

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86 Cal.App.2d 271

HOWE et al. v. BROCK et al.

Civ. 3693.

District Court of Appeal, Fourth District, California.
June 17, 1948.

1. Adverse possession 🔑13

To establish title by adverse possession, claimant's possession must be by actual occupation under circumstances constituting reasonable notice to owner and hostile to owner's title, claimant must claim property as his own either under color of title or claim of right, his possession must be continuous and uninterrupted for five years, and he must pay all taxes levied and assessed on property during such period.

2. Adverse possession 🔑88

Payment of taxes by one claiming title by adverse possession is not an act of ownership equivalent to possession.

3. Adverse possession 🔑114(1)

In suit to quiet title to mining claim, evidence was insufficient to establish plaintiffs' claim of adverse possession, in absence of proof of actual occupation of property, hostility of possession, open and notorious claim of title, or continuous and uninterrupted occupancy for five years.

4. Tenancy in common 🔑15(5)

Exclusive occupancy by cotenant is deemed permissive and does not become adverse until tenant out of possession has had actual or constructive notice that possession of cotenant is hostile to him.

5. Executors and administrators 🔑315(5, 6)

Final decree of distribution which, although it did not describe mining claim, provided for distribution of "all other property belonging to said estate whether described herein or not" as well as for the distribution of "all the residue of the property of said estate", effectively and finally disposed of all property belonging to decedent at time of his death and vested in distributees whatever title decedent had in mining claim, and such decree, being final, was conclusive as to rights of heirs, devisees, and legatees. Probate Code, § 1021.

6. Executors and administrators 🔑315(6)

Where final decree of distribution had been entered and thereafter a distributee obtained his appointment as administrator without reference to the first probate proceedings, there was no estate belonging to decedent which could be distributed in second probate proceedings, and no title could be conveyed by deed of administrator to a one-eighth interest in mining claim. Probate Code, § 1021.

7. Courts 🔑200½

Probate court has no power to declare decedent to be owner of property contrary to fact, and limit of its power is to determine succession to such title as decedent had at time of his decease. Probate Code, § 1021.

8. Equity 🔑65(1)

Court of equity has duty, upon any suggestion that plaintiff has not acted in good faith concerning matters upon which he bases his suit, to inquire into the facts in that regard.

9. Equity 🔑65(1)

Suitor is prevented, not only by fraud or illegality, from obtaining equitable relief, but also by any unconscientious conduct upon his part which is connected with controversy.

10. Equity 🔑1

Foundation of equity is good conscience.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by Coy Swallow Howe and others against Mrs. Walla Brock and others to quiet title to a mining claim. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Solon S. Kipp and W. E. Starke, both of San Diego, for appellants.

Maurice M. Sattinger, of Calexico, for respondents.

MUSSELL, Justice pro tem.

This is an appeal from a judgment for defendants in an action to quiet title to a mining claim situated in the County of Imperial.

The complaint contains an allegation of ownership and right to the possession of the Swallow Placer Mining Claim described therein. It contains a general allegation that defendants claim some right, title, interest, estate or lien in or to the real property adverse to plaintiffs. Judgment is demanded that plaintiffs be declared the owners in fee and entitled to possession and that the claim of the defendants be declared to be without right, null and void. Defendants in their answer deny plaintiffs' allegation of ownership and right of possession; admit that the defendants claim some right, title and interest in the property adverse to plaintiffs and deny that said adverse claims are without right. Defendants ask that plaintiffs take nothing by their complaint.

Plaintiffs and appellants are the children of Charles H. Swallow and defendants and respondents are distributees of William J. Swallow, deceased.

William J. Swallow, his brother Charles H. Swallow, and six other persons located the mining claim described in the complaint on January 11, 1911, and on that date filed the notice of location in Imperial County.

William J. Swallow died intestate on December 17, 1922. His estate was duly probated in the County of San Diego and the decree of distribution was entered on January 7, 1927. The decree did not describe the mining claim involved but it did contain a provision distributing all of the property of said estate whether described therein or not to the heirs at law of William J. Swallow.

By the terms of the decree Charles H. Swallow received twelve-sixtieths of the estate and the remainder was distributed to the defendants herein and others. Defendants' claim of ownership and title to their respective interests in the mining claim is founded on this decree.

On September 6, 1930, an amended notice of location of the claim purportedly executed by or on behalf of all of the original locators was recorded. This amended notice contained a recital that it was posted for the sole purpose of correcting an error in the original description and that the land discovered and located by the locators had been in their peaceable possession since the date of the original location.

Charles H. Swallow, who was then a distributee in the estate of his brother William, applied for, and on September 26, 1930, obtained an order of the Superior Court in San Diego County under and pursuant to the terms of which he was appointed administrator of the estate of his deceased brother William J. Swallow. The first probate proceeding was numbered 13689 and the second 17878 in the records of the Superior Court. The only property involved in the second probate proceeding was the undivided ⅛ interest of the decedent William J. Swallow in the mining claim.

A United States Government patent to the claim was issued on November 19, 1931, to Charles H. Swallow and the heirs of William J. Swallow and others.

Charles H. Swallow as administrator in the second probate proceeding executed an agreement to sell a ⅛ interest in the mining claim to one John Bass for the sum of $100. This sale was confirmed by the court on December 18, 1931, and the administrator's deed to him was executed January 18, 1932. By a deed dated January 19, 1932, plaintiffs deeded their interest in the property to Charles H. Swallow.

John Bass conveyed all of his interest in the mining claim to Coy S. Howe, one of the plaintiffs, on April 19, 1932. These three deeds were all recorded on May 5, 1932, and on May 6, 1933, Charles H. Swallow executed a grant deed to plaintiffs of all property owned by him in the County of Imperial.

In the trial of the action plaintiffs abandoned all claim to a ⅞ interest in the mining claim and the case proceeded to trial on the theory that only an undivided ⅛ interest was involved and findings pertain only to the ⅛ interest.

The court found that the defendants were owners of fractional parts of the ⅛ interest obtained by them through the decree of distribution made and entered on January 7, 1927, in the probate of the estate of William J. Swallow, No. 13689, and that the court by the subsequent probate proceedings did not acquire any jurisdiction over the property involved. It was further found there was no valid reason or legal justification for the second probate proceeding by Charles H. Swallow and that he did not act in good faith in instituting such proceeding. The court also found that the record title to this property was attempted to be transferred from Charles H. Swallow in his representative capacity as administrator, to Charles H. Swallow as an individual, to the exclusion of all other heirs of William J. Swallow, deceased; that the plaintiffs were parties to such proceedings and that they came into equity with unclean hands.

Plaintiffs first contend that the evidence supports their claim of adverse possession and that the findings of the court to the contrary were erroneous.

The proof offered by plaintiffs of their claim of title by adverse possession was the administrator's deed and the statement by one of the plaintiffs, Coy S. Howe, that subsequent to the time she received the deeds she exercised full and complete control of the mining property for and on behalf of her co-plaintiffs and also paid all taxes against the property from the year 1935 to 1946 inclusive.

[1] To establish title by adverse possession the plaintiffs must establish five elements in connection with their occupancy: (1) Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner. (2) Possession must be hostile to the owner's title. (3) The holder must claim the property as his own, either under color of title or claim of right. (4) Possession must be continuous and uninterrupted for five years. (5) The possessor must pay all of the taxes levied and assessed upon the property during the period. Unless each one of these elements is established by the evidence, the plaintiffs have not acquired title by adverse possession. West v. Evans, 29 Cal.2d 414, 417, 175 P.2d 219.

[2] It was held in West v. Evans, supra, that the payment of taxes is not an act of ownership equivalent to possession.

[3, 4] No testimony was offered by plaintiffs to show that the property involved was actually occupied by them openly and notoriously or at all.

Since plaintiffs failed to prove actual occupation of the property, hostility of possession, open and notorious claim of title, or continuous and uninterrupted occupancy for five years their claim of adverse possession was not established. In this connection it is apparent from the record that the relationship of cotenants existed between plaintiffs and defendants. Such title as plaintiffs acquired by reason of the conveyance from Charles H. Swallow, their father, stemmed from the interest he obtained as one of the original locators of the claim and from his share of the inheritance from the estate of William J. Swallow, the decedent. The exclusive occupancy by a cotenant is deemed permissive, it does not become adverse until the tenant out of possession has had actual or constructive notice that the possession of the cotenant is hostile to him. West v. Evans, 29 Cal.2d 414, 418, 175 P.2d 219.

[5] Plaintiffs contend that no attack can be made on the order confirming the sale in the second probate proceedings under which they claim. Defendants' claim to title is based on the decree of distribu-

tion in the first probate proceeding. This was a final decree and effectively and finally disposed of all property belonging to the decedent at the time of his death. While the decree did not describe the mining claim herein involved it adequately provided, as herein before noted, for the distribution of "all other property belonging to said estate whether described herein or not" as well as for the distribution of "all the residue of the property of said estate." This provision vested in the distributees, including defendants herein, whatever title the decedent William J. Swallow had in the mining claim. Estate of Bouche, 24 Cal.App.2d 86, 90, 74 P.2d 563. Such decree of distribution, being final, is conclusive as to the rights of heirs, devisees and legatees. (Probate Code, Sec. 1021.)

[6, 7] It follows therefore that there was no estate belonging to the decedent which could be distributed in the second probate proceedings, and no title could be conveyed by the deed to Bass. The probate court has not the power to declare the decedent to be the owner of property contrary to fact. The limit of its power is to determine the succession to such title as the decedent had at the time of his decease. Kauffman v. Meyberg, 59 Cal.App. 2d 730, 741, 140 P.2d 210.

The trial court found that the second probate proceedings were entirely independent, separate and apart from the first probate proceedings; that no reference was made in the second proceedings as to the first probate proceedings; that there was no valid reason or legal justification for the instituting by Charles H. Swallow of the second and subsequent proceeding in total disregard of and without reference to the prior probate proceedings; and that Charles H. Swallow did not act in good faith in so doing.

We think this finding is amply supported by the evidence. Had the court been advised of the existence of prior probate proceedings when the second attempt was made to distribute the estate of William J. Swallow, obviously no second decree would have been granted.

[8–10] It is the duty of a court of equity, upon any suggestion that a plaintiff has not acted in good faith concerning the matters upon which he bases his suit, to inquire into the facts in that regard. It is not only fraud or illegality which will prevent a suitor from obtaining equitable relief. Any unconscientious conduct upon his part which is connected with the controversy will repel him from the forum whose very foundation is good conscience. DeGarmo v. Goldman, 19 Cal.2d 755, 764, 123 P.2d 1.

Judgment affirmed.

BARNARD, P. J., concurs.

GRIFFIN, J., being disqualified, does not participate herein.

86 Cal.App.2d 506

BARAN et al. v. GOLDBERG.

Civ. 16092.

District Court of Appeal, Second District,
Division 3, California.
June 30, 1948.

1. Specific performance 🔑49(2)

Under statute, adequacy of consideration is a prerequisite to the granting of specific performance of a contract. Civ.Code, § 3391.

2. Specific performance 🔑49(2)

Under statute making adequacy of consideration a prerequisite to granting specific performance of contract, adequacy of consideration must be determined as of date of execution of contract. Civ.Code, § 3391.

3. Specific performance 🔑49(2)

Under statute making adequacy of consideration a prerequisite to granting specific performance of contract, "adequate consideration" does not necessarily mean the highest price obtainable, but a price that is fair and reasonable under all the circumstances. Civ.Code, § 3391.

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Consideration".

4. Appeal and error ⚿1009(1)

Whether party has not received an adequate consideration for contract so as to preclude granting specific performance of contract against him, is a question of fact for trial court to determine, in the light of all the facts and circumstances. Civ.Code, § 3391.

5. Specific performance ⚿121(3)

Evidence sustained finding that realty contracted to be sold to plaintiffs by defendant was reasonably worth $16,500 when contract was executed, and that consideration of $11,500 was not an adequate consideration as to defendant, and precluded purchasers from being granted specific performance. Civ.Code, § 3391.

6. Specific performance ⚿128(1)

Where a cause of action for specific performance of contract to sell realty was not established, there could be no award for damages which might have been incidental to a decree of specific performance.

7. Vendor and purchaser ⚿349

Purchasers who alleged bad faith were not entitled to damages for breach of contract to sell realty on basis of difference between purchase price agreed upon and value at time of breach, under allegation of purchasers' complaint that no difference existed between agreed price of realty and value of realty at time of breach, and fact that no evidence showed value of realty at time of breach. Civ.Code, § 3306.

8. New trial ⚿99

Denial of motion for new trial of action for specific performance of contract for sale of realty to plaintiffs, or damages in the alternative, on ground of newly discovered evidence, was discretionary.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Max Baran and Anna Baran against Anna L. Goldberg, also known as Anna L. Grover, for specific performance of a contract to sell realty, or for damages in the alternative. From an adverse judgment, plaintiffs appeal.

Affirmed.

Alfred A. Grant, of Los Angeles, for appellants.

Ralph Rosenstock and Maurice Rose, both of Los Angeles, for respondent.

WOOD, Justice.

Action for specific performance or for damages if specific performance cannot be decreed. Plaintiffs appeal from the judgment in favor of defendant.

On September 8, 1943, plaintiffs and defendant entered into a written agreement, in the form of escrow instructions, whereby defendant agreed to sell to plaintiffs certain real property for $11,500, and whereby plaintiffs agreed to buy from defendant the said property for said sum. The agreement provided in part as follows: that the plaintiffs should pay $200 into said escrow on said September 8th, and should pay an additional sum of $11,300 into the escrow on or before November 8, 1943; and that in consideration of the payment of said $11,500 the defendant agreed to execute, on or before November 8, 1943, a grant deed conveying said property to plaintiffs. The plaintiffs paid $200 into the escrow on said September 8th. On October 9, 1943, defendant recorded a grant deed conveying said property to her son and two daughters. On October 11, 1943, defendant notified the escrow holder that said deed had been recorded. That deed was executed without the knowledge of her said children, and they reconveyed the property to her in October, 1944, before the trial herein. The defendant cancelled the escrow on November 8, 1943. According to a finding of the court, plaintiffs tendered $11,300 to the defendant "on or about the 8th day of November, 1943," and, according to another finding, that sum "was tendered to the escrow." Under the first finding just referred to, the tender to the defendant might have been after November 8th. The second finding just referred to does not state when the tender "to the escrow" was made. Those findings are so indefinite as to time that they do not show that the tender was made within the time provided in the agreement. There is another finding, however, "that plaintiffs have performed all of the terms of the contract on their part to be performed." Although the court should have found specifically when the tender was made, those findings when construed together, are to be regarded as sufficient to constitute a finding that the tender was made on or before November 8, 1943.

The court also found that defendant was the owner of said property on September 8, 1943, at all times mentioned in the complaint, and at the time of trial; that on September 8, 1943, the sum of $11,500 was grossly inadequate consideration for said property and "that the said fact was well known to the plaintiffs"; that on September 8, 1943, the sum of $11,500 was not the reasonable value of said property, and that said sum has not at any time since then been the fair and reasonable value thereof; that said $11,500 was not an adequate, just and reasonable consideration as to the defendant; and that on September 8, 1943, said property was reasonably worth $16,500.

The court also found that the defendant refused and still refuses to carry out the terms of the said contract; that it is not true that the failure and refusal of the defendant "to comply with the terms of the said written agreement and to convey said property to the plaintiffs was without justification or lawful reason or excuse and was in bad faith"; that the defendant did act in good faith. The court also found that it is not true that plaintiffs were damaged in the sum of $5,000 or in any sum.

Appellants contend that the court erred in finding that the reasonable value of the property was $16,500, and in finding that $11,500 was not an adequate and reasonable consideration therefor. They argue to the effect that the court should have based its finding as to value upon the testimony of witnesses who testified in their behalf. One of their statements is that, "the plaintiff was in this matter overcome by a weight of testimony which should not have been permitted to over-weigh the plaintiff." One of plaintiffs' witnesses, a real estate broker, testified that on September 8, 1943, the property was of the value of $11,000; that in January, 1943, the appellants had listed the property with him for sale at the price of $10,000, and that he had sold the property for $10,000 in that month but the sale was not completed. That witness testified further that the plaintiffs had agreed to pay him $100 as commission on the present sale, and the defendant had agreed also to pay him $100 as commission, but the commission had not been paid; that before he testified herein he had told plaintiffs that he would not testify unless they guaranteed the payment of the $200; and that the plaintiffs had agreed to pay that amount to him. Another witness for appellants, a real estate salesman, testified that on September 8, 1943, the property was of the value of $12,000; and that in 1943 appellants had listed the property for sale with him at a price between $10,500 and $11,000. A witness called by respondent (defendant), a qualified appraiser of real property, testified that on September 8, 1943, the property was of the value of $16,500. Another witness for respondent, a qualified appraiser of real property, testified that on said date the property was of the value of $15,500. Another witness for respondent, who had been in the real estate business 25 years, testified that on said date the value of the property was between $16,000 and $17,000.

[1-5] Section 3391 of the Civil Code provides in part: "Specific performance cannot be enforced against a party to a contract in any of the following cases: 1. If he has not received an adequate consideration for the contract; 2. If it is not, as to him, just and reasonable; 3. * * *." Said section 3391 "makes adequacy of consideration a prerequisite to the granting" of specific performance. Lamb v. Calif. Water & Tel. Co., 21 Cal.2d 33, 44, 129 P.2d 371, 377. Adequacy of consideration, within the meaning of said section, must be determined as of the date of the execution of the contract. O'Connell v. Lampe, 206 Cal. 282, 285, 274 P. 336. In the case of Cushing v. Levi, 117 Cal.App. 94, at page 101, 3 P.2d 958, 960, it was said: "'Adequate consideration,' as used in sec-

tion 3391, subdivision 1, Civil Code, does not necessarily mean the highest price obtainable, but a price that is fair and reasonable under all the circumstances; it is always peculiarly a question of fact for the trial court to determine, in the light of all the facts and circumstances of each particular case." At the time the trial judge in the present case rendered his oral decision, he said that the testimony of the real estate broker (a witness for plaintiffs), who wanted to collect $200 from plaintiffs, had no weight at all with the court. The findings of the court in regard to the value of the property and the inadequacy of the consideration are supported by the evidence.

Appellants assert further that the court should have awarded damages to plaintiffs. In their complaint appellants alleged that defendant had continued to collect the rents from the property and had converted the rents to defendant's own use; and appellants prayed that the court order an accounting as to the rents. Appellants also alleged that defendant's failure to comply with the contract was in bad faith and was to plaintiffs' general damage in the sum of $5,000. The trial judge disallowed damages for the reason, as stated in his oral decision, that since plaintiffs were not entitled to specific performance, they were not entitled to damages. He relied upon the case of Hupp v. Lawler, 106 Cal.App. 121, at page 126, 288 P. 801, 803, wherein it was stated: "An action to recover damages in lieu of specific performance lies not at law, but in equity, for the right to such damages depends upon the right to specific performance, and is not available until the latter is established." The decision therein, regarding that point, was based upon the case of Morgan v. Dibble, 43 Cal.App. 116, 184 P. 704. The Supreme Court held to the contrary in the case of Pascoe v. Morrison, 219 Cal. 54, 25 P.2d 9, wherein there was a separate cause of action for damages. In the last cited case, after referring to said ruling in the case of Morgan v. Dibble, supra, the court said, 219 Cal., on pages 57 and 58, 25 P.2d on page 10 (in quoting from another case): "'* * * while the equitable relief will be denied in such a case, now the action will be retained and the issue as to the breach of contract and damages will be sent to a jury for trial.' * * * In addition thereto, the facts as pleaded, without reference to any question of specific performance, entitled plaintiff to damages; and, as shown by the cases heretofore cited, the court was not only authorized, but it was its duty, to grant such relief as the evidence warranted." In the case of Bank of America, etc., Ass'n v. Moore, 18 Cal.App.2d 522, at page 529, 64 P.2d 460, 463, the court declined to follow the cases of Hupp v. Lawler, supra, and Morgan v. Dibble, supra, and stated: "* * * we hold that although a cause of action for equitable relief may not be established, damages may properly be awarded." In Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386, wherein specific performance could not be decreed, and wherein no cause of action was alleged for damages for breach of contract and the complaint was not framed in the alternative for damages, it was indicated on page 173 of 13 Cal.2d, on page 387 of 89 P.2d that under amended pleadings plaintiff might seek to recover damages for breach of contract. It appears therefore that the decision in the case of Hupp v. Lawler, supra, upon which the trial judge relied, is not in accord with several other cases. The mere fact that plaintiffs were not entitled to specific performance did not preclude them from recovering damages for breach of contract.

[6] As to damages which might have been incidental to a decree of specific performance, there could be no award herein, since a cause of action for specific performance was not established. Equity cannot grant damages "unless some case of equitable relief is made out also, to which the damages would be applicable or subsidiary." Eagle Oil & Refining Co. v. James, 52 Cal.App.2d 669, 678, 126 P.2d 880, 884.

[7] As to damages for breach of contract, the decision of the trial judge in disallowing such damages was correct, even though the reason stated by him for disallowing them was not valid. Section 3306 of the Civil Code provides in part as follows: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examin-

ing the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach * * *." Damages were properly denied for the reason that no cause of action for damages was stated. The complaint stated only a cause of action for specific performance and alleged no facts which would have justified an award of damages. There was no allegation in the fourth amended complaint, upon which the case was tried, that the value of the property at the time of the breach of the contract to convey was greater than the value of the property at the time the contract was made. On the contrary, it was alleged in that complaint that the price agreed to be paid for the property was $11,500, and that said sum "is and at all times since the execution of the said contract has been a fair and reasonable value of the said property." It therefore appears from the complaint that there was no difference between the price agreed to be paid and the value of the property at the time of the breach of the contract. Furthermore, there was no proof as to the value of the property at the time of the breach of the contract on November 8, 1943, when defendant cancelled the escrow. The evidence herein regarding value pertained to the time the agreement was executed on September 8, 1943, except that one of the witnesses for plaintiffs (the real estate salesman) did testify as to the value at the time of the trial on January 3, 1947. The value at the time of trial was, of course, immaterial on the question of damages. Therefore, it does not appear from the evidence that there was any difference between the price agreed to be paid and the value of the property at the time of the breach. Furthermore, as provided in section 3306 of the Civil Code, above referred to, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed can be recovered as damages, for the breach of an agreement to convey real property, only "in case of bad faith." The court found, as above stated, that defendant did not act in bad faith in refusing to convey the property. The action of defendant in conveying the property to her children indicates, contrary to the finding of the court, that she was acting in bad faith and was attempting to make it impossible for her to comply with her contract. In his oral decision the trial judge characterized that act of defendant as "reprehensible." Irrespective of the question of bad faith, the allegation in the complaint to the effect that there was no difference between the agreed price and the value of the property at the time of the breach of the contract, and the fact that there was no evidence as to the value of the property at the time of the breach, are sufficient to support a finding that plaintiffs were not entitled to damages on the basis of a difference between the agreed price and the value of the property at the time of the breach of the contract. There was no evidence that the escrow deposit of $200 was not returned to plaintiffs, and there was no evidence as to expenses incurred in examining title and preparing necessary papers.

[8] Appellants assert further that the court erred in not granting their motion for a new trial on the ground of newly discovered evidence. Such alleged new evidence related to the value of the property involved herein and was to the effect that other property, allegedly comparable to the property herein and located within the same street block as the property herein, was purchased in January, 1943, for $9,500 and was sold in August, 1944, for $14,500. This contention is not sustainable. During the cross-examination of one of defendant's expert witnesses as to value, counsel for plaintiffs (not present counsel) referred specifically to the sale of said other property for $9,500, thereby indicating that the proposed additional evidence was not newly discovered. The determination of the motion for a new trial was within the sound discretion of the trial court.

The judgment is affirmed.

SHINN, Acting Presiding Justice and McCOMB, Justice Assigned, concur.

86 Cal.App.2d 346

FURTADO v. TAYLOR et al.

SAME v. FREDERICK et al.

Civ. 7466.

Sac. 5890.

District Court of Appeal, Third District, California.

June 22, 1948.

Rehearing Denied July 15, 1948.

Hearing Denied Aug. 19, 1948.

1. Waters and water courses 🔑247(1)

In actions to quiet title to easement for a ditch across defendants' lands, to compel defendants to restore destroyed portions of ditch, and to enjoin defendants from interfering with the ditch, evidence sustained findings that defendants' use of a portion of ditch for more than five years for growing of crops had not been hostile to plaintiff or his predecessor in interest, had not been open or notorious or under a claim of right, and that no claim had been asserted adverse to plaintiff or his predecessors in interest, requiring denial of defendants' defense of adverse possession.

2. Easements 🔑30(2)

An easement acquired by grant or by a reservation having the effect of an implied grant, is not lost by disuse.

3. Adverse possession 🔑13

To establish title by adverse possession, claimant's possession must be by actual occupation under circumstances constituting reasonable notice to owner and hostile to owner's title, claimant must claim property as his own either under color of title or claim of right, his possession must be continuous and uninterrupted for five years, and he must pay all taxes levied and assessed on property during such period.

4. Adverse possession 🔑16(1)

"Actual possession" necessary to establish title to realty by adverse possession means subjection to claimant's will and dominion, and must be coupled with acts of ownership proclaiming to the world and bringing notice to owner that a right is claimed in the realty.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Possession".

5. Adverse possession 🔑85(3)

In order for statute of limitations to run against owner of realty and in favor of adverse claimant, there must be definite and positive evidence of an adverse claim and an adverse holding, and burden is on claimant to prove the claim and adverse holding by the clearest and the most satisfactory evidence.

6. Appeal and error 🔑1010(1)

Trial court's findings supported by evidence are binding on the District Court of Appeal whatever evidence there may be tending to support a contrary conclusion.

7. Waters and water courses 🔑244

The plaintiff as owner of an easement in an existing ditch could not be compelled to surrender it because defendants as owners of the servient tenement believed that plaintiff could get water from another source with less burden upon the servient estates of defendants.

8. Waters and water courses 🔑247(1)

In actions to quiet title to an easement for a ditch across defendants' land, to compel defendants to restore destroyed portions of ditch and to enjoin defendants from interfering with the ditch, trial court, by its decree, properly compelled defendants to restore the ditch to its former condition as it existed at commencement of actions, where there was evidence that after actions were instituted, portions of the ditch had been destroyed.

9. Waters and water courses 🔑247(1)

In actions to quiet title to an easement for a ditch across defendants' lands, to compel defendants to restore destroyed portions of ditch, and to enjoin defendants from interfering with the ditch, evidence sustained finding that it was possible for plaintiff to irrigate his land from the ditch and that unless plaintiff was permitted to do so he would suffer great and irreparable injury.

◆

Appeal from Superior Court, Stanislaus County; J. T. B. Warne, Judge.

Actions by Manuel G. Furtado against C. R. Taylor and others, and against E. J.

Frederick and others to quiet title to an easement for a ditch across defendants' lands, to compel defendants to restore portions of ditch which they had destroyed, to enjoin defendants from interfering with the ditch, and for damages. The plaintiff withdrew his claim for damages. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

T. B. Scott, of Modesto, and W. Coburn Cook, of Turlock, for appellants.

Hawkins & Hawkins, of Modesto, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought two actions seeking to quiet his title to an easement for a ditch across defendants' lands, which ditch he alleged had been destroyed in part by defendants. He also prayed that defendants be compelled to restore the portions of said ditch which they had destroyed, that they be enjoined from interfering with same, and that he be awarded damages for injuries resulting from the alleged acts of defendants.

Defendants answered denying generally the allegations of the complaint, including a denial that defendants Taylor had destroyed, covered up or filled in a portion of the ditch as alleged in the complaint, or would unless restrained keep same filled up, or render it useless to plaintiff, and a denial that defendants Frederick had, within five years prior to commencement of the action, filled in a portion of the ditch. They also alleged that the ditch had become valueless to plaintiff by reason of recent plans for irrigation of his land by the improvement district in which it is located, asserted that it is impossible to irrigate plaintiff's lands from said ditch, and, finally, that defendants have acquired title to the ditch by adverse possession.

The trial court found in favor of plaintiff and entered a decree quieting his title to the claimed easement, enjoining defendants from interfering with the said ditch, and requiring them to restore it to the condition in which it existed at the commencement of the action. Plaintiff having withdrawn his claim for damages, none were awarded.

On this appeal defendants contend that the evidence is insufficient to support the judgment, that the trial court committed error in excluding certain evidence offered by them, that the decision is against public policy, and that the mandatory provisions of the decree are erroneous.

The evidence shows that all of the lands now owned by the respective parties, as well as certain adjoining lands, were acquired by Turlock Garden Land Co., a corporation, prior to 1911. In order to get water for the irrigation of its said lands that company acquired rights of way for the purpose of taking water from the Turlock Irrigation District within the limits of which its lands were located. In 1913 it constructed a ditch from the Irrigation District's lateral 3, which ditch ran southward from said lateral through the northwest quarter of section 1, T. 5 S., R. 8 E., M. D. B. & M., and about 200 feet into the southwest quarter of said section 1, to a point which is designated in this action as "2". Thence it ran westward about 1588 feet to point "3", thence south across the southwest quarter of said section 1, about 600 feet to a point designated as "4", at which point it turned in a southeasterly direction about 2,000 feet to a point designated as "5", thence in the same direction to point "6" which is on the easterly line of the quarter section a short distance north of the southerly line along which line is a road known as the Monte Vista Road. From point "6" the ditch continued due south into section 12, T. 5 S., R. 8 E., M. D. B. & M.

The lands owned by defendants Taylor lie in the southwest quarter of section 1 above described, and consist of 80 acres (the north half of the southwest quarter) acquired by them in 1927, and 60 acres (the SW¼ of the SW¼ and the W½ of the SE¼ of the SW¼ of section 1) acquired by them in 1943. The tract originally acquired by them had passed from the Turlock Company through several parties before coming into the possession of the Taylors, but it is conceded that the various deeds of transfer contained a reservation for the ditch in controversy reading, "subject, however, to right of way for use and benefit of party of first part, its successors and assigns for purpose of digging, maintaining, cleaning and operating one or more ditches or canals to flow water therein for use upon said lands and adjoining lands in the usual and practical manner and all rights necessary and incidental to the full enjoyment of this reservation are also reserved." The deed conveying the 60 acres acquired in 1943 was executed by the Turlock Company and contained a similar reservation, together with the additional proviso: "The inclusion of said land hereby conveyed in an improvement district of Turlock Irrigation District shall not in any way limit, restrict or obstruct the rights hereby reserved to Grantor."

The land belonging to defendants Frederick consists of the east one-half of the southeast quarter of the southwest quarter of section 1, and was granted by the Turlock Company to Isobel H. Allison in 1913, the deed containing the same reservation contained in the other deeds above mentioned. After passing through several hands it was acquired by the Fredericks in October 1934.

Plaintiff's lands lie in section 12, T. 5 S., R. 8 E., M. D. B. & M., and consist of the northeast quarter of the northwest quarter and the east half of the west half of the northwest quarter of said section abutting upon the Monte Vista Road on the north. They were acquired by him in January, 1944, directly from the Turlock Company.

The ditch constructed by the Turlock Company in 1913 therefore crosses both of the Taylor tracts and also the Frederick tract, and extends to the lands of plaintiff, and there is evidence sustaining the finding of the trial court that plaintiff's lands are susceptible of irrigation therefrom though they had, prior to the commencement of this action, been used for dry pasture only, without irrigation.

At the trial defendant Taylor testified that when he acquired his original tract in 1936 there was a ditch across it, and that there was evidence of it down to the Monte Vista Road. He stated that it was in disrepair, but that he used it for irrigation on his own property. He testified, however, in defense of the action, that approximately ten years before he had filled in a part of the ditch—about 100 feet—where it crossed his land—"pulled the ditch away so there was no ditch there"—and planted the area where it had been to alfalfa and/or corn and had continued to raise crops on it for about ten years without objection or interference by any one; and that he had paid taxes upon his land during all those years, though the easement was not separately assessed. It is upon that testimony that said defendant relies to sustain his claim that he acquired the right to use his said land freed of the easement.

Defendant Frederick makes a like claim, his testimony being that in 1936, after he had tried unsuccessfully to get water onto his land through the ditch, he had "pulled away" possibly 200 feet of it, and farmed over it thereafter—put it in alfalfa from 1936 to 1944. He also stated that no one ever objected to his doing so; also that he had paid taxes on his land, though the ditch, or easement therefor, had not been separately assessed.

The trial court found that defendants had used the portions of the ditch aforesaid for the growing of crops and that they had been in the use and possession of same for more than five years prior to the commencement of the action; but it also found that defendants' use had not been hostile to the plaintiff or his predecessor in interest, had not been open or notorious, or under claim of right, and that none of the defendants had ever asserted any claim to said ditch adverse to plaintiff or his predecessors in interest.

[1] This conclusion of the trial court cannot be said to be without ample support in the evidence. There is no evidence on the part of defendants that they ever asserted to any one any right to use the portion of the ditch for cultivation, or that they ever asserted to any one any claim that they were the owners of the land free from the easement. They rely solely upon statements that they had farmed the areas where they had destroyed the ditch and that their operations were visible.

Plaintiff called as a witness Mr. Elfving, secretary-treasurer of the Turlock Company and a director since 1934, who testified that he had attended all meetings of the directors of said company and that no resolution to abandon the ditch in controversy had ever been adopted by such directors, and that it had never been abandoned; that he did not know of Taylor's closing any part of the ditch, and though, probably in 1943, he had talked with Taylor about difficulties in getting water through it, and Taylor had said that the course which it followed was impracticable, Taylor had never made any claim of right to the ditch nor did he know that Taylor had closed any portion of it until the time of the trial; that he had never at any time seen that Taylor had closed any part of it. There is no evidence that either Taylor or Frederick had ever informed any one that they had closed a portion of the ditch, or that plaintiff knew that they had done so.

[2] That an easement acquired by grant or by a reservation having the effect of an implied grant is not lost by disuse is well established in this state and elsewhere. (Parker v. Swett, 188 Cal. 474, 480, 205 P. 1065; Parker v. Swett, 40 Cal. App. 68, 74, 180 P. 351; Currier v. Howes, 103 Cal. 431, 437, 37 P. 521; Copeland v. Fairview Land & Water Co., 165 Cal. 148, 167, 131 P. 119; City of Vallejo v. Scally, 192 Cal. 175, 177, 219 P. 63. Also see cases cited in 66 A.L.R. 1100 et seq.)

[3, 4] The essential elements for the establishment of a title by adverse possession are set forth succinctly in West v. Evans, 29 Cal.2d 414, 417, 175 P.2d 219, 220, as follows: (1) Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner; (2) possession must be hostile to the owner's title; (3) the holder must claim the property as his own, either under color of title, or claim of right; (4) possession must be continuous and uninterrupted for five years; (5) the possessor must pay all of the taxes levied and assessed upon the property during the period. And it was there said that actual possession means "a subjection to the will and dominion of the claimant," and that it must be established by the assertion of title, coupled with the acts of ownership which proclaim to the world and bring notice to the owner that a right is claimed in the land over which the claimant is seeking to exercise dominion.

[5] In order for the statute of limitations to run against a party there must be "definite and positive evidence" of an adverse claim and an adverse holding (Parker v. Swett, 40 Cal.App. 68, at page 73, 180 P. 351, 353), and the burden is upon claimants of a prescriptive right to prove same by the clearest and most satisfactory evidence (Pyramid Land etc. Co. v. Scott, 51 Cal.App. 634, 646, 197 P. 398; Crain v. Hoefling, 56 Cal.App.2d 396, 402, 132 P.2d 882).

In Janke v. McMahon, 21 Cal.App. 781, 784, 133 P. 21, it was held that mere occupancy, where there is no evidence that the occupant ever declared that he owned the land or that he intended to retain it as against the holder of the legal title, is not necessarily adverse. In Enos v. Murtaugh, 47 Cal.App.2d 269, 273, 117 P.2d 905, the court said that in order to be adverse the possession of a claimant must operate as an ouster of the holder of the true legal title. And in Hibberd v. McCosker, 55 Cal.App. 568, 569, 203 P. 810, it is asserted that the adverse character of a holding, in order to bar the claim of the holder of the legal title, must be manifested to the owner; that he must be notified in some way that the possession is hostile to his claim. And in Jones v. Tierney-Sinclair, 71 Cal.App.2d 366, 162 P.2d 669, the rule is stated that an adverse claim must be asserted in such manner that the owner may know of the claim. And it is said in 1 Am.Jur. 897, that "The mere fact that one is in possession of land, no matter how long such possession is continued, will not bar a recovery by the true owner thereof, unless the occupant asserts an exclusive ownership in himself, for, in the absence of such a claim, the law will presume his possession to be in subservience to the legal title." To the same effect see Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., 70 Cal.App. 283, 289, 233 P. 370.

[6] As the trial court found that defendants' possession had not been hostile to plaintiff or his predecessors, had not been open or notorious, or under a claim of right, and that none of the defendants had ever asserted any claim to the ditch adverse to plaintiff or his predecessors, and the evidence lands ample support to its conclusions, they are binding upon this court whatever evidence there may be which would tend to support a contrary conclusion.

[7] As for appellants' argument that the trial court erred in excluding evidence in regard to the organization of an improvement district and the construction by it of a new and different ditch over and across defendants' land, by means of which ditch defendants claim that plaintiff could irrigate his land, appellants cite no authority in support of their contention that the exclusion of such offered proof was erroneous; and we are unable to see what bearing it would have upon plaintiff's right to the easement which he claims and which belongs to him as the owner of the dominant tenement and which he acquired by his deed, especially since it is not shown nor claimed that he had acquired, or even could acquire any easement or right in the new ditch. It is scarcely within the province of the courts to compel the owner of an easement in an existing ditch to surrender it because the owners of the servient tenement believe that the owner of the dominant tenement could get water from another source with less burden upon the servient estates. See Edgar v. Pensinger, 73 Cal.App.2d 405, 414, 415, 166 P.2d 354; Hannah v. Pogue, 23 Cal.2d 849, 854, 855, 147 P.2d 572.

[8] Appellants' next contention is that the trial court erred in requiring, by its decree, that defendants restore the ditch to its former condition, as it existed at the commencement of this action, as shown on the profile map of said ditch, which was introduced in evidence as plaintiff's Exhibit 25 on the trial of this action. In their brief appellants assert that the court made no finding that defendants filled in any part of the ditch after this action was commenced, and therefore it had no basis for an order requiring them to restore it to its condition when the action was commenced. Appellants do not assert, however, that they did not destroy portions of the ditch after the commencement of the action. Their own testimony shows that they did. Frederick testified that he had some work done with heavy machinery during the past two weeks, and they had torn the ditch out; and Taylor testified that within the past sixty days he had "pulled away" a portion of the ditch—probably 300 or 400 feet—but had not finished the work. As this action was filed in June, 1944, and was tried in January, 1947, it is obvious that had the trial court made findings in this behalf they would have been adverse to defendants' present contention. The profile map of the ditch referred to by the court was made by Mr. Brookey, a surveyor, after a survey in 1944 with additional data secured just before the trial; and this witness also testified that appearances indicated that a portion of the ditch had been "knocked out" within the past week. Under such conditions the court was justified in issuing the injunction and in ordering defendants to restore the ditch to the condition in which it existed at the commencement of the action. (Taft v. Washington, 29 Cal.App. 197, 199, 154 P. 1073; Allen v. Stowell, 145 Cal. 666, 668, 79 P. 371, 68 L.R.A. 223, 104 Am.St. Rep. 80; McRae v. Blakeley, 3 Cal.App. 171, 174, 84 P. 679; Western etc. Co. v. Knickerbocker, 103 Cal. 111, 117, 37 P. 192; Morris v. George, 57 Cal.App.2d 665, 676, 677, 680, 135 P.2d 195; Island Reclamation District No. 776 v. Floribel Alfalfa Syndicate, 167 Cal. 467, 471, 140 P. 4; 14 Cal. Jur. 223-224; High on Injunctions (4th Ed.), sec. 708, p. 679; 28 C.J.S., Easements, § 107(f), p. 795.

[9] Finally, appellants urge that the court's finding that it is possible for plaintiff to irrigate his land from said ditch, and unless he is permitted to do so he will suffer great and irreparable injury, is contrary to the evidence. There may be a conflict of the evidence on this subject but Mr. Brookey testified that though the ditch would have to be rebuilt and repaired in part, a very good ditch could be built there and a steady flow of water effected. It

cannot be said, therefore, that there is no evidence to sustain the trial court's finding in this connection.

We find no reverseible error in the record, and the judgment of the trial court is affirmed accordingly.

THOMPSON and PEEK, JJ., concur.

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86 Cal.App.2d 397

SPENCER et al. v. CROCKER FIRST NAT. BANK OF SAN FRANCISCO.

No. 13675.

District Court of Appeal, First District, Division 1, California.

June 25, 1948.

Hearing Denied Aug. 19, 1948.

1. Appeal and error 🔑959(1)
Pleading 🔑225(2)

The right to amend after a demurrer has been sustained is not absolute, but may be granted or denied in discretion of court, and court's action will not be disturbed on appeal unless there has been a manifest abuse of discretion. Code Civ.Proc. § 472a.

2. Appeal and error 🔑854(3)

Where there is a general demurrer and a demurrer attacking court's jurisdiction, order sustaining demurrer in general terms must be affirmed if demurrer was properly sustained as to either of the grounds.

3. Pleading 🔑34(4)

The allegations of complaint must be construed against the pleader.

4. Appeal and error 🔑909(4)

In beneficiaries' action against executor, where court sustained special demurrer to first amended complaint because it could not be ascertained whether executor's final account had been settled, and second amended complaint did not supply the omission, reviewing court was required to assume that estate was still in course of probate and that no final account had been settled.

5. Executors and administrators 🔑507(1), 508(1)

On final accounting probate court may determine amount which executor holds belonging to estate or to beneficiaries, and if fraud has been practiced by executor, or executor refuses to make payments to beneficiaries as previously ordered, court may require executor to account to the victims of that fraud.

6. Courts 🔑475(2)

Beneficiaries of an estate discovering while estate is still in course of probate that executor has violated its trust must seek relief from probate court.

7. Courts 🔑475(2)

Beneficiaries under will who claimed executor had fraudulently induced them to release portions of their shares in the estate could not during pendency of probate proceedings maintain action against executor based on such fraud, since questions involved were within exclusive jurisdiction of probate court.

8. Courts 🔑475(2)

The fact that probate court was a part of superior court did not entitle beneficiaries under will who claimed that executor had fraudulently withheld a portion of their distributive shares to bring separate action against executor in superior court instead of seeking relief in probate court.

9. Executors and administrators 🔑429

Where plaintiffs were not entitled to recover on first cause of action alleged in their complaint in action against executor, they were likewise not entitled to recover on second cause of action which was merely a common count grounded on same facts set forth in first cause of action.

◆

Appeal from Superior Court, City and County of San Francisco; Herbert C. Kaufman, Judge.

Suit by Varian E. Spencer and others against the Crocker First National Bank of San Francisco, executor under the last will and testament of Meta S. Healy, deceased, to recover a portion of their shares under the will of the deceased of which they had allegedly been deprived by the fraud of the defendant. From a judgment sustaining a demurrer, the plaintiffs appeal.

Judgment affirmed.

Henry J. Kleefisch, of San Francisco, for appellants.

Cooper, White & Cooper, Edwin T. Cooper, Chickering & Gregory, and John Philip Coghlan, II., all of San Francisco, for respondent.

BRAY, Justice.

Appeal by plaintiffs from a judgment of the superior court on an order sustaining, without leave to amend, defendant's demurrer—both general and special in form—to the second amended complaint. The court also granted defendant's motion to strike such second amended complaint.

While there are many questions raised, this appeal resolves itself mainly into the question—when legatees under a will claim fraud by the executor in the settlement of a contest against the estate, must their claim be made in the probate court?

Plaintiffs, eight in number, are beneficiaries under the will of Meta S. Healy, while defendant bank is the executor thereunder. In the second amended complaint there are two causes of action, the second (not included in either of the first two complaints) being a common count, alleging the indebtedness of defendant to plaintiffs in the sum of $40,538.85 for "money had and received," obviously grounded upon and springing out of the identical facts and circumstances set forth in the first cause of action. That cause of action seeks damages in a similar sum for fraud. It alleges that the defendant bank owned and controlled the Crocker First Federal Trust Company; that Meta S. Healy died testate on May 27, 1942, and that defendant bank was appointed and qualified as the executor of her will; that she died childless and was the widow of William H. Healy, who died testate in 1931. The alleged fraud grew out of the proceedings in the probate of his estate. In his will, after certain bequests to other people, he bequeathed a specific cash legacy and the remainder and residue of his estate to his wife, Meta, with the "request" that upon her death she leave such portion as might be left of such remainder and residue to his heirs at law, who were Alice E. Healy and William R. Healy, children of his predeceased brother Alfred. During the course of administration of William's estate, the said Alice and William R. claimed an interest in the residue of the estate, on the theory that the "request" was mandatory. A compromise of their claim was reached, and an agreement in writing signed (Exhibit A to the complaint), under which it was agreed between the surviving wife, Meta, and the said Alice and William R., that Meta was to receive the entire residue of her husband's estate, but was to pay the sum of $5000 to the claimants' attorneys, and deposit in trust with defendant bank "under and through and in the name of its instrumentality, the Crocker First Federal Trust Company," bonds to the value of $150,000, from which she was to receive the income during her life, and on her death the principal was to pass from the trustee and vest in Alice and William R. In consideration of this settlement, the latter, for themselves and their heirs, waived all claim to the residue of their uncle's estate. A copy of the trust agreement between Meta Healy and Crocker First Federal Trust Company is annexed to the complaint.

After the death of Meta Healy, Alice and William R. instituted a contest of her will on the ground of testamentary incapacity. Except for the release contained in the above mentioned agreement, said persons, in case of Meta's intestacy, would be entitled to succeed[1] to whatever estate came to her as the separate property of her predeceased husband or as community property of him and her. Actually, by reason of said release, the said Alice and William R. were not entitled to contest said will or to succeed to any of her estate. (In addition to the property coming to her from her husband it is claimed that she had separate property of the value of about $250,000.) The defendant bank "carefully and studiously suppressed and concealed" from the beneficiaries of Meta's will, including the eight plaintiffs, none of whom knew of the release, its knowledge of the release, and while, as executor, occupying a position of trust towards plaintiffs and the other beneficiaries, procured them to sign an agreement with the executor authorising defendant, as executor, to deduct from the shares of said estate to be received by said beneficiaries the sum of $75,000, to be paid by it to Alice and William R., as a compromise of the claims of the latter in said estate and for a dismissal of said contest and a release of all claims. It is further alleged that plaintiffs' shares of said compromise paid by the executor from their interests in the estate amounted to $40,538.85; that defendant bank obtained from the probate court a decree of distribution of plaintiffs' shares in said estate but withheld from payment to them out of their distributive shares the said sum of $40,538.85 which defendant paid to said contestants; that each of the plaintiffs signed the authorization to pay their portion of the settlement out of his share of the estate at the importunity of, and by reason of his confidence in, defendant bank, and would not have done so had the fact of the prior release been revealed to him; and that defendant bank knew that plaintiffs were receiving no consideration for the payment to the contestants and the compromise was in fraud of plaintiffs' rights.

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[1] (under section 229, Probate Code)

The first amended complaint was substantially similar to the first cause of action in the second amended complaint. To the first amended complaint the defendant filed a general and special demurrer. The court overruled the general demurrer without prejudice to renewing it as to the next amended complaint, but sustained the special demurrer on the ground, among others, "that it cannot be ascertained from the Complaint whether or not there has been a final distribution of the Estate of Meta S. Healy, and whether or not the final account of the Executor of said Estate has been settled, allowed and approved." In spite of this ruling of the court, plaintiffs did not see fit in the following amended complaint to meet this objection and to allege whether there had been such account or distribution.

[1, 2] The right to amend after a demurrer has been sustained to a complaint is not an absolute one but is one which may be granted or denied in the discretion of the court; and its action will not be disturbed on appeal unless there has been a manifest abuse of discretion. Code Civ. Proc., sec. 472a; 21 Cal.Jur. 119, sec. 77; 9 Cal.Jur. 10 Yr. Supp. p. 216 et seq. In the absence of some valid explanation, the refusal of plaintiffs to amend, as directed in the order sustaining the demurrer to the first amended complaint, probably would justify the court in exercising its discretion in refusing to permit an amendment to the second amended complaint. However, there is a more important ground which requires that the court's action be affirmed, and that is, that as long as the probate court still had jurisdiction of the Meta Healy estate proceedings, the lower court did not have jurisdiction of the subject matter of the complaint. (This was one of the grounds of demurrer.) Where, as here, there is a general demurrer and a demurrer attacking the jurisdiction of the court, and the order sustaining the demurrer is general in terms, this order must be affirmed if the demurrer was properly sustained as to any one of those grounds. Moxley v. Title Ins. & Trust Co., 27 Cal.2d 457, 165 P.2d 15, 163 A.L.R. 838.

Although plaintiffs contend that their action is one against the defendant bank, in its individual capacity, for fraudulently procuring them to release portions of their shares in the Meta Healy estate, actually their cause of action (assuming for the purposes of demurrer that the allegations of their complaint are true) is based upon the fact that they are beneficiaries of the will; that defendant, as executor, fraudulently induced them so to act in order that as executor defendant might settle a contest of said will, and that defendant, as such executor, has improperly failed to pay them the share of said estate heretofore distributed to them by the court. It is really a controversy between the executor and the beneficiaries relating to the conduct of the executor and its administration of the estate. As said in Colden v. Costello, 50 Cal.App.2d 363, at page 370, 122 P.2d 959, 963: "The Probate Code provides one comprehensive, exclusive method for administration upon the estates of decedents. The proceeding is in rem and the jurisdiction of the court is complete over the property of the estate and over all persons claiming interests therein under the decedent, as to all matters involved in a complete and effective administration." And in Nickals v. Stanley, 146 Cal. 724, at page 726, 81 P. 117, 118, the court stated: "An administrator holds all of the assets of an estate subject to the control of the court having jurisdiction of the estate, and that court has sole and exclusive jurisdiction to settle the accounts of the administrator, and to determine to whom the property of the estate shall be set apart or distributed. *The liability of the administrator, arising from his dealings with the property of the estate, can, during the pendency of the administration and the lifetime of the administrator, be determined only by the judgment or order of such court* * * *." (Emphasis added.)

[3, 4] Under well established rules of pleading we must construe the allegations of the complaint against the pleader. 21 Cal.Jur. sec. 29, p. 51; 9 Cal.Jur. 10 Yr. Supp. sec. 29, p. 200. In view of the failure of the plaintiffs to amend as directed, we must assume that the Meta Healy estate is still in the course of probate and that no final account has yet been settled. Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516; Whittemore v. Davis, 112 Cal.App. 702, 297 P. 640. (This was stated to be the fact by respondent in its briefs and on oral argument, and appellants conceded that it was true.) In Parsley v. Superior Court, 40 Cal.App.2d 446, 104 P.2d 1073, the court upheld the granting of a writ of prohibition restraining the superior court from proceeding in an action brought by the surviving husband against the executrix of his wife's estate to "quiet title in himself and to establish property as community property and to recover personal property and to procure an accounting" on the ground that the estate proceeding was still pending in the probate court. The court said, 40 Cal.App.2d at page 450, 104 P.2d at page 1075: "From an examination of said provisions of the Probate Code it clearly appears that not only is the executrix charged with the duty of taking possession of all of decedent's property and of collecting all sums due the decedent or her estate and of accounting therefor to the court, but the code has provided ample safeguards to all persons interested in the estate of decedent by authorizing such parties to require the executrix to make an accounting and for such interested parties to contest the account so rendered. * * * The superior court sitting in probate has jurisdiction to determine against the executor the amount of money or property in his hands for the purpose of charging him therewith, and in determining that question the court may also determine the issues necessarily incidental thereto. Stevens v. Superior Court, 155 Cal. 148, 99 P. 512."

[5] Here it is charged that the defendant executor fraudulently paid out to other persons $40,538.85 of plaintiffs' shares in the estate. At the time of final accounting, the court may inquire into this claim, and if it is substantiated, compel the executor to account to plaintiffs for that sum. The probate court, on final accounting, has the right to determine what amount the executor holds belonging to the estate or to the beneficiaries, and if fraud has been practiced by the executor, or if the executor refuses to pay over to the beneficiaries of the estate money theretofore ordered distributed to them, the court may require it to account to the victims of that fraud.

In Landis v. Grimes, 38 Cal.App.2d 324, 100 P.2d 1089, the decedent, at the time of his death, owned certain bank stock which he had pledged to secure a certain debt. The executor of his estate caused the pledgee to sell this stock, and through an agent, the executor bought it at the pledge sale for far less than its actual worth. The executor in his first current account reported the sale and the money received therefrom (which the pledgee applied on the debt). The account was approved by the court. The legatees under the decedent's will knew nothing about the report until too late to appeal therefrom or to move under section 473 of the Code of Civil Procedure. When the executor filed his second current account the legatees sought to surcharge the first current account. The court refused to do so. Again, at the hearing of the final account and petition for distribution the legatees contested that account and asked the probate court to surcharge the final account. The court declined so to do. Thereafter the legatees brought suit against the executor claiming fraud in the pledge sale. In affirming an order sustaining a demurrer without leave to amend to the second amended complaint in that action, the court said, 38 Cal.App.2d at page 327, 100 P.2d at page 1090: "It is therefore clear the plaintiffs not only had a plain, speedy, and adequate remedy in the probate court, but they have exercised such remedy. *Conceding, as claimed, that the order settling the first account current may not be disturbed, nevertheless the probate court had power to surcharge the later accounts and, if any portion of the estate was being fraudulently converted, to direct the executor to recover it and account therefor in his later accounts.* In re Estate of Eilert, 131 Cal.App. 409, 21 P.2d 630; Security-First Nat. Bk. v. Superior Court, 1 Cal.2d 749, 757, 758, 37 P. 2d 69." (Emphasis added.)

[6, 7] The executor occupies a most confidential relationship to the beneficiaries of the estate. They have a right to rely on its representations and to assume that it will deal fairly and honestly with them. Because of this fact, it could easily happen that the beneficiaries would not discover the fraudulent character of the acts of an executor as it proceeds with the management of the estate until shortly before the final accounting. But, if they discover that the trust has been violated, and if the estate is still in course of probate, they must seek relief from the probate court, which still has jurisdiction of the executor and of the estate. Thus, during the pendency of the probate proceedings, all questions between the executor and the beneficiaries concerning its acts as executor and its relationship with them, are within the exclusive jurisdiction of the probate court.

[8] While there is only one superior court, and the probate court is merely a part thereof, that does not change the fact that where, as here, the parties are all "interested" in the estate and are already before the probate court, that court has exclusive jurisdiction of all questions concerning the conduct of the estate and their interests therein. Here the real question is whether the executor has fraudulently withheld a portion of the distributive shares of plaintiffs—beneficiaries of the estate.

In Curtis v. Schell, 129 Cal. 208, 61 P. 951, 79 Am.St.Rep. 107, the court used language which appears to support the position of plaintiffs. It said, 129 Cal. at page 216, 67 P. at page 953, 79 Am.St.Rep. 107: "The probate court does not possess the requisite machinery to try a question of fraud. That is the peculiar province of a court of equity." However, the ground of the decision was that "Under its probate jurisdiction the court cannot bring before it strangers to the estate for the purpose of adjusting their claims to property held by the executrix or administrator, or for determining their rights to the proceeds of a sale derived under those for whose benefits the sale was ordered." 129 Cal. at page 221, 61 P. at page 955, 79 Am.St.Rep. 107. In our case the parties are not strangers to the estate. Moreover, the opinion gives as one of the matters of which the probate court does not have jurisdiction "the distribution of the residue to those who are entitled thereto." 129 Cal. at page 220, 61 P. at page 955, 79 Am.St.Rep. 107. The probate court in this matter can determine on final distribution whether the plaintiffs are entitled to the $40,538.85 which they claim the executor improperly paid out. As said in Nickals v. Stanley, supra, 146 Cal. 724, 726, 81 P. 117, 118, the probate "court has sole and exclusive jurisdiction to settle the accounts of the administrator, and to determine to whom the property of the estate shall be set apart or distributed." In Estate of De Barry, 43 Cal.App.2d 715, at page 725, 726, 111 P.2d 728, 733, in which the probate court required the attorney for the estate to restore to the estate attorney's fees received by him under an agreement with the executrix and heirs in excess of the amount allowed by the court, it was held: "The estate of a deceased person is in the custody and control of the probate court and it is within its exclusive province to determine the validity and the amount of all claims that are made against the estate to the end that parties interested may be heard upon the propriety of such expenditures. * * * Where an officer of the court without authority withholds personal property of the estate the probate court may require him to restore the property to the estate. * * *" "It is now well settled that the court, sitting in probate, is clothed with jurisdiction to hear and determine, as against an administratrix the amount of money or property of the estate that has come into her hands, for the purpose of charging her therewith, and in determining that question to determine all issues necessarily incidental thereto. Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; In re Estate of Fulton, 188 Cal. 489, 205 P. 681; Bauer v. Bauer, 201 Cal. 267, 256 P. 820, 821; In re Estate of Kelpsch, 203 Cal. 613, 265 P. 214." In re Estate of Roach, 208 Cal. 394, 395, 281 P. 607, 608. "It affirmatively appears from the creditor's claim upon which plaintiffs herein rely that the liability sought to be asserted against the estate is one arising by virtue of the former status of Carl P. Coloneus as executor, and that the asserted causes of action relate to funds for which he should have accounted to the estate and with which his account, presented by his executrix, could be charged upon a settlement thereof. * * * It affirmatively appears from the complaint that the Cone estate is still under administration in the probate court. That is the proper forum and the only one for the adjudication of the claims sought to be prosecuted in this independent action." Best v. Coloneus, 56 Cal.App.2d 285, 288, 132 P.2d 260, 262.

At the oral argument, plaintiffs, in opposing the position taken by defendant that all matters concerning the alleged fraud of the executor and the payment by the executor of the $40,538.85 to the contestants, could and must be determined by the probate court on final accounting, contended, in addition to the claim that the probate court would have no jurisdiction to try the question of fraud, that the question of the statute of limitations might be raised by defendant. The cases hereinbefore cited demonstrate the right of the probate court to examine into the fraud question. The executor could not raise the bar of the statute of limitations as against any matter cognizable by the court on the accounting. This is conceded by defendant. Its attorneys stated in open court at the argument, that a proceeding was then pending in the probate court and that the right of the plaintiffs to challenge there the acts of the executor in question here still exists, "without any statute of limitation problem arising."[2]

[9] Plaintiffs concede that the second cause of action (common count) is for the same amount and arises out of the same transaction as the first cause of action. Therefore, if plaintiff is "not entitled to recovery under the first count, wherein all of the facts upon which the demand was based were specifically pleaded, he [is] not entitled to recover the same under the common count." Harris v. Kessler, 124 Cal.App. 299, 303, 12 P.2d 467, 468. See also Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 110 P.2d 396; Fruns v. Albertsworth, 71 Cal.App.2d 318, 162 P.2d 666; Birch Ranch & Oil Co. v. Campbell, 43 Cal.App.2d 624, 111 P.2d 445.

As the sole jurisdiction of the subject matter and the parties is in the probate court, the demurrer to the second amended complaint was properly sustained without leave to amend, and the motion to strike that complaint was properly granted. The judgment is affirmed.

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[2] Question by Peters, P. J.: "Do you agree with your associate counsel that there can still be, without any statute of limitations problem arising, a proceeding in the Probate Court to challenge the very actions that are here challenged?" Answer of Attorney John Philip Coghlan II, representing defendant: "Yes."

Also on oral argument—question by Peters, P. J.: "Counsel, do you state to this Court now that there is still open to these litigants the right to proceed before Judge Fitzpatrick?" Answer by Attorney Edwin T. Cooper, also representing defendant: "Absolutely." Presiding Justice Peters: "To challenge the right of the Executor?" Mr. Cooper: "Absolutely."

PETERS, P. J., and WARD, J., concur.

86 Cal.App.2d 373

SCUTT v. BASSETT.

Civ. 16331.

District Court of Appeal, Second District, Division 2, California.
June 23, 1948.

Rehearing Denied July 8, 1948.
Hearing Denied Aug. 19, 1948.

1. Appeal and error 🔑931(1)

On appeal, conflicting evidence is viewed in light most favorable to respondent.

2. Trover and conversion 🔑35

In an action for conversion, plaintiff must prove either ownership with right of possession or actual possession of article claimed to have been converted at time of alleged conversion.

3. Trover and conversion 🔑40(3)

Where defendant had not delivered 5 of 88 cranes manufactured for plaintiff, and plaintiff had moved without leaving a forwarding address, made no request or demand for delivery, and did not offer payment for such cranes, evidence established that plaintiff did not have either ownership with right to possession or actual possession of cranes so as to be entitled to maintain action for conversion by reason of defendant's sale of such cranes.

4. Trade-marks and trade-names and unfair competition 🔑68(1)

To constitute unfair competition with respect to commodities or between persons, there must be actual competition, and that cannot exist in absence of some competing commodity or persons.

5. Trade-marks and trade-names and unfair competition 🔑93(3)

Where plaintiff's uncontradicted testimony disclosed that he was not in business during period when he claimed that defendant was unfairly competing by continuing the manufacture of sale of automobile cranes of same kind that defendant had previously manufactured for plaintiff, defendant was not guilty of unfair competition.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action by H. B. Scutt, doing business as California Lift Company, against F. O. Bassett, doing business as Modern Welding Works, for damages for conversion, for unfair competition, and for injunction. Judgment for plaintiff, and defendant appeals.

Reversed.

Ernest A. Tolin and W. Claude Fields, Jr., both of Los Angeles, and Paul A. Mason, of Long Beach, for defendant-appellant.

Newby, Holder & Newby, by Dee Holder, all of Los Angeles, for plaintiff-respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after a trial before the court without a jury in an action for damages (a) for conversion, (b) for unfair competition, and (c) to enjoin defendant from making automobile cranes or engine stands which are of the same construction as those heretofore manufactured under a contract by defendant for plaintiff, defendant appeals.

[1] The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are these:

Prior to March, 1945, plaintiff was a salesman for the Stuart Manufacturing Company, a manufacturer of automobile cranes. In the month just mentioned plaintiff entered into a contract with defendant whereby defendant, who was the owner of a welding and iron working shop, agreed to build thirteen automobile cranes similar to a Stuart crane. For this experimental work, defendant was paid the sum of $1,000. On September 1, 1945, plaintiff and defendant entered into a further contract by the terms of which defendant agreed to build one hundred additional cranes for plaintiff at a cost of $60 each. By May 6, 1946, defendant had constructed eighty-eight of these cranes and delivered eighty-three of them to plaintiff. About May 6, 1946, plaintiff and defendant had a dispute and defendant ordered plaintiff to leave his premises, which plaintiff had been using as his business headquarters. Plaintiff complied with defendant's request but left no forwarding address. He made no request or demand for delivery of the five additional cranes which had been completed, nor did he offer payment for them.

Plaintiff filed an application for a patent upon the cranes and in July, 1946, notified defendant of the fact that he had made such application.

In July, 1946, defendant sold the five cranes and some engine stands which he had constructed under his contract with plaintiff. In addition, defendant manufactured seventy-five more cranes and sold them to former customers of plaintiff. The cranes and stands thus manufactured were of the same design as those manufactured by defendant under his contract with plaintiff.

Plaintiff instituted the present suit predicated upon two causes of action; first, for conversion based upon defendant's selling five of the eighty-eight cranes which he had manufactured for plaintiff under their contract; second, based upon unfair competition in that defendant had manufactured some seventy-five cranes and certain stands and sold them to plaintiff's former customers, which were of the same design as those manufactured by defendant for plaintiff under their contract.

Questions Presented for Determination.

First: *Did the evidence sustain the trial court's finding that defendant had converted personal property belonging to plaintiff?*

[2] This question must be answered in the negative and is controlled by this pertinent rule of law: In an action for conversion, plaintiff must prove either (1) ownership with the right of possession, or (2) actual possession of the article claimed to have been converted at the time of the alleged conversion. (Middlesworth v. Sedgwick, 10 Cal. 392, 393; National Lumber Co. v. Tejunga Valley Rock Co., 22 Cal.App. 726, 730, 136 P. 508; McCoy v. Northwestern Casualty & Surety Co., 3 Cal.App.2d 534, 537, 39 P.2d 864.)

[3] In the instant case the uncontradicted evidence disclosed that plaintiff did not have either ownership with the right to possession or the actual possession of the machines alleged to have been converted by defendant. Therefore, applying the foregoing rule, plaintiff failed to establish a cause of action for conversion.

Second: *Did plaintiff establish a cause of action for unfair competition?*

[4] This question must likewise be answered in the negative and is governed by this pertinent rule: To constitute unfair competition with respect to commodities or between persons there must be actual competition, and that cannot exist in the absence of some competing commodity or persons. (Raladam Co. v. Federal Trade Comm., 6 Cir., 42 F.2d 430, 436; Carroll v. Duluth Superior Milling Co., 8 Cir., 232 F. 675, 681. See also Federal Trade Comm. v. Raladam Co., 283 U.S. 643, 647, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191, and cases cited in 63 Corpus Juris (1933) p 389, Trade-marks, Trade-names and Unfair Competition, sec. 100, footnote 11.)

[5] In the instant case, the uncontradicted testimony of plaintiff disclosed that he was not in business during the period when he claimed that defendant was engaged in unfair competition.* Therefore, applying the foregoing rule to the present

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* Plaintiff's testimony on this subject was as follows:

"Q. After you moved your place of business into your home, did you continue to sell to the same customers? A. No.

"Q. To whom you had previously sold? A. No.

"Q. Did you solicit them? A. I called on them and told them that I had had some trouble with Mr. Bassett and I didn't case, plaintiff failed to establish one of the essential elements of a cause of action for unfair competition.

There is no question presented in this case relative to defendant's using any of plaintiff's trade secrets for the reason that plaintiff's own testimony disclosed that he had no trade secrets.

Standard Parts Co. v. Peck, 264 U.S. 52, 44 S.Ct. 239, 68 L.Ed. 560, 32 A.L.R. 1033; Magnetic Mfg. Co. v. Dings Magnetic Separator Co., 8 Cir., 16 F.2d 739; Houghton v. United States, 4 Cir., 23 F.2d 386; Dinwiddie v. St. Louis & O'Fallon Coal Co., 4 Cir., 64 F.2d 303; Famous-Players-Lasky Corp. v. Ewing, 49 Cal.App. 676, 194 P. 65; and Wireless Specialty Apparatus Co. v. Mica Condenser Co., 239 Mass. 158, 131 N.E. 307, 16 A.L.R. 1170, relied on by plaintiff, are factually different from the present case. In each of the cases cited the problem involved was the right of the employer to recover or secure ownership of certain patent rights which were acquired by an employee while employed in a master-servant relationship. Obviously, such a situation does not obtain in the present case and therefore such cases are here not applicable.

In Goodyear Tire & Rubber Co. v. Miller, 9 Cir., 22 F. 2d 353, specific performance of an agreement by defendant to assign to plaintiff patents secured while defendant was in plaintiff's employ was the basis of the litigation. Such a situation is entirely different from that now presented to this court.

Holley v. Hunt, 13 Cal.App.2d 335, 56 P.2d 1240, also relied on by plaintiff, merely held that the superior court had jurisdiction of a cause of action for unfair competition and that upon proof of unfair competition, injunctive relief is appropriate.

Tobin Grocery Co. v. Spry, 204 Cal. 247, 267 P. 694, pertains to an employee who misappropriated funds of his employer and was ordered to account for the money and its use. The reason for the citation of such case by plaintiff is not apparent. Neither is section 2237 of the Civil Code defining the duty of a trustee to account to a beneficiary for profits derived from the use or disposition of trust property relevant to the questions here presented for determination.

In view of our conclusion, it is unnecessary to discuss other propositions presented by counsel. The trial court erred in granting a judgment in favor of plaintiff.

The judgment is reversed.

MOORE, P. J., concurs.

WILSON, Justice (concurring).

I concur. It should be made clear that by reason of the rapid development of the law of unfair competition and of the judicial declaration of rules that are made applicable to new situations when and as they arise, any rule announced should be specifically limited in its application to the particular subject then in question.

General statements such as the following always lead to confusion. In Raladam Co. v. Federal Trade Comm., 6 Cir., 42 F.2d 430, 436, it is said that unfair competition cannot exist "unless there is competition, and there cannot be competition unless there is something to compete with." In American Philatelic Society v. Claibourne, 3 Cal.2d 689, 697, 46 P.2d 135, 139, the court said that "the essence of unfair competition lies in the simulation and limitation of the goods of a rival or competitor with the purpose of deceiving the unwary public into buying the imitation under the impression that it is purchasing the goods of such competitor."

Conceding the accuracy of these statements as applied to the facts in the respective cases above cited, numerous decisions are to be found in the books in which unfair competition in the use of a name has been enjoined when one party was not sell-

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know when I could make deliveries after that.

"Q. Did you undertake to find someone else to manufacture your hoist? A. Yes.

"Q. Did you find someone? A. No.

"Q. Did you solicit any business from your previous customers? A. No, I didn't solicit any business from them because I couldn't fill their orders and there was no need of it."

ing his product in competition with that of another. If confusion is likely to result whereby the public would be led to believe that the merchandise produced or sold by one is produced or sold by another or that the producer or merchant first in the field is in some manner connected with the newcomer, an injunction will issue even though the products of the parties are wholly dissimilar and for that reason the sale of the newcomer's article would not be in competition with or prevent the sale of the article produced or sold by the person first engaged in business.

Events have occurred and no doubt others will occur hereafter rendering necessary the restraining hand of the court to thwart efforts to pirate the good will of established businesses by acts of unfair competition, although the business or commodity of the junior dealer is not in direct competition with that of the established operator.

Decisions limiting the injunctive process of the court to the restraining of competition by unfair means of the producer of one product with another producer of a similar product have been outmoded in the development and extension of the law within recent years so that acts are now enjoined that were not prohibited by or that were expressly sanctioned by former decisions.

Injunctions are no longer limited to situations in which there is actual market competition. The desiccated doctrine of L. E. Waterman Co. v. Modern Pen Co., 235 U.S. 88, 35 S.Ct. 91, 59 L.Ed. 1421, and Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U.S. 554, 28 S.Ct. 350, 52 L.Ed. 616, wherein a name similar to one previously in use was permitted to be used in the same kind of business provided the public was informed that the second user was not connected with the first, has been superseded by decisions sustaining injunctions prohibiting a junior user from appropriating or imitating an established name in connection with an article not at all similar to that manufactured or sold by the original user of the name and which is not competitive with the latter's product. Del Monte Special Food Co. v. California Packing Corp., 9 Cir., 34 F.2d 774, 775; Akron-Overland Tire Co. v. Willys-Overland Co., 3 Cir., 273 F. 674; Wall v. Rolls-Royce of America, Inc., 3 Cir., 4 F.2d 333, 334; Duro Co. v. Duro Co., 3 Cir., 27 F.2d 339; Yale Electric Corp. v. Robertson, 2 Cir., 26 F.2d 972, 974; Peninsular Chemical Co. v. Levinson, 6 Cir., 247 F. 658, 661; Vogue Co. v. Thompson-Hudson Co., 6 Cir., 300 F. 509, 512; certiorari denied 273 U.S. 706, 47 S.Ct. 98, 71 L.Ed. 850; Lady Esther, Ltd., v. Lady Esther Corset Shoppe, Inc., 317 Ill.App. 451, 46 N.E.2d 165, 167, 148 A.L.R. 6, 9; Ward Baking Co. v. Potter-Wrightington, 1 Cir., 298 F. 398; Pennsylvania Storage Battery Co. v. Mindlin, 163 Misc. 52, 296 N.Y.S. 176, 178-9; Finchley, Inc., v. Finchly Co., Inc., D.C., 40 F.2d 736, 738; American Products Co. v. American Products Co., D.C., 42 F.2d 488, 490; Armour & Co. v. Master Tire & Rubber Co., D.C., 34 F.2d 201, 202. See also cases cited in note, 148 A.L.R. 22.

It is manifest from this discussion, sustained by the authorities cited, that unfair competition may be and frequently is present even though the commodities produced or sold by the two litigants are totally dissimilar. In other words, there may be unfair competition even in the absence of "something to compete with" and "the essence of unfair competition" does not always lie "in the simulation and imitation of the goods of a rival or competitor."

86 Cal.App.2d 407

COMPAS et ux. v. ESCONDIDO MUT. WATER CO. et al.

Civ. 3691.

District Court of Appeal, Fourth District, California.

June 25, 1948.

1. Action ⚿6

A complaint for declaratory relief is legally sufficient if it sets forth facts showing existence of an actual controversy relating to legal rights and duties of respective parties under a written instrument and requests that such rights and duties be adjudged. Code Civ.Proc. § 1060.

2. Action ⚿6

Complaint, alleging plaintiffs' purchase of house and lot from certain defendants, that other defendants claimed that structure extended onto their property, although they had permitted its erection without complaint, and praying for a declaration of rights and duties of parties stated a cause of action for declaratory relief. Code Civ. Proc. § 1060.

3. Fraud ⚿41

Complaint, alleging that plaintiffs purchased property from defendants in reliance upon representations by defendants as to boundary line, which representations were knowingly false, and that plaintiffs were damaged thereby, stated a cause of action for damages for fraud sufficient against general demurrer.

4. Fraud ⚿41

The essential averments in pleading "fraud" are fraudulent representations, knowledge by defendant of falsity, intent to deceive, reliance on representations believing them to be true, and injury suffered as result thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

5. Quieting title ⚿34(1)

Complaint in usual form of actions to quiet title to real estate and against all defendants was sufficient against general demurrer.

6. Quieting title ⚿34(5), 35(2)

A complaint to quiet title is sufficient if it alleges that plaintiff is owner of described property, that defendant claims an interest therein adverse to plaintiff, and that such claim is without right.

7. Pleading ⚿218(3), 225(1)

Where facts sufficient to state a cause of action were alleged in each of the three counts of amended complaint, the sustaining of general demurrers without leave to amend was error.

8. Pleading ⚿225(1)

Where objections to complaint raised by special demurrers could have been obviated by amendment, permission should have been granted to plaintiffs to amend.

9. Pleading ⚿225(1)

Unless it is clear that a complaint does not state a cause of action and cannot be so amended as to obviate objections thereto, refusal of permission to amend is error.

10. Pleading ⚿225(1)

A demurrer on ground of improper joinder of causes of action in same complaint should not be sustained without leave to amend when it appears that defect can be cured by amendment.

◆

Appeal from Superior Court, San Diego County; V. N. Thompson, Judge.

Action by Stephen A. Compas and Jeannette A. Compas, his wife, against Escondido Mutual Water Company and others for declaratory relief, for damages for fraud, and to quiet title. From judgments of dismissal entered after defendants' demurrers were sustained without leave to amend, plaintiffs appeal.

Judgment reversed.

Phil D. Swing and C. H. Scharnikow, both of San Diego, for appellants.

Eugene Glenn, Donald B. White, and Gray, Gary, Ames & Driscoll, all of San Diego, for respondents.

MUSSELL, Justice pro tem.

This is an appeal by the plaintiffs from judgments of dismissal entered after sustaining the separate demurrers of the defendants to plaintiffs' second amended complaint without leave to amend.

There are three causes of action alleged in the complaint. In the first cause it is alleged in substance that in March, 1945, the plaintiffs purchased certain real property, described therein, from the defendants Charles F. Meyer and Myra C. Meyer, his wife. The defendant Myra C. Meyer died after the commencement of this action and the defendant Charles F. Meyer as executor was substituted as defendant in her place. Defendants Charles F. Meyer and Charles F. Meyer, as executor, will hereafter be referred to as the "defendants Meyer."

It is further alleged that the defendant Escondido Mutual Water Company, a corporation, hereinafter referred to as the "water company," is the owner of certain land lying immediately adjacent on the east to a portion of the land thus purchased by plaintiffs; that before plaintiffs purchased the property there had been constructed thereon by the Meyers a substantial and costly residence; that before the plaintiffs purchased the property the defendants pointed out to the plaintiffs a certain fence running in a northerly and southerly direction in the vicinity of and to the east of the residence, and represented to the plaintiffs that this fence was the easterly boundary line of a portion of the property and that the residence was entirely located west of this boundary line and entirely within and on the land to be purchased; that the plaintiffs believed and relied upon these representations and were thereby induced to purchase the property and to spend large sums of money in improvements, and that the plaintiffs would not have purchased the property, nor have spent any money in its improvement, except for these representations.

It is further alleged in the first cause of action, upon information and belief, that at the time of the erection of the residence in June, 1942, by defendants Meyer, the defendant water company was aware of and had knowledge of the construction of the residence by the defendants Meyer, and was at all times aware of and had knowledge of the exact site, place and location of its erection; that the defendant water company did not at any time object to the construction of the residence in the location where it was erected; and that it permitted them to expend large sums of money in the construction of the residence without objection and without any notice or claim of any kind that it was being constructed either wholly or in part upon the lands owned or claimed by the water company.

It is then alleged in the first cause of action that an actual controversy has arisen and now exists between plaintiffs as successors in interest of the Meyers on the one hand and the water company on the other relating to the true location of the residence, and relating to the true location of the boundary line between the properties. It is alleged that plaintiffs contend that the true and correct easterly boundary line is where it was represented to plaintiffs to be by the defendants Meyer, namely, east of the residence, and that the residence is located entirely within and upon a portion of the property purchased by the plaintiffs. It is alleged that the water company contends that the residence extends over onto and upon the adjacent land owned by the water company.

It is further alleged that the defendants Meyer are joined as defendants for the reason that their interests and their liabilities to the plaintiffs arising out of the sale by them to the plaintiffs of the property, and their representations to plaintiffs as to the location of the boundary line and the location of the residence may be affected by the determination of the controversy between plaintiffs and the water company, and that their interests and liabilities will necessarily be affected if the residence extends over onto the land of the water company, in that if the residence is not entirely within and upon the land purchased by plaintiffs from them, and is either wholly or partly upon the adjacent land of the water company, plaintiffs have suffered damages thereby.

The second cause of action, after referring to the purchase of the property by the plaintiffs from the defendants Meyer, alleges the representations of the defendants concerning the location of the boundary line and of the residence, and the plaintiffs' reliance upon those representations, and then alleges that the statements and representations so made to the plaintiffs by the defendants Meyer were false and untrue, and were known to be false and untrue by the defendants Meyer; that in truth and in fact the easterly boundary line of the portion of the property involved was and is westerly of the place where it was represented to be by the defendants Meyer, and in truth and in fact it intersects and divides the residence which the plaintiffs understood and believed was located upon the property being purchased from the defendants Meyer, and that a portion of the residence extends over onto the land of the water company by reason of which plaintiffs have been damaged in the sum of $50,000.

The third cause of action is a statement of a cause of action to quiet title to the real property upon which the residence is located. It is in the usual form of such actions and is against all the defendants.

The defendants demurred to the complaint both generally and specially. The trial court sustained the demurrers to each cause of action, without leave to amend, and separate judgments of dismissal were entered in favor of the defendants.

It is the contention of the plaintiffs that the first cause of action states a cause of action against both defendants.

[1] A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court. Code Civ. Proc. Sec. 1060; Maguire v. Hibernia Savings & Loan Society, 23 Cal.2d 719, 728, 146 P.2d 673, 151 A.L.R. 1062; Columbia Pictures Corp. v. DeTroth, 26 Cal.2d 753, 760, 161 P.2d 717, 162 A.L.R. 747.

[2] The allegations in the first cause of action of the complaint state a cause of action for declaratory relief and meet the requirements of the statute.

[3] The second contention of plaintiffs is that the second cause of action states a cause of action against the defendants Meyer. This cause of action is for damages for fraud.

[4] The essential averments in pleading fraud are stated in California Jurisprudence as follows:

"The pleadings must, of course, show the fraudulent representations; that they were known by the defendant to be false or were made under circumstances not warranted by his knowledge; that they were actually false; that they were made with intent to deceive the plaintiff, or with intent to induce him to enter the transaction; that the plaintiff relied upon the representations, believing them to be true; and that he was injured." 12 Cal.Jur. 806; Cohen v. Metropolitan Life Ins. Co., 32 Cal.App.2d 337, 348, 89 P.2d 732.

Defendants argue that the allegations of the second cause of action do not show that plaintiffs suffered damage as a result of the alleged false representations and that there is no allegation that plaintiffs have been damaged as a result of the false representations. The allegations of this cause of action are sufficient to meet the requirements as against a general demurrer and the objections urged by defendants could be obviated by amendment.

[5] The third cause of action is a sufficient statement of a cause of action against both defendants to quiet title to the portion of the property upon which the residence is claimed to be and contains the usual and customary allegations in such an action.

[6] It has been held that in a complaint to quiet title it is sufficient to allege that plaintiff is the owner of certain described property, that the defendant claims an interest therein adverse to plaintiff, and that such claim is without right. 22 Cal.Jur. 146; Williams v. San Francisco, 24 Cal. App.2d 630, 633, 76 P.2d 182.

[7, 8] Facts sufficient to state a cause of action were alleged in each of the three counts of the second amended complaint herein and the general demurrers should not have been sustained without leave to amend. The objections to the complaint raised by special demurrers could have been obviated by amendment and permission,

should have been granted to plaintiffs to file an amended complaint.

[9] In Hillman v. Hillman, 81 Cal.App. 2d 174, 183 P.2d 730, 735, it was said: "Unless it is clear that a complaint does not state a cause of action and cannot be so amended as to obviate the objections thereto it is error to refuse permission to amend. Hamer v. Ellis, 40 Cal.App. 57, 59, 180 P. 30. Citing cases."

[10] And in Lord v. Garland, 27 Cal.2d 840, at page 854, 168 P.2d 5, 13, the court said: "Moreover, a demurrer upon the ground of improper joinder of causes of action in the same complaint should not be sustained without leave to amend when it appears that the defect can be cured by amendment."

The judgments are reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

86 Cal.App.2d 380

NATIONAL CITY v. DUNLOP et al.

Civ. 3675.

District Court of Appeal, Fourth District, California.

June 24, 1948.

1. Appeal and error 🔑931(3)

Where findings of fact and conclusions of law were waived, every intendment was in favor of the judgment, and on all issues before the trial court, it was required to be presumed that court found all facts necessary to support the judgment.

2. Appeal and error 🔑931(3)

If there was any substantial evidence to support judgment in action in which findings of fact and conclusions of law were waived, it was necessary to affirm the judgment.

3. Municipal corporations 🔑657(7)

In action by city to eject defendants from realty and to enjoin them from occupying or using it on ground that the realty had been regularly dedicated as a city street, and that resolution of city closing street was void because of failure to comply with Street Vacation Act, city had burden of proving invalidity of resolution, and all presumptions were in favor of validity thereof. Streets and Highways Code, § 8322.

4. Evidence 🔑87

Statutory presumptions that official duty has been regularly performed and that the law has been obeyed, though disputable, are in themselves evidence and will support a finding made in accordance with them even though there be evidence to the contrary. Code Civ.Proc. § 1963, subds. 15, 33.

5. Municipal corporations 🔑657(7)

In action by city to eject defendants from realty and to enjoin them from occupying or using it on ground that resolution of city closing street was void because of failure to comply with Street Vacation Act wherein city's street superintendent and city engineer testified that notices required by the act were not posted, it was for trier of facts to determine whether testimony of superintendent and engineer was sufficiently convincing to overcome presumption that required notices were in fact posted. Code Civ.Proc. § 1963, subds. 15, 33; Streets and Highways Code, § 8322.

6. Municipal corporations 🔑657(7)

In action by city to eject defendants from realty and to enjoin them from occupying or using it on ground that resolution of city closing the street was void because of failure to comply with the Street Vacation Act, evidence sustained finding that city failed to prove a noncompliance with procedural step of posting notices of time and place of hearing prior to closing of street as required by act. Code Civ. Proc. § 1963, subds. 15, 33; Streets and Highways Code, § 8322.

7. Municipal corporations ⚷657(5)

Resolution of city vacating street was not void because made on condition that substantial commercial enterprises be operated on the realty for the period of five years from date of resolution. Streets and Highways Code, § 8322.

8. Municipal corporations ⚷657(2)

Resolution of city vacating a street so that realty could be used for private use was not void, in absence of fraud or collusion between city and private landowners.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by the City of National City, a municipal corporation, against Mary Z. Dunlop and Harry Dunlop, husband and wife, and E. A. Boyle to eject defendants from certain realty and to enjoin them from occupying or using the realty. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment affirmed.

Campbell & Campbell, of National City, for appellant.

Monroe & McInnis, of San Diego, for respondents.

MUSSELL, Justice pro tem.

This is an appeal from a judgment for defendants in an action brought by the city of National City, a municipal corporation, to eject defendants from certain real property and to enjoin them from occupying or using the said land.

The complaint alleges that at the time the present action was commenced, and for many years prior thereto, the land in question was a public street within the plaintiff municipality; that plaintiff city is the owner and entitled to possession thereof, and that defendants have entered upon and have exercised exclusive possession and control over said land. The defendants admit occupancy of the property. They allege they have made improvements thereon and will continue to occupy the same, and that the land is not a public street but is their private property.

Findings of fact and conclusions of law having been waived, the trial court rendered judgment denying an injunction and that plaintiff have no relief upon its complaint.

The property involved herein was a part of 24th Street in the city of National City. The street had been regularly dedicated but the portion which is the subject of this action was never physically open or used as a street.

The city council of plaintiff city passed a written resolution on the 29th day of June, 1943, which resolution contained a recital that because of existing emergencies and the necessity for closing the street, it was to the best interest and furtherance of the war effort and because the said street was unnecessary for present or prospective public street uses, that that portion of 24th Street lying between Blocks 280 and 281 and between the westerly line of Cleveland Avenue and the easterly line of Harrison Avenue, was thereby vacated and closed, subject to divestment as thereinafter set forth. The resolution contained the following provision:

"Be it Further Resolved that in the event said National City Dehydrating Company, or its assigns and successors and the said Stewart & Bennett, or their assigns and successors fail to operate a substantial commercial enterprise upon the said demised premises or a major portion thereof for a period of five years from the date of this resolution, then, and in that event, the deeds, which were executed simultaneously herewith by the said National City Dehydrating Company and the said Stewwart & Bennett to the City of National City, and which deeds are in escrow with said city shall be immediately recorded. In the event said conditions are fulfilled for a period of five years, said deeds shall be delivered to the said National City Dehydrating Company, a corporation, or its assigns or successors, and the said Stewart & Bennett, and said vacation and closing shall be absolute."

Prior to the passage of the resolution the city council adopted an ordinance of intention to vacate and close a public street in the city of National City, which ordinance described the portion of 24th Street involved herein. The time for hearing objections to the proposed vacation was set for June 29th, 1943, at the city hall, National City, California. Section 3 of the ordinance provides as follows:

"That the United States of America is at War with several nations and a state of emergency exists and therefore this ordinance is passed as an emergency ordinance for the immediate preservation of the public peace, health and/or safety and shall be in full force and effect as and of the date of final passage."

Section 4 requires the city clerk to cause the ordinance to be published once in the National City News, a weekly newspaper printed and published in the city.

Defendants purchased the property, which abuts on 24th Street, from the corporation and parties named in the resolution as having executed deeds to the city of National City, and at the time of the commencement of this action were building a slaughter house on the property adjacent to 24th Street. They were using the property involved in the vacation and closing proceedings, and claim the expenditure of approximately $20,000.00 in the construction of the slaughter house and in the improvement of the land upon which it is situated.

[1, 2] Before considering the contentions of the plaintiff, it should be observed that inasmuch as findings of fact and conclusions of law were waived, every intendment is in favor of the judgment, and upon all issues before the trial court it must be presumed that the court found all the facts necessary to support the judgment. If there is any substantial evidence to support the judgment it must be affirmed. Haime v. de Beaulieu, 20 Cal.2d 849, 852, 129 P.2d 345; Smith v. McKinstry, 69 Cal.App.2d 95, 96, 158 P.2d 262.

The plaintiff first contends that the resolution closing the street is void because of a failure to comply with the portion of the Street Vacation Act of 1941, which requires the posting of notices of time and place of hearing.

Section 8322 of the Streets and Highways Code provides in part as follows:

"Notices of street vacation shall be posted conspicuously along the line of the street or part thereof proposed to be vacated. Such notices shall be posted not more than 300 feet apart, but at least three shall be posted. Such notices shall state the passage of the ordinance of intention and the time and place of the hearing."

The testimony offered by plaintiff in an attempt to show that such notices were not posted consists of the statements of the city engineer that he did not post the notices and that to his knowledge notice was not posted as required by law, together with the statement of the superintendent of streets to the effect that all official posting done in the city of National City was done by him; that he knew no posters were ordered and he therefore knew that no posting was done in accordance with law.

Section 8322 of the Streets and Highways Code does not direct a specific person to post the notices, and plaintiff contends that in such case the clerk is required to perform that duty. There was no testimony offered that the clerk or some one in his office did not actually post the required notices.

[3] The burden of proving the invalidity of the resolution is on the plaintiff city and all presumptions are in favor of the validity of an ordinance which has been passed relating to a matter which is within the legislative power of the municipality. City of Yuba City v. Cherniavsky, 117 Cal.App. 568, 572, 4 P.2d 299.

[4] The trial court, in determining whether or not to accept the testimony of the superintendent of streets and the city engineer, as proof of the nonposting of the notices of street vacation had a right to consider the presumptions raised by law "that official duty has been regularly performed" (Code Civ.Proc. Sec. 1963, Subd. 15); and "that the law has been obeyed" (Code Civ.Proc. Sec. 1963, Subdv. 33). These presumptions, while disputable, are in themselves evidence and will support a

finding made in accordance with them even though there be evidence to the contrary. People v. Siemsen, 153 Cal. 387, 390, 95 P. 863.

[5] It was for the trial judge to determine whether the testimony of the street superintendent and the city engineer were sufficiently convincing to overcome the presumption that the required notices were in fact posted.

[6] It is stated in plaintiff's opening brief that the court found substantially "That plaintiff city did not prove a noncompliance with the procedural step of posting notices of time and place of hearing prior to the closing of the street." Considering the evidence offered in the light of the presumptions we think this finding should not be disturbed on appeal.

Plaintiff next contends that the street was never closed nor vacated. This contention is based upon the provisions of the resolution relating to divestment in the event of the failure of National City Dehydrating Company, and Stewart & Bennett, or their assigns and successors, to operate a substantial commercial enterprise upon the premises or a major portion thereof for a period of five years from the date of the resolution.

[7] No competent evidence was offered at the trial to show that the defendants had failed to use the property as required by the resolution. The record does not disclose that any steps were taken by the city to declare a breach of conditions contained in the resolution. The apparent position taken by the plaintiff is that because of the condition the resolution is valid. No authority is cited to sustain this contention. In Portland Baseball Club v. City of Portland, 142 Or. 13, 18 P.2d 811, 813, the plaintiff contended that the city council had no authority to annex a condition subsequent to an ordinance of the city of Portland, the condition being that the vacation proceedings should not be valid unless the Portland Baseball Club should on or before a certain date construct a grandstand, bleachers and clubhouse on the property described in the ordinance. The court there said:

"'The effect of a condition subsequent,' said Shaw, C. J., in Harrington v. Harrington, 1 Metc. 404, 42 Mass. 404, 408, 'is not to prevent the act to which it is annexed from taking present effect; but it may defeat it afterwards, or be attended with other legal consequences.' It is obvious that the passage of this ordinance was to give immediate effect to the vacation of the street, and, if the condition was contrary to law, then the condition alone was void, and the vacation would stand as if it were absolute and unconditional."

[8] Plaintiff's third contention is that streets cannot be closed for private use. The plaintiff city in its brief recognized the general rule that the act of the council in ordering the vacation of a street is legislative in character and the act of a legislative body is conclusive as to a finding of necessity or convenience.

It is argued that the finality of such a legislative determination is subject to an exception when the finding of public convenience and necessity results from fraud or collusion between the city and private land owners. The rule and the exception are both stated in Beals v. City of Los Angeles, 23 Cal.2d 381, 386, 144 P.2d 839. The complaint in the present action does not allege fraud or collusion. This question was not before the court by pleading or otherwise.

In view of our conclusion that the decision of the trial court as to the validity of the resolution should not be disturbed on appeal, we deem it unnecessary to pass upon the contention of plaintiff that estoppel may not be invoked against a municipal corporation.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

86 Cal.App.2d 339

SEAFORD et al. v. SMITH et al.

Civ. 7464.

District Court of Appeal, Third District, California.

June 22, 1948.

Rehearing Denied July 15, 1948.

Hearing Denied Aug. 19, 1948.

1. Explosives ⚷7

Evidence presented question for jury as to whether damages to plaintiffs' real and personal property as result of explosion and fire were caused by negligence of defendants' decedent while he was engaged in repairing a butane gas tank.

2. Trial ⚷165

Plaintiffs were entitled to benefit of full credit for all favorable evidence, together with reasonable inferences to be drawn therefrom, on a motion for nonsuit at close of their case.

3. Trial ⚷165

On motion for nonsuit at close of plaintiffs' case, trial court may not weigh evidence nor discredit witnesses, but if evidence of witness is conflicting his statement most favorable to plaintiffs must be accepted as true.

4. Trial ⚷105(1)

Incompetent evidence admitted without objection is to be regarded as sufficient to establish a fact.

5. Trial ⚷165

Statutory presumption that a person takes ordinary care of his own concern is a mere presumption to be weighed with evidence adduced on that subject and reasonable inferences to be drawn therefrom, and cannot be considered in determining motion for nonsuit at close of plaintiff's case. Code Civ.Proc. § 1963, subd. 4.

◆

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by Fred R. Seaford, Elvira Dell Seaford, husband and wife, and others against L. C. Smith and another, as administrators of the estate of Frank Cedric Schott, deceased, for damages to real and personal property resulting from alleged negligence of deceased while he was engaged in repairing a butane gas tank. From judgment of dismissal rendered pursuant to order granting a nonsuit at close of plaintiffs' evidence, the plaintiffs appeal.

Judgment reversed with directions.

Carlton & Shadwell and L. C. Smith, all of Redding, for appellants.

Alfred E. Frazier of Red Bluff, for respondents.

THOMPSON, Justice.

Plaintiffs have appealed from a judgment of dismissal of their action, which was rendered pursuant to an order granting a nonsuit at the close of their evidence. The suit was brought against the Estate of Frank Cedric Schott, deceased, for damages to real and personal property, resulting from the alleged negligence of the deceased while he was engaged in repairing a butane gas tank. The gas was released from the tank in the presence of an open electric motor attached to a refrigerator. It evidently came in contact with the spark from the motor, causing an explosion and a fire which completely consumed plaintiff's cottage, household goods and equipment.

The complaint alleges that plaintiffs, Mr. and Mrs. Seaford, owned a five room cottage at Burney in Shasta County, containing a partially enclosed porch adjacent to the kitchen at the rear of the house. A doorway connected the kitchen and the porch. A fifty-five gallon upright tank of butane gas was installed on the porch and connected with the kitchen stove. A few feet distant a "Norge" refrigerator, to which there was attached at the bottom thereof an open electric motor, was being operated near the door in the kitchen. Mr. Seaford joined the Navy and left home. He leased the property April 1, 1945, to Mrs. Florence Neptune, who with her family occupied the cottage at the time of the accident. The lessee furnished the house with her furniture and equipment.

On July 8, 1945, Mrs. Florence Neptune observed that the butane gas tank was leaking at the top. It continued to leak, and on the morning of July 10th she asked her son Murray to tell Mr. Schott, a local butane gas agent, who supplied the gas, to come and repair the leak. Within an hour thereafter, Mr. Schott appeared at the house in company with her son, Murray. Schott brought with him a wrench and other tools with which to perform the service. Her son Murray accompanied him. The complaint alleges that "Frank Cedric Schott, was employed to make repairs to a certain Butane tank located in the above described premises." The evidence shows that Mrs. Florence Neptune stood in the open doorway between the kitchen and the porch and watched the operation. She testified that, without removing the tank or detaching the electric wire connecting the electric motor of the refrigerator, or turning off the electric switch, Schott lit a match and ignited the escaping gas at the top of the butane gas tank, and immediately blew out the flame. He then took the wrench and released a plug in the tank and the gas rushed out, as the witness said, with an "awful noise" like a locomotive engine blowing off steam. She said, "It [the gas] was just going right up high, hitting the roof of that porch." The witness said "I couldn't stand the noise, so I just turned around. * * * I walked across that kitchen to the diningroom and half way through the livingroom" when a flash and explosion occurred. The porch and rooms were filled with flame, and the windows were blown out. Both Mrs. Neptune and her son were badly burned, and Mr. Schott was also seriously burned. He died about a year later. The house and its contents were entirely consumed by the fire which resulted from the explosion. An expert witness testified to the highly explosive nature of butane gas and the great danger of handling that commodity. He said that it would readily ignite and explode if the gas came in contact with a flame or the spark from an electric motor of a refrigerator, and that due care would require the turning off of the electric switch or the disconnecting of the electric motor before the gas was released from the tank, or the removal of the tank to the back yard before the plug was released and the pressure reduced by the escaping of gas.

At the close of plaintiffs' evidence, the defendants moved for a nonsuit on the grounds that there was a lack of evidence showing that Mr. Schott was employed by plaintiffs to repair the tank, that he was an expert in the handling of butane gas, or engaged in the business of repairing such tanks. On the contrary, it was contended he was a mere volunteer who offered his services without pay and as an accommodation, and that there is no evidence of the real cause of the explosion or of his negligence. That motion was argued, submitted and taken under advisement. On the day the motion was determined, but before the decision was rendered, plaintiffs' attorney asked leave to open the case for further corroborating evidence that Mr. Schott was engaged in that vicinity as a dealer and serviceman for butane gas and its equipment and that, as such, he had full knowledge of the danger of handling that commodity and its necessary equipment. The attorney said that he had two available witnesses who would so testify, but that he had not previously called them because he thought that the evidence adduced was adequate for that purpose.

Four days later the court denied plaintiffs' motion to reopen the case for further evidence, and granted the defendants' motion for a nonsuit. Judgment that plaintiffs take nothing by their action was accordingly rendered and entered.

Regarding the grounds for granting the nonsuit, the court said: "It just seemed to me * * * there wasn't sufficient evidence that the deceased did something which an ordinarily reasonable and prudent man under the same circumstances, * * * would not do, or omitted to do something [such person] * * * would have done." The court also stated that there seemed to be a lack of evidence as to "just what did cause the explosion and fire" except by inference or speculation.

[1] We are impelled to hold that the court erred in granting the motion for a nonsuit at the close of plaintiffs' evidence. There appears to be ample evidence, in-

cluding the reasonable inferences to be drawn therefrom, that Mr. Schott was a distributor of butane gas in that small community; that he was employed to repair the leaking tank; that he was negligent in that undertaking in failing to detach the connection with the open electric motor of the refrigerator, or in first throwing the switch and turning off the electricity before opening the valve and permitting the gas to escape, and that the spark from the motor was the cause of the explosion which resulted in the fire. We are of the opinion there was sufficient evidence to have supported a judgment in favor of the plaintiffs, in the absence of any evidence in rebuttal thereof.

[2, 3] The rule with respect to a motion for nonsuit at the close of plaintiffs' case gives to them the benefit of full credit for all favorable evidence, together with the reasonable inferences to be drawn therefrom. Upon such motion the court may not weigh the evidence nor discredit the witnesses. If the evidence of a witness is conflicting, his statements most favorable to the plaintiff must be accepted as true. Mastro v. Kennedy, 57 Cal.App. 2d 499, 134 P.2d 865; Estate of Rabinowitz, 58 Cal.App.2d 106, 135 P.2d 579; Williamson v. Pacific Greyhound Lines, 78 Cal.App. 2d 482, 485, 177 P.2d 977; Mastrangelo v. West Side Union High School Dist., 2 Cal.2d 540, 42 P.2d 634; 9 Cal.Jur. 551, sec. 35; 5 Cal.Jur., Ten-Year Supp., Rev., 267, sec. 35. In the text last cited it is said:

> "If the motion is presented at the close of plaintiff's case, its purpose and effect are those of a demurrer to the evidence; and the court, therefore, assumes the truth of and accords full credit to all relevant evidence that is favorable to the plaintiff. * * *
>
> "* * * Evidence which is favorable to the plaintiff's case is, as above noted, to be assumed to be true, and evidence which contradicts the evidence in favor of the plaintiff is to be disregarded. * * *
>
> "* * * Nor will the court weigh the evidence or pass on the credibility of witnesses."

We may assume, in the present case, that the court had a sound discretion in denying plaintiffs' motion to open the case for further testimony, with which we may not interfere. But, nevertheless, we are of the opinion the evidence which was adduced was adequate, in the absence of rebuttal thereof on the part of the defendants, to require a denial of the motion at that stage of the trial.

[4] Two witnesses testified that Mr. Schott was a local agent for butane gas in the town of Burney. He "did install tanks in town." Florence Neptune testified that she was told he installed the tank in the Seaford cottage. There was no objection to that evidence. She said, "He has the agency for it I understand. * * * And he filled the tank." It has been held that "incompetent evidence admitted without objection is to be regarded as sufficient to establish the fact." Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 466, 168 P. 1037, 1039; Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156; 2 Cal.Jur. 804, sec. 473. The last mentioned witness testified that, when she discovered the escaping gas, she sent her son Murray for Mr. Schott to come and repair the leak; that within an hour he arrived with a wrench and proceeded to work on the tank; that she stood in the open doorway within a few feet of the tank and observed the entire transaction; that the "open motor" beneath the refrigerator was attached and operating; that Schott took charge of the transaction and directed Murray Neptune how to assist him; that Schott first lit a match and applied it to the escaping gas at the top of the tank, and immediately blew out the flame which followed; that no other match or light was lit; that he then opened the valve or removed the plug, and that the gas rushed out with a terrible noise and filled the room; that she turned away and walked through the kitchen, and that an explosion immediately followed and the gas in the rooms burst into flame and destroyed the property.

[5] The respondent contends that the presumption created by Section 1963, subdivision 4, of the Code of Civil Procedure, that "A person takes ordinary care of his

own concerns" is conclusive of the fact that Mr. Schott turned off the electricity connected with the motor of the refrigerator and performed all acts necessary to assure the safety of releasing the butane gas. But that is a mere presumption to be weighed with the evidence adduced on that subject and the reasonable inferences to be drawn therefrom. As we have previously held, the court may not weigh the evidence in determining a motion for nonsuit at the close of plaintiff's case. The inference from the evidence adduced is that the electricity was not turned off. Mrs. Seaford testified that she was at the cottage the day before the fire occurred, and that the electric refrigerator was then connected and operating. Mrs. Neptune testified that the house was wired for electricity; that the electric refrigerator was connected and operating at the time Mr. Schott "came to work on this tank"; that it had been running ever since she took possession of the cottage; that she stood at the open door to the porch during the entire operation and watched the transaction; that Mr. Schott did not inquire whether the electricity had been turned off. She was then asked, "Did he, to your knowledge, shut off any gas or electrical appliances?" to which she replied, "No". Moreover, Mr. Foresman, the expert witness, was asked a hypothetical question, including the following language, If "some person removed one of the plugs from the top of the Butane tank without first turning off the electric current in the house and without otherwise checking for fire or sparks of any kind," etc., would the spark of the electric refrigerator have ignited the Butane gas? To that question he replied "Yes, it could have." He was then asked if the workman should have anticipated that an explosion would follow the releasing of the gas under such circumstances, to which he replied, "Well, if you handled Butane you should have known, yes, that there would have been an explosion and fire." Those questions were not objected to on the ground that there was no evidence to support the inference that the electricity had not been turned off. The objection to the questions was merely that it did not appear that Mr. Schott was an expert or that he should have known, in the exercise of ordinary care, that the spark of an electric motor was likely to cause an explosion. The foregoing evidence clearly infers that the electric motor was not shut off or disconnected. It furnishes adequate evidence of the cause of the explosion to require the denial of the motion for nonsuit. It furnishes some evidence rebutting the previously mentioned presumption of due care. The court was not authorized to weigh the evidence in that regard. The expert witness testified to the highly explosive and inflammable nature of butane gas; that the specific gravity of that gas would tend to cause it to settle to the floor; and that the spark from an electric motor would ignite butane gas coming in contact with it. He also testified that due care would require a person to turn off an electric switch or disconnect an electric motor on a refrigerator before releasing the gas from a tank in its immediate vicinity.

The reasonable inferences from the evidence in this case indicate quite satisfactorily that Mr. Schott was not working on the tank as a mere volunteer. On the contrary, it appears that he was an agent or dealer in butane gas in the town of Burney; that he furnished the gas with which the tank was filled; and that he knew, or should have known, of the great danger of releasing the gas in the presence of an electric motor attached to a refrigerator, without first disconnecting it or switching off the electricity, and that the explosion and fire were the proximate result of that negligence. Mr. Schott promptly responded to the request to repair the leak in the tank, and brought with him his tools for that purpose.

The judgment is reversed and the court is directed to overrule the motion for nonsuit and to proceed with the trial on its merits.

PEEK, J., and ADAMS, P.J., concur.

86 Cal.App.2d 513

BLACKWELL v. BLACKWELL.

Civ. 16134.

District Court of Appeal, Second District, Division 3, California.

June 30, 1948.

1. Divorce ⚷130

Evidence was sufficient to authorize granting wife a divorce on ground of extreme cruelty.

2. Divorce ⚷150(2)

Where, at conclusion of trial in divorce action, plaintiff's attorney asked in open court if findings were waived, and trial court replied that findings were waived and defendant's attorney made no response, silence of defendant's attorney was a consent to waiver of findings.

3. Divorce ⚷160

Where divorce decree is entered in a default action, relief granted may not exceed that demanded by the complaint. Code Civ.Proc. § 580.

4. Divorce ⚷287

Where divorce action, though not technically a default proceeding because of filing of answer, was in fact tried as a default action, and wife's complaint therein only prayed for allowance of $50 per month for her support until January 5, 1949, interlocutory decree insofar as it purported to reserve jurisdiction in court to increase allowance in matter of amount or to extend it beyond January 5, 1949, would be modified so as to conform to prayer of complaint. Code Civ.Proc. § 580.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Thelma Estelle Blackwell against Louis Mason Blackwell for divorce. From interlocutory judgment which awarded plaintiff a divorce, $50 a month for her support until further order of the court, and $30 a month for support of child of the parties, the defendant appeals.

Modified and affirmed.

Thomas W. Hughes, of Los Angeles, for appellant.

Robert M. Bushnell, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Defendant appeals from an interlocutory judgment which awarded plaintiff a divorce, $50 a month for her support until the further order of the court, and $30 a month for support of the child of the parties. Although he seeks a reversal of the judgment on several grounds, we are convinced from a study of the entire record that he feels especially aggrieved by the provision of the judgment awarding plaintiff support until the further order of the court. In this particular the appeal has merit.

At the time of trial defendant was in the armed services, under an enlistment expiring January 5, 1949. He was receiving $195 per month, from which plaintiff was receiving an allotment of $80 per month for herself and the child. It was alleged in the complaint "that the defendant is an able bodied man, permanently employed and is well able to pay to plaintiff the sum of $50 per month for her support and maintenance until January 5, 1949 and is further able to pay to the plaintiff for the support and maintenance of the minor child of the parties the sum of $30 per month." The prayer of the complaint was for a divorce and "that defendant be ordered to pay to the plaintiff for the support and maintenance of herself the sum of $50 per month until January 5, 1949 * * *. That defendant be ordered to pay to plaintiff for the support and maintenance of the minor child of the parties herein the sum of $30 per month." Defendant filed an answer and a cross complaint, but later withdrew the cross complaint. At the time of trial he was stationed in New York but soon thereafter was returned to March Field, California. His attorney was present at the trial and participated therein, although no evidence was introduced on defendant's behalf. In the month following the granting of the decree the defendant made application to have it vacated. He filed an affidavit setting up his status in the army; he stated that when his answer and cross complaint were filed he fully intended to defend the action and to prosecute his cross complaint and that "he was deprived of his rights herein by accident and surprise." He stated in the affidavit that he had stated the facts of the case to his attorney and had been advised that he had a good and sufficient defense to the action and a good and sufficient cause of action on his cross complaint. In an answering affidavit plaintiff's attorney set forth copies of letters written by defendant to plaintiff, enclosing a copy of a letter which he had written to his attorney. In a letter to his attorney he requested that his cross complaint be withdrawn and he stated in his letters to plaintiff that he did not intend to be present or to defend the action and urged her to proceed with the trial in his absence, stating, "you can proceed and get the divorce by default." The action was tried as a default action, although defendant's attorney appeared at the trial. The attorney took no part in the proceedings except to call the attention of the court to the fact that plaintiff was seeking support only until January 5, 1949, when defendant's term of enlistment would expire, and that she thereby placed a limitation upon the amount which could properly be awarded for her support by the judgment. The court evidently entertained the same view. It would appear that the provision that the allowance should continue until the further order of the court was intended to reserve jurisdiction to modify the allowance within the limitation of plaintiff's pleading and not to subject defendant to a greater liability for plaintiff's support than that which plaintiff sought to have imposed upon him. It clearly appears that defendant had no desire to contest the action for divorce. He understood that plaintiff was seeking support for herself only for a limited time and in a limited amount, and was willing that the trial proceed as a default action under these circumstances. His attorney conceded at the trial that plaintiff was entitled to support in the amount and for the time stated in the prayer of her complaint, and no contrary contention is made on the appeal.

The court denied defendant's application to vacate the judgment. The order did not constitute an abuse of discretion. There was no showing whatever that defendant would have been unable to present a defense had he desired to contest the action. His attorney, acting pursuant to his instructions, did not seek a continuance of the trial. If defendant had ever intended to appear or to defend the action he purposely waived his right to defend, and having taken that course advisedly, was bound to abide by it.

[1, 2] It is contended that the evidence was insufficient to establish the cause of action alleged, namely, extreme cruelty, and also that the judgment should be reversed because of the failure of the court to make findings. We think both of these contentions are without merit. At the conclusion of the trial plaintiff's attorney asked in open court if findings were waived. The court replied that findings were waived and defendant's attorney made no response. His silence must be deemed as consent to the waiver of findings.

[3, 4] However, since defendant questions the correctness of the provision for plaintiff's support, in that it purports to reserve jurisdiction in the court to increase the allowance in the matter of amount, or to extend it beyond January 5, 1949, we think the judgment should be modified so as to conform to the prayer of the complaint. It is well settled that where a divorce decree is entered in a default action, the relief granted may not exceed that demanded by the complaint. Code Civ. Proc. sec. 580; Eddy v. Eddy, 64 Cal.App.2d 672, 149 P.2d 187; Peck v. Peck, 52 Cal.App.2d 792, 127 P.2d 94; Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64. Although, technically speaking, the present action was not a default proceeding, because of the filing of the answer, it is clear from appellant's letters that he intended to let the action proceed without a contest and to abandon the defenses pleaded in his answer. The action was, in fact, tried as a default action, and under the circumstances, it would be unreasonable and unjust to fail to treat it as such.

We believe that a modification of the decree will provide a satisfactory conclusion to the late marital relationship of the parties.

The judgment is modified so as to provide that defendant shall pay to plaintiff the sum of $50 per month for her support to January 5, 1949, and no more, and, as modified, is affirmed.

WOOD, J., and McCOMB, J., Assigned, concur.

GWINN v. RYAN. *

Civ. 3845.

District Court of Appeal, Fourth District, California.

June 15, 1948.

Hearing Granted Aug. 12, 1948.

1. Appeal and error 🔑347(1)

Where notice of appeal was filed more than 60 days after date of minute entry of order granting motion to dismiss action for failure to serve summons within three years, but within 60 days after entry of judgment of dismissal, appeal was timely under rules in effect in May, 1947, requiring notice of appeal within 60 days from "date of entry of judgment." Rules on Appeal, rules 2(a, b), 53(b); Code Civ. Proc. §§ 577, 581, 581a, 664, 668, 1003.

2. Appeal and error 🔑2

The statute providing that all dismissals shall, when entered upon minutes, constitute judgments effective for all purposes, was inapplicable in determining timeliness of appeal notice of which was filed before effective date of such statute. Code Civ.Proc. § 581d.

◆

Appeal from Superior Court, Orange County; Raymond Thompson, Judge.

Action by Grace Gwinn against Robert E. Ryan. From a judgment dismissing the action, plaintiff appeals and defendant moves to dismiss the appeal.

Motion denied.

E. P. Mulholland, of Long Beach, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

GRIFFIN, Justice.

The original proceedings in the trial court were based upon a motion of the defendant under sec. 581a, Code Civ.Proc., to dismiss the action because summons had not been served upon the defendant within three years after the commencement of the action. Defendant accompanied his motion by supporting affidavits. Plaintiff, in opposition, filed affidavits indicating that defendant was in the military service and stationed in various military camps in this state, and also that he was without the jurisdiction of this state during said period. The question of due diligence in attempting to serve defendant was before the court. After hearing on the motion the trial court granted it and the clerk entered in the minutes on that date (2/14/47): "Motion to Dismiss. Motion granted." No further order was made therein directing that a written order or judgment would be later prepared, signed and filed. Thereafter, on March 19, 1947, counsel for defendant presented, the judge signed, and the clerk entered a written judgment reciting that plaintiff failed to serve defendant with summons for a period of three years and that for more than three years defendant was in the State of California and did not secrete himself to prevent service of summons; that the action be dismissed and the service of summons quashed. Plaintiff filed a notice of appeal on May 15, 1947, from the "judgment entered * * * against plaintiff" which date was more than 60 days after the date of the minute entry of the order granting the motion, but within the 60-day period from the date of the entry of the judgment of dismissal.

Rules 2(a) and 2(b) of the Rules on Appeal, effective July 1, 1943, governing the procedure in all appeals taken after the effective date, Rule 53(b), provide that the "notice of appeal shall be filed within

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* Subsequent opinion 202 P.2d 51.

60 days from the date of entry of the judgment," and that "For the purposes of this rule: (1) The date of entry of a *judgment* shall be the date of its entry in the *judgment book*. (2) The date of entry of an *order* which is entered in the minutes shall be the date of its entry in the *minutes*, unless the entry in the minutes expressly directs that a written order be prepared, signed and filed, in which case the date of entry shall be the date of filing of the signed order. (3) The date of entry of an order which is not entered in the minutes shall be the date of filing of the order signed by the court." (Italics ours.)

The real question here presented, as we see it, is whether or not the minute entry constituted an effective and final judgment requiring entry in the judgment book, within the meaning of Rule 2(b) (1), or whether or not such minute entry constituted an appealable order, as distinguished from a judgment, and the entry of such order only, in the minutes, was sufficient. Section 577 of the Code of Civil Procedure clearly defines a judgment to be "the final determination of the rights of the parties in an action or proceeding."

Section 1003 of the Code of Civil Procedure defines an order as "Every direction of a court * * * made or entered in writing, and not included in a judgment * * *."

In Dowling v. Polack, 18 Cal. 625, it was held that a judgment of dismissal is, in effect, a final judgment in favor of the defendant, the same as if there had been an adjudication upon the merits. See, also, Associated Oil Co. v. Mullin, 110 Cal. App. 385, 294 P. 421; Leese v. Sherwood, 21 Cal. 151; Heim v. Mooney, 23 Cal.App. 233, 137 P. 616; Lincoln v. Superior Court, 22 Cal.2d 304, 310, 139 P.2d 13; 14 Cal. Jur. 854, sec. 3.

Section 664 of the Code of Civil Procedure provides that "In no case is a judgment effectual for any purpose until entered."

Marks v. Keenan, 140 Cal. 33, 73 P. 751, involved about the same question as here presented, and it was there held that the entry of the order of the court in the minutes rather than in the judgment book constituted a final appealable judgment. See, also Consolidated Const. Co. v. Pacific Electric R. Co., 184 Cal. 244, 193 P. 238. However, the conclusion there reached is opposed to the reasoning and decision set forth in Egan v. McCray, 220 Cal. 546, 31 P.2d 1041, wherein it was held that where there was an order entered in the minutes only, purporting to dismiss an action, and such order was not followed by a judgment of dismissal entered in accordance with sections 664 and 668 of the Code of Civil Procedure, such judgment was not "effectual for any purpose until so entered."

Section 581 of the Code of Civil Procedure provides that dismissals, for grounds therein stated, may be made by minute order. But sec. 581a, C.C.P., the section here involved, providing certain grounds for dismissal, does not contain a similar provision. The Egan case directly holds that the provisions of section 581, C.C.P., in reference thereto, is an exception to the general rule that judgments must be entered in the judgment book before they become effective as judgments and that the exception should not be extended beyond the particular case provided for by the statute. See, also, Integral Land Corporation v. Anderson, 62 Cal.App.2d 770, 145 P.2d 364; McCallum v. Stull, 59 Cal. App. 572, 211 P. 466; Ross v. O'Brien, 1 Cal.App.2d 496, 36 P.2d 1108.

The case of Pessarra v. Pessarra, 80 Cal.App.2d 965, 183 P.2d 279, relied upon by respondent, involved an order granting a motion to set aside an interlocutory and final decree of divorce. Such an order was not a final determination of the rights of the parties in the action. It was not necessary, under the statute, that such an order be entered in the judgment book to be effective. Therefore that case is distinguishable.

[1, 2] Section 581d, C.C.P. (New), effective 91 days after June 20, 1947, (which date was subsequent to the minute entry and filing of the notice of appeal in the present action), was adopted. It now provides that "*All dismissals* ordered by the court shall be entered upon the minutes thereof * * * and such orders when

so entered shall constitute judgments and be effective for all purposes, * * *." (Italics ours.) Since this new section is not applicable to the present appeal, the motion to dismiss is denied.

BARNARD, P. J., and MUSSELL, Justice pro tem., concur.

WEST KEY NUMBER SYSTEM

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86 Cal.App.2d 217

Ex parte MORGAN.

Cr. 4248.

District Court of Appeal, Second District, Division 2, California.

June 15, 1948.

1. States 🔑4

State legislation in aid of the federal Constitution is valid.

2. States 🔑4

An act of Congress, if upon a subject concerning which it is authorized by Constitution to legislate, is exclusive as to matters for which it expressly or by necessary implication provides, but if it does not occupy the whole field, it does not preclude states from enacting legislation to regulate situations not covered by the act.

3. States 🔑4

State statutes are not necessarily invalid because they cover a field in which the Constitution empowers Congress to legislate.

4. Commerce 🔑8(1), 10

Regulation of interstate commerce is matter exclusively within power of Congress if and when it chooses to act, but if there is no federal statute covering particular subject, a state law is not invalid because it may in some manner affect commerce between the states, though such law would become inoperative upon adoption of federal statute covering same field. U.S.C.A.Const. art. 1, § 8, cl. 3.

5. Commerce 🔑8(1)
States 🔑4

State law does not conflict with federal statutes if it does not impede execution of will and purpose of Congress or if it does not cast an undue burden upon interstate commerce, or if its effect upon such commerce is only incidental or indirect. U.S.C.A.Const. art. 1, § 8, cl. 3.

6. States 🔑4

A state law which stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in reference to matters on which it is empowered by the Constitution to legislate must yield to superior force of the latter.

7. Extradition 🔑22

Provision in Uniform Extradition Act authorizing extradition though accused was not in demanding state at time of commission of crime and has not fled therefrom is not unconstitutional on ground of conflict with federal constitutional and statutory provisions relating to extradition. Pen.Code, § 1549.1; U.S.C.A.Const. art. 4, § 2, cl. 2; 18 U.S.C.A. § 662.

8. Extradition 🔑22

Federal extradition statute does not purport to cover entire field of extradition and mentions only those who flee from state in which crime was committed and who are fugitives from justice, whereas Uniform Criminal Extradition Act does not provide for extradition of persons of that class but covers those who commit an act in one state intentionally resulting in a crime in another state, and hence, since each statute refers to a subject different and distinct from the other, there is no conflict and each is enforceable in its own sphere. Pen.Code, § 1549.1; U.S.C.A. Const. art. 4, § 2, cl. 2; 18 U.S.C.A § 662.

9. Extradition 🔑22

Uniform Criminal Extradition Act is enforceable within any state that adopts it, whether or not the state requisitioning a person charged with crime has a similar statute. Pen.Code, § 1549.1.

10. Appeal and error 🔑1078(1)

Point not urged in briefs or in oral argument were abandoned.

11. Extradition ⚷32

Complaint and information alleging that defendant unlawfully conspired with three other persons to aid in commission of grand larceny in Colorado, which conspiracy intentionally resulted in commission of felony in Colorado, alleged offense under Colorado law as basis for extradition to Colorado. Pen.Code, § 1549.1; '35 C.S.A.Colo.1935, c. 48, §§ 13, 177.

12. Indictment and information ⚷83

Under Colorado law, an accessory may be charged as a principal. '35 C.S.A.Colo. 1935, c. 48, §§ 13, 177.

13. Criminal law ⚷59(3)

Under Colorado law, a crime may be perpetrated in violation of Colorado law by a person who has never entered the state, and he may be convicted thereof. '35 C.C.A.Colo.1935, c. 48, §§ 13, 177.

14. Criminal law ⚷59(3)

One may be charged as an aider or abettor or as a conspirator in crime though he was not present at scene of crime, constructive presence being sufficient.

15. Criminal law ⚷59(3)

Actual presence of defendant within state at time of commission of crime with which he is charged is not prerequisite to his conviction.

◆

Proceeding in the matter of the application of Thomas B. Morgan for writ of habeas corpus to prevent extradition under the Uniform Criminal Extradition Act.

Writ denied.

Richard A. Haley, of Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland and Philip E. Grey, Deputy City Attys., all of Los Angeles, for respondent C. B. Horrall, Chief of Police.

WILSON, Justice.

Petitioner was charged by verified complaint and information filed in the Justice's Court of the City and County of Denver, State of Colorado, with a felony in that on or about March 1, 1948, in the city of Los Angeles, state of California, he unlawfully conspired with three other persons named in the information to aid in the commission of the crime of grand larceny, a felony, in the city and county of Denver, and which conspiracy intentionally resulted in the commission of such crime on the thirteenth day of March, 1948. Upon requisition of the governor of Colorado a warrant was issued by the governor of California pursuant to section 1549.1 of the Penal Code for petitioner's arrest for the purpose of his extradition to Colorado. By reason of such warrant he was placed under arrest and detained by the respondent Chief of Police of the City of Los Angeles.

Petitioner seeks his release on a writ of habeas corpus contending that his arrest and detention are unlawful in that section 1549.1 is in conflict with the Constitution and laws of the United States.

Petitioner maintains that the only authority for the extradition from one state to another of a person charged with a crime is clause 2 of section 2, Article IV of the Constitution of the United States which reads as follows: "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." He contends further that section 5278 of the Revised Statutes, 18 U.S.C.A § 662, implementing the constitutional provision, furnishes the only statutory authority for extradition. That section provides that whenever the executive authority of any state demands any person, as a fugitive from justice, of the executive authority of any state to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state, charging the person demanded with having committed a crime, certified as authentic by the governor of the state from whence the person so charged has fled, it shall be the duty of the executive authority of the state to which such person has fled to cause him to be arrested and to cause the fugitive to be delivered to the agent of the demanding state.

Petitioner asserts, and respondent admits, that he was not in the state of Colorado on the date the crime was committed. He contends that since he was not in the state of Colorado he could not have fled and did not flee therefrom and was not a fugitive from justice; consequently, he argues, the effort to extradite him to Colorado for the purpose of prosecution for the conspiracy alleged to have been entered into in California must fail and he is entitled to his release from custody.

The Uniform Criminal Extradition Act has been adopted in more than 30 states. Section 1549.1 of the Penal Code is a part of the Uniform Act. It was enacted in 1937 (Stats.1937, ch. 554, p. 1581) and reads as follows: "The Governor of this State may also surrender, on demand of the executive authority of any other State, any person in this State charged in such other State in the manner provided in section 1548.2 of this code with committing an act in this State, or in a third State, intentionally resulting in a crime in the State whose executive authority is making the demand. The provisions of this chapter, not otherwise inconsistent, shall apply to such cases, even though the accused was not in the demanding State at the time of the commission of the crime, and has not fled therefrom. Neither the demand, the oath, nor any proceedings under this chapter pursuant to this section need state or show that the accused has fled from justice from, or at the time of the commission of the crime was in, the demanding or other State."

Petitioner's contention that the Penal Code provision pursuant to which he is now in custody is unconstitutional is the same as that which has been asserted in other states in reference to the Uniform Criminal Extradition Act and has been consistently rejected. Cassis v. Fair, 126 W.Va. 557, 29 S.E.2d 245, 248, 151 A.L.R. 233; Ennist v. Baden, 158 Fla. 141, 28 So. 2d 160, 162; English v. Matowitz, 148 Ohio St. 39, 72 N.E.2d 898, 900; Ex parte Campbell, 147 Neb. 820, 25 N.W.2d 419, 423; Culbertson v. Sweeney, 70 Ohio App. 344, 44 N.E.2d 807, 810; appeal dismissed, 140 Ohio St. 426, 45 N.E.2d 118, "for the reason that no debatable constitutional question is involved."

The cases cited by petitioner to the effect that a person cannot be deemed to have fled from a state which he has never entered and is not a fugitive from a state unless he has been in that state and has participated in a crime therein need not be discussed since such cases were all decided under the federal statute mentioned above and refer to a person who was in reality a fugitive from the state in which the crime had been committed and to one who had actually fled therefrom. Section 1549.1 of the Penal Code and the Uniform Criminal Extradition Act, of which it is a part, extend the power of extradition beyond that contained in the federal statute. Petitioner maintains that the constitutional provision above quoted is an inhibition on the power of the states so to do.

"* * * the validity of state legislation ancillary to, and in aid of, the act of Congress in regard to interstate extradition is now well established. Moreover, while state legislation impairing the full operation of the Constitution and laws of Congress would be void, yet a state may enact laws on the subject of interstate extradition at a stage prior to that which the Constitution and Federal laws have designated as the time at which they take cognizance of it * * * provided that such enactments are not inconsistent with the end named in the Constitution. A state may also, in the exercise of its reserved sovereign powers and as an act of comity to a sister state, provide by statute for the surrender, on requisition, of persons who are indictable for a crime committed through their constructive presence in such sister state, even though they have never been corporally within such state and have never fled therefrom to escape arrest and punishment, since, in the absence of such statute, such persons are not subject to extradition by the latter state. * * * While it has been declared that state laws cannot make any requirements further than those made by the act of Congress, yet the laws of a state may require the governor to surrender a fugitive on terms less exacting than those imposed by the act of Congress, and also that the states may provide for cases not provided for by the United States." 22 Am.Jur. 249, 250. The foregoing is quoted in part with approval in Culbertson v. Sweeney and Ennist v. Baden, supra.

In the Cassis case, after referring to the quoted clause of the Constitution, the court said, 29 S.E.2d at page 248: "It in no sense purports to limit extradition to these cases. It does not forbid a state to yield up to another state one charged with crime but who has not in fact fled from that other state. No reason in law, expediency or comity has been suggested why extradition should be limited to those who were physically in the state at the time the crime was committed. Many crimes may be committed in a state while the culprit remains without its borders. This is particularly true where such offender acts through an agent or a conspirator." In English v. Matowitz, supra, the court said [148 Ohio St. 39, 72 N.E.2d 900]: "The federal enactments relating to extradition do not expressly or impliedly cover a situation such as that presented in the case at bar, and, since they do not, it would seem that there is no conflict between the federal and state enactments and that the latter merely supplement the former. It is to be observed that there are no negative provisions in the U. S. Constitution or federal legislation forbidding the extradition of one not physically present at the scene of crime in the demanding state."

The Uniform Act for Out-of-State Parolee Supervision, Gen.Laws, Act 5783, is analogous to the Uniform Criminal Extradition Act in that it provides for the return of a parolee to the state in which he was paroled without the necessity of following the legal requirements for the extradition of fugitives from justice. The validity of that statute was sustained in Re Tenner, 20 Cal.2d 670, 128 P.2d 338, wherein the court held that the act does not deprive the petitioner of his liberty without due process of law in violation of the Fourteenth Amendment and is not in conflict with clause 2 of section 2 of Article IV of the United States Constitution or with the federal extradition act. In the Tenner case, 20 Cal.2d on page 677, 128 P.2d on page 342, the court said, "As authority to require the return of fugitives originally existed in the states and remains there except as expressly limited by the Constitution, even in the field of federal extradition, the act of Congress is not exclusive of state action which does not come within its express terms. On the contrary, said the Supreme Court of the United States, it must have been intended to leave subjects within the constitutional power and not provided for by that statute subject to the state authority which then controlled them."

In re Davis, 68 Cal.App.2d 798, 158 P.2d 36, and In re Brewer, 61 Cal.App.2d 388, 143 P.2d 33, are cited by petitioner but they furnish no aid to his contention. In the Davis case, a proceeding in which section 1548.2 of the Penal Code, also a part of the Uniform Criminal Extradition Act, was involved, the court rejected the contention of the petitioner that the federal Constitution and statute supersedes all state legislation on the subject of extradition. 68 Cal.App.2d at page 802, 158 P.2d at page 37. In the Brewer case the demand for extradition and the warrant were totally devoid of any showing that the petitioner was present in the demanding state when the crime was committed or that he committed an act in another state intentionally resulting in a crime in the demanding state. In the Davis case, supra, in 68 Cal.App.2d at page 807, 158 P.2d at page 40, the court said that section 1548.2 of the Penal Code is not inconsistent with section 2 of Article IV of the Constitution of the United States and that the federal statute (18 U.S.C.A. § 662) does not "purport to exclude legislation by the states in aid of the purposes of the constitutional provision, which are not for the benefit of an alleged fugitive, but to secure his presence for trial in the courts of the state where he is charged with crime."

[1, 2] Petitioner concedes in his brief that "state legislation in aid of the federal Constitution is valid and proper." The

courts have so held. An act of Congress, if it is upon a subject concerning which it is authorized by the Constitution to legislate, is exclusive as to the matters for which it expressly or by necessary implication provides, but if it does not occupy the whole field it does not preclude the states from enacting legislation to regulate situations not covered by such statute. "The reasonable assumption is that by the omission to extend the statute to the full limits of constitutional power it must have been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them,—state authority until it was deemed essential by further legislation to govern them exclusively by national authority." Innes v. Tobin, 240 U.S. 127, 135, 36 S.Ct. 290, 292, 60 L.Ed. 562, 566.

[3-5] Statutes adopted by the states are not necessarily invalid if they cover a field in which the Constitution empowers Congress to legislate. The regulation of interstate commerce is a matter exclusively within the power of Congress (Const., Art. I, sec. 8, clause 3) if and when it chooses to act, but if there is no federal statute covering a particular subject a state law is not invalid because it may in some manner affect commerce between the states, although such a law would become inoperative upon the adoption of a federal statute covering the same field as that embraced by the state legislation. A state law does not conflict with federal statutes if it does not impede the execution of the will and purpose of Congress (Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 157 [62 S.Ct. 491], 86 L.Ed. 754, 763) or if it does not cast an undue burden upon interstate commerce (Nippert v. Richmond, 327 U.S. 416, 425, 66 S.Ct. 586, 90 L.Ed. 760, 765, 162 A.L.R. 844) or if its effect on such commerce is only incidental or indirect. California v. Thompson, 313 U.S. 109, 113, 61 S.Ct. 930, 85 L.Ed. 1219, 1221.

[6] If a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in reference to matters on which it is empowered by the Constitution to legislate the former must yield to the superior force of the latter. Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581, 587.

[7] The statute in question in this proceeding is not an obstacle to the purposes of the federal extradition act. In Re Tenner, 20 Cal.2d 670, 675, 128 P.2d 338, 342, the court said: "The validity of legislation in aid of the act of Congress concerning extradition is now well established (citing cases) and it has been held that a state may legislate upon a subject of extradition unprovided for because Congress failed to extend section 5278 of the Revised Statutes to the full limits of constitutional power. Innes v. Tobin, 240 U.S. 127, 36 S.Ct. 290, 60 L.Ed. 562."

[8] The Constitution refers only to persons "who shall flee from Justice" and provides for their surrender to the state from which they "fled." Since Congress may legislate only on the subjects expressly authorized by the Constitution, and since a person cannot flee from a state unless he has been there, its power to provide for the extradition of a person who becomes a party to a conspiracy in one state to commit a crime in a sister state and never enters the latter may be questioned. However, if its power in that respect be conceded it has not undertaken to exercise it. The federal statute (18 U.S.C.A. § 662) does not purport to cover the entire field of extradition. It mentions only one class of persons—those who flee from the state in which the crime was committed and who are fugitives from justice. The Uniform Criminal Extradition Act does not provide for the extradition of persons of that class but covers persons in an entirely different category—those who commit an act in one state intentionally resulting in a crime in another state. Since each statute refers to a subject different and distinct from the other there is no conflict and each is enforceable in its own sphere.

[9] Petitioner urged in the oral argument that section 1549.1 is inapplicable to him and to the crime with which he is charged in Colorado unless that state has adopted a similar statute. There is nothing in the Uniform Criminal Extradition Act that requires reciprocity between the states

in such a matter. The statute is not comparable in this respect to the Uniform Out-of-State Parolee Act discussed in In re Tenner, supra. The latter statute provides for the return of a parolee without the formality of extradition to the state in which he was paroled and it requires reciprocal action by other states. This Uniform Act constitutes a compact among the states that become parties thereto by adopting it, and it has the approval of Congress. Const., Art. I, sec. 10, clause 3; 18 U.S.C.A. § 420. The Extradition Act is enforceable within any state that adopts it whether or not the state requisitioning a person charged with crime has a similar statute.

[10] In petitioners application for a writ of habeas corpus it is alleged that the papers submitted to the governor of this state were insufficient to justify his extradition to Colorado. Since this point was not urged in the briefs or in the oral argument it will be deemed to have been abandoned. Nevertheless we have carefully examined the documents filed with the governor, the same having been submitted to the court with respondent's return to the writ, and find that they are regular and sufficient in all respects.

[11-15] The point raised by petitioner that he is not subject to prosecution in Colorado is without merit. He is charged by a complaint and information in that state with having unlawfully and feloniously conspired with three other persons to aid in the commission of an unlawful act in the State of Colorado, to wit, grand larceny, a felony, which conspiracy intentionally resulted in the commission of such felony in the city and county of Denver, Colorado. Section 13 of chapter 48 of Volume II of 1935 Colorado Statutes Annotated provides that an accessory is one who, not being present, has advised and encouraged the perpetration of a crime and that such person shall be deemed as principal and punished accordingly. Section 177 of the same chapter provides that if two or more persons shall agree, conspire or cooperate to do or to aid in doing any unlawful act each such person, in case of a conspiracy to commit a felony, shall be confined in a penitentiary. In Colorado it has been held that an accessory may be charged as a principal. Bacino v. People, 104 Colo. 229, 90 P.2d 5, 9; Mulligan v. People, 68 Colo. 17, 189 P. 5, 8. The Colorado court has also held that a crime may be perpetrated by a person who has never entered the state, and that he may be convicted of such crime. Newton v. People, 96 Colo. 246, 41 P.2d 300, 302; Updike v. People, 92 Colo. 125, 18 P.2d 472, 474. In order to change one as an aider or abettor or as a conspirator in crime his presence at the scene of the crime is unnecessary. Constructive presence is sufficient. English v. Matowitz, 148 Ohio St. 39, 72 N.E. 2d 898, 900; Hyde v. United States, 225 U.S. 347, 363, 32 S.Ct. 793, 56 L.Ed. 1114, 1124, Ann.Cas.1914A, 614; Commonwealth v. Hollister, 157 Pa. 13, 27 A. 386, 395, 25 L.R.A. 349; 11 Am.Jur. "Conspiracy," sec. 23, p. 559. The actual presence of the defendant within the state at the time of the commission of the crime with which he is charged is not a prerequisite to his conviction. State v. Wolkow, 110 Kan. 722, 205 P. 639, 642, 42 A.L.R. 265.

The writ of habeas corpus is discharged and petitioner is remanded to custody.

MOORE, P. J., and McCOMB, J., concur.

86 Cal.App.2d 250

FLANERY v. MUDD et al.

MUDD et al. v. LAMB et al.

Civ. 16167.

District Court of Appeal, Second District, Division 1, California.
June 17, 1948.

1. Vendor and purchaser 🔑80

Evidence established that vendor waived clause of contract for sale of land making time of the essence not only as to payments in default but also as to future installments, thereby giving purchaser a reasonable time within which to make payments. Civ.Code, § 3275.

2. Vendor and purchaser 🔑187

Where vendor waived clause of contract for sale of land making time of the essence and no notice was ever given to purchasers of an insistence upon forfeiture if payments were not promptly made, purchasers' delay of payment for a few days while making arrangements not only to make that payment but also to pay off entire balance was not unreasonable and vendor's declaration of forfeiture was unauthorized. Civ.Code, § 3275.

3. Contracts 🔑318

The law does not favor forfeitures.

4. Vendor and purchaser 🔑81

What is a reasonable time for purchaser to perform after waiver by vendor of clause of contract for the sale of land making time of the essence is a question for trier of fact to determine.

5. Specific performance 🔑115

In quiet title action by grantee under quitclaim deed from vendor under contract for sale of land, cross-complaint, for specific performance by purchasers under such contract, alleging waiver by vendor of clause making time of the essence and alleging their willingness and ability to not only pay installments due but entire balance of contract, stated facts which entitled purchasers to statutory relief against a forfeiture. Civ.Code, § 3275.

6. Husband and wife 🔑270(5)

In quiet title action by grantee under quitclaim deed from vendor under contract for sale of land against purchasers named in contract, vendor and his wife were proper and necessary parties to action, since, although wife did not sign contract, land was presumptively community property and, as such, her signature would be required in execution of the conveyance. Civ.Code, § 172a.

7. Appeal and error 🔑1151(3)
Evidence 🔑591

Where attorney for respondents testified at trial that he had computed balance due appellants to be a specified amount and appellants accepted figure as correct, respondents were bound by such testimony, and findings and judgment determining a lesser amount to be due were corrected by reviewing court.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Benjamin Flanery against Charles W. Mudd and others to quiet title to real estate and for other relief, wherein Charles W. Mudd and Ruth Truth Mudd cross-complained against plaintiff, certain codefendants, and third parties. From a judgment for cross-complainants, plaintiff and cross-defendants appeal.

Corrected and affirmed.

Kelsey Petterson, of Los Angeles, for appellants.

Howard Hemenway, of Lynwood, for respondents.

BARTLETT, Justice pro tem.

Benjamin Flanery, plaintiff and appellant, filed a complaint to quiet title to certain real estate in Willowbrook in Los Angeles County, against the respondents, Charles W. Mudd and Ruth Truth Mudd, husband and wife, alleging that respondents were in possession of the property and, in addition, to praying that his title be quieted, asked for the ouster of the respondents. The respondents denied his title and filed a cross-complaint against the appellant Benjamin Flanery and the other defendants, his wife Goldie Flanery and Wilbur M. Lamb and Hazel M. Lamb, husband and wife, to specifically enforce a contract for the sale of the real estate in question executed by appellant Wilbur M. Lamb to respondents on March 10, 1942. The court rendered judgment in favor of respondents on this cross-complaint.

At the trial Benjamin Flanery based his claim of title on a quitclaim deed executed by appellant Wilbur M. Lamb to him on February 26, 1946. Prior to that the following had happened:

On March 10, 1942, the appellant Lamb had entered into a written contract for the sale of land to respondents for the sum of $1,500, payable $50 down and the balance at $20 or more per month, including interest at 6% per annum, on the 10th of each month. The respondents were occupying the premises at this time. Thereafter payments were made by Mrs. Mudd to Mrs. Lamb in person by delivering them to Mrs. Lamb at her home until October 11, 1945. Nine of these payments were made after the date specified in the contract, although the contract provided that time was of the essence. These payments so made were accepted without any objection on the part of either Mr. or Mrs. Lamb. Shortly prior to September, 1944, Mr. Mudd had gone into the armed services and Mrs. Mudd went to Tulare to be with her husband's relatives. She missed the September payment. She came back to Los Angeles in October of that year. Mr. Lamb came to see her and told her that she had done a fine job in making her house payments out of the $100 a month allotment check she received and if she wanted anything or the children needed anything she could go ahead and miss her house payments, if she wanted to. She told him she did not want to as she did not desire to have such a burden on her husband when he returned. The October payment was made. Later in the month she saw both of the Lambs and told them she had lost her copy of the contract. Mr. Lamb told his wife to get the contract from the bank within the next couple of days and present it to Mrs. Mudd. Mrs. Lamb told her she didn't need to make the September payment until after Mrs. Mudd's husband returned from the war. Mrs. Lamb never got the contract or brought it to Mrs. Mudd. On November 8, 1945, Mrs. Mudd and her sister-in-law went to the Lamb residence to make a payment. Unknown to Mrs. Mudd, Mrs. Lamb had left the residence in October and Mr. Lamb was in the armed services, so she found the house vacant, the blinds drawn and an accumulation of mail in the mail box. She and her sister-in-law went back that night and again on November 9th and November 10th and found the conditions the same. They made inquiries in the neighborhood but found no trace of the Lambs. Mrs. Mudd also inquired as to their whereabouts at all of the banks in Compton, endeavoring to find which bank had her contract, but without avail. She made like trips in December, 1945, and January, 1946, but found no one, nor did either of the Lambs ever communicate with her or ask for any of the payments. The appellant Flanery, who is the next door neighbor of the Mudds, was cognizant of this contract from the time it was entered into. He was a friend of the Lambs. In the meantime it may be mentioned for its bearing on a subsequent conversation that the Flanerys and the Mudds had quarreled over some fighting dogs owned by Flanery. On February 3, 1946, Mr. Mudd returned and found Mr. Lamb. Mr. Lamb told him that his wife was no longer there, that he had kicked her out. Mr. Mudd said he had come to see about the house and they wanted to pay off the contract because when Lamb got out of the service he might need some money. Lamb said he needed no money and further that he didn't know whether or not there was a contract. Mudd then said he would see Lamb later as there was a balance of about $800 remaining on the contract which he would like to pay off in its entirety. Lamb said that there was no hurry and told Mudd to bring in the money and he would give him a deed and the title the next time he saw him. During the conversation Lamb referred to Mudd's treatment of the Flanerys and made threats as to what he would do if Mudds continued such a course of conduct. The respondent Mudd then went to the bank to get a loan to pay Lamb. The bank approved the loan for $800 or a larger amount, if necessary. The respondents signed the note and trust deed and escrow instructions on February 9, 1946. The bank notified the appellant Lamb of this fact and asked for his demand for the amount required to pay off the contract in full. In the meantime, however, the appellants Wilbur M. Lamb and Hazel M. Lamb, it is admitted by the pleadings, declared a forfeiture of the rights of respondents under the contract of sale and executed and delivered to the appellant Flanery a quitclaim deed signed by Wilbur M. Lamb alone on February 22, 1946, and Flanery about a week later notified the Mudds that he was the legal owner of the premises. The respondents tendered him a payment for March, 1946, which tender he refused.

[1-4] We have set forth the testimony in such detail for the reason that the appellant so emphatically contends that the judgment cannot be maintained either upon the ground that the Mudds were excused for not making the payments for the few months subsequent to October, 1945, or that the Lambs had waived the clause of the contract making time of the essence. The recital of the facts which we have made is a sufficient refutation of these contentions. The evidence not only shows that for month after month the vendor accepted payments after they became due, but the only legitimate inference that can be drawn from their conduct and from their express words is that these vendors intended to waive the provisions of the contract that time should be of its essence, not only as to payments then in default but as to future installments. Their words and conduct could not do other than lull respondents into a sense of security. There was no notification ever given to respondents of an insistence upon forfeiture in the event respondents failed to make payments promptly. The law does not favor forfeitures and as stated in Knarston v. Manhattan Life Insurance Co., 124 Cal. 74, 77, 56 P. 773, 774, "evidence tending to show the waiver of a forfeiture will be looked upon with kindly eyes." Cases such as Laffoon v. Collins, 212 Cal. 750, 300 P. 808, and Redd v. Garford Motor Truck Co., 205 Cal. 245, 270 P. 447, indicate that facts such as are shown by the record here are sufficient to establish such a waiver. Where there is such a waiver the purchaser has a reasonable time to perform and as to what is a reasonable time for such performance presents a question of fact for the trial court to determine from all the circumstances of the particular case. Hoppin v. Munsey, 185 Cal. 678, 198 P. 398. In view of the conversation which Lamb had with Mudd a week before the February payment became due, it cannot be said that there was any unreasonable delay on the part of the Purchasers. Mudd not only offered to pay the small amount due but the entire balance of the contract notwithstanding Lamb's statement that there was no hurry. Within a few days the Mudds went to the bank and arranged for a loan to pay off not only the amount due but the whole contract. In fact, he and his wife signed the note, trust deed and escrow instructions which would have effectuated this, as early as February 9, 1946.

[5] Appellant urges that the cross-complainant did not plead a waiver and did not plead "ability and willingness to make payment of the amount due." An examination of the cross-complaint discloses that so far as the waiver is concerned respondents, in unusual detail, pleaded the facts constituting this waiver and not only pleaded their ability and willingness to pay the small amount due but their ability and willingness to pay off the entire balance of the contract and that they attempted to do so but were prevented by appellants. Furthermore, the cross-complaint alleged and the appellants in the first paragraph of their answer to the cross-complaint, expressly admitted that appellants forfeited the rights of respondents under the contract and thereafter one of them executed a quit claim deed to the appellant Flanery. The cross-complaint stated facts which entitled respondents to relief against a forfeiture under the provision of Section 3275 of the Civil Code which reads as follows: "Whenever, by the terms of an obligation,

a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." In the case before us the respondents can be charged with no gross negligence or with fraud or with any willful breach of duty and are entitled to relief under the provisions of that Section. McDonald v. Kingsbury, 16 Cal.App. 244, 116 P. 380; Bedell v. Barber, 80 Cal.App.2d 806, 182 P.2d 591.

[6] There can be no doubt that the appellant Wilbur M. Lamb, who signed the contract as the vendor, was a proper party to the action. His wife was also a proper party to the action, for while she did not sign the contract it was presumptively community property and as such her signature would be required in the execution of any document in which any interest therein was sold or conveyed. C.C. § 172a. She was the one to whom all the payments were made and was not only a proper party but a necessary party to the action.

[7] There is a matter in the findings and judgment which should be corrected. It is found that the balance due on the contract is $743.80 and the judgment directs the respondents as a condition precedent to specific performance to pay that amount. At the trial, Howard Hemenway, who was the attorney for respondents, testified that he had computed the balance due and that it amounted to $839.81. Appellants evidently accepted this figure as correct for they introduced no evidence on the subject. The respondent is bound by this testimony and the findings and judgment should be corrected accordingly.

It is therefore ordered that paragraph 18 of the findings and paragraph 1 of the conclusions of law be corrected by inserting the figures $839.81 in lieu of the figures $743.80 and that the same correction be made in paragraph 1 of the judgment. As so corrected the judgment is affirmed. Respondents to recover costs on appeal.

DORAN, Acting P. J., and WHITE, J., concur.

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86 Cal.App.2d 386

RICH v. ERVIN et al.

Civ. 13569.

District Court of Appeal, First District.
Division 1, California.
June 25, 1948.
Hearing Denied Aug. 19, 1948.

1. Homestead ⚷1

The tests by which the validity of a homestead may be ascertained are the same whether the question is raised by a creditor or by the heirs of a deceased person. Civ.Code, §§ 1263, 1265–1269.

2. Homestead ⚷47

Where the required acts have been substantially performed, the construction of declaration of homestead should be liberal, but there must be a substantial compliance or the declaration will be strictly construed. Civ.Code, §§ 1263, 1265–1269.

3. Homestead ⚷1

A homestead is not a contract between the parties but is a constitutional right or privilege granted by the government. Const. Art. 17, § 1.

4. Homestead ⚷47

The truth or falsity of the contents of a declaration of homestead strikes at the heart of the validity of the homestead. Civ. Code, §§ 1263, 1265–1269.

5. Contracts ⚷150

A "written instrument" may be generally defined as anything reduced to writing and the terms "instrument in writing", "instrument of writing", and "written instrument" are descriptive phrases with a legal meaning implying an agreement or contract which the instrument contains and of which it is a memorial.

See Words and Phrases, Permanent Edition, for all other definitions of "Instrument in Writing", "Instrument of Writing" and "Written Instrument".

6. Evidence ⚷70

As used in the Code of Civil Procedure providing that recital in written instrument is presumed to be true, a "written instrument" applies only to the parties thereto or their successors in interest. Code Civ. Proc. § 1962, subd. 2.

7. Homestead ⟹47, 134

A declaration of homestead is not a written instrument between the parties, but a mere recitation of matters that may be true or untrue, and the incident of survivorship which is present in a valid homestead is not an agreement of parties but the result of operation of law. Civ.Code, §§ 1263, 1265–1269.

8. Homestead ⟹23

Declaration of homestead by persons who were not married was invalid. Civ. Code, § 1261.

9. Homestead ⟹57(1)

The existence of a homestead is a question of fact and burden of proof was upon plaintiff alleging such existence.

10. Appeal and error ⟹1010(1)

Findings as to existence of homestead will not be disturbed on appeal if supported by the evidence.

11. Deeds ⟹194(1), 208(3)

Possession of a deed by grantee constitutes prima facie evidence of delivery, and burden was upon plaintiff to produce evidence that there had been no delivery.

12. Husband and wife ⟹47(1)

Finding that deed from husband to wife had been delivered was sustained by substantial evidence.

13. Deeds ⟹68(1½)

Whether notary or grantor directed muscular effort in signing grantor's name to deed was a question of fact to be considered in determining the physical condition of grantor as that circumstance might play a part in reaching a conclusion on grantor's mental condition.

14. Signatures ⟹2, 4

If one requests another to sign a document for him and such signature is written in the presence of the party making the request or if a person aids another to sign his name and the signature is acknowledged by words or acts, that is all that the law requires. Civ.Code, § 3100.

15. Deeds ⟹3

Where the validity of deed is questioned, there must be some circumstance from which an inference may be drawn that there was a present intention on part of the grantor to divest herself of title.

16. Deeds ⟹53

Grantor's intent in signing deed is a question of fact.

17. Deeds ⟹207

Finding that deed was validly executed and that grantees were the owners of property covered thereby was sustained by the evidence.

◆

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by James F. Rich against Francis J. Ervin and others to quiet title. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

I. Karmel and Joseph B. Bates, both of San Francisco, for appellant.

Licking, Hammack, Davis & Schmidt and James T. Davis, all of San Francisco, for respondents.

WARD, Justice.

Plaintiff appeals from a judgment in favor of defendants quieting title to certain property in San Mateo County. The property is described in the complaint, with an allegation of ownership in fee simple in plaintiff, and that defendants claim some title or interest therein adverse to plaintiff. There is a prayer that defendants set forth the nature of such claim; also that plaintiff's title be quieted and defendants enjoined from further asserting any claim adverse to plaintiff. The answer sets forth that defendants Ervin became the owners of the property "by deed dated June 8, 1942, executed and acknowledged by May E. Rich, to these defendants." The deed was recorded June 10, 1942.

On the date the complaint was filed two of the defendants were minors but attained majority during the trial of the action approximately four years later. The delay was caused by continuances granted under the provisions of the Soldiers' & Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq.

The evidence shows that in 1909 plaintiff and Mae Ervin lived together as man and wife. October 11, 1922, plaintiff took title to the land in question in the form of a grant, bargain and sale deed, which was duly recorded. April 30, 1923, a declaration of homestead was executed by plaintiff and Mae Ervin Rich on the real property and the dwelling house thereon; it was subsequently recorded.

Plaintiff and Mary Ervin were married October 7, 1930, in accordance with the provisions of Civil Code sec. 79. A clergyman's certificate to that effect is an exhibit in the case. Mrs. Rich obtained an interlocutory decree of divorce on the ground of the husband's extreme cruelty on November 30, 1932. The decree provided "That plaintiff is allowed to resume her name prior to her marriage to the defendant which was May E. Ervin, and is awarded the house and lot at 414 Wisnom Ave., San Mateo, Calif., and defendant is awarded the house and lot at Nadina Ave., Homestead, San Mateo, Calif., and the Buick Automobile, community property of plaintiff and defendant." On or about January 3, 1933, plaintiff and Mrs. Rich resumed cohabitation.

January 3, 1933, plaintiff executed a deed of the property in question to May Ervin Rich, the deed setting forth "That the said party of the first part, for and in consideration of the love and affection which he bears towards his wife and for the purpose of making her a gift, and also for the purpose of compensating certain advances and benefits of money and property which she brought to said party of the first part by and since their marriage, the said James F. Rich, does hereby give, grant, alien, and convey, unto his wife, said party of the second part, all that certain lot, piece or parcel of land situate in the City of San Mateo, County of San Mateo, State of California, and bounded and described as follows: * * *" Following the above is a description of the property and reference to the dwelling house thereon. The deed further provides: "To Have and Enjoy, all and singular the same, and every part and parcel thereof, as and for her separate estate, especially relinquishing for himself and his heirs all right or claim to the same, or any part hereof, as community property, so that the same may be held by her as separate, and not in any respect as community property." The deed was recorded April 1, 1935.

On February 1, 1941, plaintiff and Mrs. Rich separated and about the same time the defendants Ervin took up their residence in the home of Mrs. Rich. February 11, 1941, Mrs. Rich caused to be filed the final decree of divorce awarding her the house and lot on Wisnom Avenue in San Mateo, California. The final decree contained the same provision as the interlocutory covering the disposition of property.

Mrs. Rich entered the Community Hospital of San Mateo County on May 20, 1942, and gave her address 114 Wisnom Street and the name of "relative or friend" "Mr. Richard Ervin—Nephew—above Address." On June 8, 1942, the deed, which is the subject of the main controversy, was executed; it was recorded June 10, 1942. According to the hospital records Mrs. Rich died June 9, 1942, at 1:55 A.M. Plaintiff caused the final decree to be set aside September 10, 1942.

The main questions involved in this appeal are: Was a valid homestead impressed upon the property so as to create the right of survivorship in the plaintiff, appellant herein? Is there substantial evidence to support the finding that delivery was effected by the deed of January 3, 1933 from plaintiff to Mrs. Rich? Is there substantial evidence to support the finding of the court below that the document dated June 8, 1942, is a validly delivered deed from Mrs. Rich to the three Ervin defendants?

The Declaration of Homestead is signed by plaintiff James F. Rich as *James Rich* and the name of *Mae* Ervin Rich appears thereon. (Emphasis added.) The "Declaration" contains the statement "that I am married, and the name of my wife is: *May* Ervin Rich, that my family consists of said wife only."

[1, 2] The question before this court is not what might follow upon the death of Mrs. Rich by the impressing of a valid homestead upon the property, under which

circumstances the homestead would vest in Mr. Rich. Probate Code, sec. 663; Civil Code, sec. 1265; Spencer v. Stewart, 202 Cal. 695, 262 P. 331. Rather, the above declarations "that I am the head of a family; that I am married, and the name of my wife is: *May* Ervin Rich"—whereas the declarant was not in fact married, and was not the head of a family—make the vital question involved: Was a valid homestead impressed upon the property? The declaration is merely a step which tends to create a homestead. Civil Code, secs. 1266–1269, 1263. The tests by which the validity of a homestead may be ascertained are the same whether the question is raised by a creditor or the heirs of a deceased spouse. Estate of Delaney, 37 Cal. 176. What, may be asked, is the effect of the recital in the declaration of homestead that plaintiff is the head of a family consisting of his wife May Ervin Rich? Either a married (sec. 1263), or an unmarried (sec. 1266), person may file a declaration of homestead. Where the required acts have been substantially performed the construction of the declaration should be liberal, but there must be a substantial compliance or the declaration will be strictly construed. The statement of an untruth relative to an essential requirement vitiates the document as the declaration must contain certain information. Civil Code, sec. 1267.

[3] Plaintiff contends that the recital in a declaration of homestead executed by a man and woman who were not married but living together openly as man and wife, is conclusively presumed to be "The truth of the facts recited * * * in a written instrument between the parties thereto, or their successors in interest by a subsequent title." Code Civ.Proc., sec. 1962, subd. 2, No case is cited in which a homestead declaration has been held to be a written instrument under the statute. A homestead is not a contract between parties, but is a right which is provided by the Constitution of California (Art. XVII, sec. 1) that the Legislature may define the nature of a privilege in real property, which is distinct, clear and above the normal right of ownership. The Legislature in this state has provided the rules that govern "homesteads." Civil Code, Div 2, Pt. 4, Tit. 5, Ch. 1, 2, 3. Whether a homestead confers an immunity exemption or a benefit to the homesteader, it is still a privilege granted by the government and is not a contract in the form of an instrument in writing with a creditor or one of the beneficiaries of the homestead or any third party. "The very purpose of the homestead law is to protect the property from existing debts." Yager v. Yager, 7 Cal. 2d 213, 217, 60 P.2d 422, 424, 106 A.L.R. 664. "Homestead laws are founded upon considerations of public policy, their purpose being to promote the stability and welfare of the state by encouraging property ownership and independence on the part of the citizen, and by preserving a home where the family may be sheltered and live beyond the reach of economic misfortune. The statutes are intended to secure to the householder a home for himself and family, regardless of his financial condition—whether solvent or insolvent—without reference to the number of his creditors, and without any special regard to the extent of the estate or title by which the homestead property may be owned. * * *

[4] "The homestead exemption is designed, not merely for the protection of the husband or head of the family, but also for the benefit of the wife and children; it seeks to implement the obligation which is imposed upon the head of the family to provide for the support of the dependent members thereof." 26 Am.Jur., pp. 10-11, secs. 6, 7. The truth or falsity of the contents of a declaration strikes at the heart of the validity of the homestead. A false statement—that the declarant is a married man, when in fact he is not, may give an unmarried woman in whom the property may appear to vest an illegal advantage in occupancy of the premises and result in defrauding creditors.

[5-7] A "written instrument" may be generally defined as anything reduced to writing. "The terms 'instrument in writing,' 'instrument of writing' and 'written instrument' are descriptive phrases, with a legal meaning, implying an agreement or contract which the instrument contains, and of which it is a memorial." 44 C.J.S., In-

strument, page 421. As used in Code of Civil Procedure, sec. 1962, subd. 2, it applies only to "the parties thereto, or their successors in interest." "Generally the term 'instrument' as applied to documents necessarily imports a paper writing; but every paper writing is not necessarily an instrument within the settled statutory meaning of the term. With reference to writings the term 'instrument' as employed in our statutes has been defined to mean an agreement expressed in writing, signed and delivered by one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty." People v. Fraser, 23 Cal.App. 82, 84, 85, 137 P. 276, 277; see, also, Weisbrod v. Weisbrod, 27 Cal.App.2d 712, 81 P.2d 633. The declarants herein did not contract with others, but accepted a privilege granted by the state. A declaration of homestead is not a written instrument between parties but a mere recitation of matters that may be true or untrue. The incident of survivorship which is present in a valid homestead is not an agreement of parties but the result of the operation of law.

"The mode in which a homestead is to be created, as well as the legal incidents which attached to its existence, are purely statutory." Security Loan & Trust Co. v. Kauffman, 108 Cal. 214, 219, 41 P. 467, 468. "* * * the homestead is not a technical one in the legal sense, until the required formalities have been complied with." 13 Cal.Jur. 413. "* * * *the provisions relating to the acquisition of a homestead are construed to be mandatory.*" (Emphasis added) 13 Cal.Jur 427, and cases cited.

Civil Code, sec. 1261, provides that the phrase "head of a family" includes within its meaning: "1. The husband, when the claimant is a married person. 2. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either: (a) His or her minor child, or minor grandchild, or the minor child of his or her deceased wife or husband; (b) A minor brother or sister, or the minor child of a deceased brother or sister; (c) A father, mother, grandfather, or grandmother; (d) The father, mother, grandfather, or grandmother of a deceased husband or wife; (e) An unmarried sister, or any other of the relatives mentioned in this section, who have attained the age of majority, and are unable to take care of or support themselves."

"The recital of the facts stated by the homestead claimant in her declaration is no evidence of the truth of such recitals. * * * The introduction in evidence of the declaration of homestead alone served the purpose of showing a compliance with the law which demands the filing for record of a declaration containing certain recitals. The truth of these recitals must be proven aliunde whenever the validity of the homestead is attacked. The rights of the homestead claimant are created by the filing of a declaration of homestead in the form specified by the statute, coupled with the actual present existence of the facts recited in the declaration. * * * A valid homestead and a valid declaration of homestead are widely different." Aprate v. Faure, 121 Cal. 466, 467, 468, 53 P. 917.

[8] It does not appear that at the time of the execution of the declaration Mr. or Mrs. Rich came within the provisions of Civil Code sec. 1261. Feintech v. Weaver, 50 Cal.App.2d 181, 122 P.2d 606, is not controlling as applied to the facts of this case. Certain declarations in the Feintech case were treated as surplusage, but in the present case Mr. Rich made a statement which he knew to be false. In Schuler-Knox Co. v. Smith, 62 Cal.App.2d 86, 144 P.2d 47, two declarations of homestead were filed. It was held in 62 Cal.App.2d at page 98, 144 P.2d at page 53, that the wife failed to state in the declaration that her husband had previously filed a homestead and "that she was filing the homestead for the 'joint benefit' of herself and her husband. Those omissions rendered the declaration fatally defective."

There is no denial of plaintiff's contention that evidence is not received to contradict a conclusive presumption. Gayton v. Pacific Fruit Express Co., 127 Cal.App., 50, 15 P.2d 217. A fair example is the execution of a joint and mutual will, wherein the parties agree with respect to property that may be held or transmitted from one status to another. Under such circumstances a will may constitute a contract. Estate of Watkins, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1. However, considering a will not as a contract, but whether it was in fact a valid will, "evidence outside the will may be introduced not to alter its provisions, but to show that it was not intended * * * as a will." Estate of Janes, 18 Cal.2d 512, 515, 116 P.2d 438, 441. Evidence relative to recitals in declarations of homestead was admitted in Spencer v. Stewart, 202 Cal. 695, 262 P. 331, and Coca Cola Bottling Co. v. Feliciano, 45 Cal.App.2d 680, 114 P.2d 604.

It has been suggested that Mrs. Rich was a party to this fraud upon the state. Her lack of candor in the recital of the declaration of homestead could not imbue or impregnate the germ of truth into plaintiff's statement and invest falsehood into truth.

[9, 10] Plaintiff did not offer proof of the recitals or testify as to the circumstances surrounding the making and recording of the homestead, but merely introduced the homestead. The existence of a homestead is a question of fact. The burden of proof was upon plaintiff. Findings thereon will not be disturbed if there is evidence to support the reasonable deductions reached by the trial court.

As previously stated a deed descriptive of the property was executed by plaintiff on January 3, 1933 to May Ervin Rich. Plaintiff claims that this deed was not validly delivered. The interlocutory decree of divorce between the parties awarded a certain parcel of land to plaintiff, and to defendant the particular land in question on this appeal. The deed was in accordance with the interlocutory decree. Plaintiff testified that the deed rested in a drawer to be recorded in the event that he should predecease Mrs. Rich. The deed was recorded two years after its execution, but plaintiff took no action until Mrs. Rich died, over seven years thereafter. The language heretofore set forth in the deed does not tend to uphold plaintiff's testimony.

[11, 12] Possession of a deed by the grantee constitutes prima facie evidence of delivery. It was incumbent upon plaintiff to produce evidence that there had been no delivery. Stewart v. Silva, 192 Cal. 405, 221 P. 191; O'Neil v. O'Malley, 75 Cal.App.2d 821, 171 P.2d 907; Butler v. Woodburn, 19 Cal.2d 420, 122 P.2d 17. The evidence of plaintiff on this issue was rejected by the trial court. Willis v. Holback, 33 Cal.App.2d 145, 91 P.2d 140. "In the final analysis, the essential and controlling element which must be discovered in determining whether there has been delivery of a deed is the intention of the grantor, and this essential matter of the grantor's intention is a question of fact which is to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question." Knudson v. Adams, 137 Cal.App. 261, 267, 30 P.2d 608, 611; see, also, Marlenee v. Brown, 21 Cal.2d 668, 134 P.2d 770. In this case there was substantial evidence to support the finding in reference to the delivery of the 1933 deed by plaintiff to Mrs. Rich.

The final major question in this case is whether the evidence is insufficient to support the finding that there was due execution and delivery of the deed dated June 8, 1942, by Mrs. Rich to defendants. It is contended that there was no valid subscription and no valid delivery of the deed.

[13] It appears that Mrs. Rich was suffering from an incurable malady, and that her right side was paralyzed. A notary public who had come to the hospital showed the deed to Mrs. Rich, read its contents to her and asked if she desired to sign it. Mrs. Rich replied "Yes." Francis Ervin was present, also a cousin of Mrs. Rich, Anna Robertson, who brought the notary public at the request of Mrs. Rich. Both parties corroborated in substance the testimony of the notary, who had been told several times previously by Mrs. Rich that she wished to execute such a deed. The notary held a portion of the pen holder as assistance to Mrs. Rich. Whether the notary or Mrs. Rich directed the muscular effort in signing the name was a question of fact to be considered in determining the physical condition of Mrs. Rich as that circumstance might play a part in reaching a conclusion on her mental condition. In brief, did she know the contents and intend to sign the deed?

A great part of the evidence was directed to the question whether Mrs. Rich knew what she was doing on the afternoon preceding her death when she signed and permitted the notary to retain the deed for notarial acknowledgment. Plaintiff contends that Mrs. Rich was not mentally capable of signing and delivering the deed. This was the second visit of Mrs. Rich to the hospital. Attention is called to a carcinoma condition; that her death occurred the next day, but the hospital charts are silent covering her condition during the particular period of the visit of Mrs. Robertson, the notary and Francis Ervin, when the deed was signed. In Estate of Powers, 81 Cal.App.2d 480, 184 P.2d 319, the record showed that a patient was irrational on "June 17th" but no entry with reference to mental condition on "June 18th." At page 482 of 81 Cal.App.2d, at page 320 of 184 P.2d, the court stated: "We cannot agree with appellant that the entries on the hospital charts constitute substantial evidence that the testatrix did not possess testamentary capacity on June 18. The critical inquiry is directed to the condition of the testatrix' mind at the very time of the execution of the will." Although the case does not involve competence to execute a deed, it sheds light on the question of the evidential effect of hospital records.

[14] If one requests another to sign a document for him, and such signature is written in the presence of the party making the request, or if a person aids another to sign his name and the signature is acknowledged by words or acts, that is all that the law requires. Civil Code, sec. 3100; Estate of Holloway, 195 Cal. 711, 235 P. 1012; Yates v. Dyer, 76 Cal.App. 288, 244 P. 950; Harris v. Harris, 59 Cal. 620, citing Bishop on Contracts, 168.

[15-17] The question of the sufficiency of the evidence to establish delivery of the deed by Mrs. Rich to defendants is the subject of extended discussion in the briefs. This subject has been mentioned heretofore in referring to the deed from plaintiff to Mrs. Rich. The question requires only slight consideration. In the deed to defendants, as in all deeds, there must be some circumstance from which an inference may be drawn that there was a present intention on the part of the grantor to divest herself of title. Security-First Nat. Bank v. Leatart, 75 Cal.App.2d 211, 170 P.2d 687; Marlenee v. Brown, supra. Mrs. Rich had previously stated to the notary that she wanted the property "to go to the boys." The notary testified that he was satisfied as to her mental capacity when she signed the deed. The question of intent is one of fact. The statement made prior to the execution of the deed—that Mrs. Rich intended that the notary should visit her at her home and that she wanted the property to go to "the boys"—is in harmony with her conduct in signing the deed and permitting it to be notarized. "Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them." Whitlow v. Durst, 20 Cal.2d 523, 524, 525, 127 P.2d 530, 531; Dinneen v. Younger, 57 Cal.App.2d 200, 134 P.2d 323; Gerard v. Gerard, 62 Cal.App.2d 672, 145 P.2d 702. Recording is prima facie evidence of delivery. Code Civ.Proc., sec. 1951. The presumption of genuineness, execution and delivery, plus the evidence introduced, and the fact that there is no evidence that Mrs. Rich intended to exercise dominion over the deed is sufficient to uphold the finding that the deed of June 8, 1942, "was at the time of its execution and delivery, ever since has been and now is a valid deed of grant, and that ever since its said execution and delivery said defendants have been and now are the owners in fee simple absolute in and to and of the whole of the real property in the complaint in the above-entitled action described and the hereinbefore described property and every part of said real property."

The judgment entered in favor of the defendants and against the plaintiff is affirmed.

PETERS, P. J., and BRAY, J., concur.

MARKS v. WALTER G. McCARTY CORPORATION.*

Civ. 15877.

District Court of Appeal, Second District, Division 3, California.

June 29, 1948.

Rehearing Denied July 26, 1948.

Hearing Granted Aug. 26, 1948.

1. Brokers ⚷43(3)

Code section requiring agreement authorizing or employing an agent or broker to purchase or sell realty for compensation to be in writing and subscribed by party to be charged or by his agent requires that the writing unequivocally show on its face the fact of the broker's employment. Civ. Code, § 1624, subd. 5.

2. Brokers ⚷43(2)

Code section requiring agreement employing an agent to purchase or sell realty for compensation to be in writing and subscribed by party to be charged or by his agent was intended to prevent fraud and perjury in enforcement of obligations depending for their evidence on unassisted memory of witnesses by requiring that enumerated transactions be evidenced by a writing signed by the party to be charged. Civ.Code, § 1624, subd. 5.

3. Brokers ⚷43(2)

Code section requiring an agreement employing an agent to purchase or sell realty for compensation to be in writing and subscribed by party to be charged or by his agent should not be limited by strained judicial construction to defeat the purpose of the people as expressed through the Legislature. Civ.Code, § 1624, subd. 5.

4. Brokers ⚷43(3)

Where documents executed by owner of realty, stating terms under which realty would be sold and providing amount of commission to be received by broker, were not signed by owner, no recovery for commission could be had thereon by broker for failure to comply with statute requiring agreement employing broker to be in writing signed by party to be charged or his agent. Civ.Code, § 1624, subd. 5.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Walter N. Marks against the Walter G. McCarty Corporation, to recover a real estate broker's commission. From a judgment for the plaintiff, the defendant appeals.

Judgment reversed.

Macfarlane, Schaefer & Haun, of Los Angeles, for appellant.

Adams, Duque & Hazeltine and A. Andrew Hauk, all of Los Angeles, for respondent.

McCOMB, Justice Assigned.

This appeal by defendant is from a judgment after trial by the court without a jury awarding plaintiff $57,500 together with interest at 7% per annum from and after December 1, 1944, and costs, in an action to recover a real estate broker's commission for the alleged sale of the Beverly Wilshire Hotel, its furniture, furnishings and equipment.

The record discloses these undisputed essential facts:

Defendant owned the Beverly Wilshire Hotel, including the land, buildings, furniture and equipment from 1928 until it was sold in 1944. Walter G. McCarty and his wife owned all of the stock of defendant corporation and Mr. McCarty, as president, was authorized to negotiate and list the property for sale.

Plaintiff, a licensed and practicing real estate broker, had known Mr. McCarty for some years prior to the transaction herein involved. Early in October, 1943, plaintiff and Mr. McCarty, together with Mr. O'Neill, manager of the hotel, held a meeting at which plaintiff asked Mr. McCarty if the hotel was for sale, and upon being informed that it was, said that he desired to act as a broker for the sale of the hotel as he had some parties in mind as prospective purchasers and that since he had been operating as a broker in Beverly Hills for many years and knew the hotel, he felt he could develop a deal. Mr. McCarty stated that the price was

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* Subsequent opinion 205 P.2d 1025.

$2,000,000. When asked about the broker's commission, Mr. McCarty told plaintiff that it would be the 5 per cent Realty Board commission. At this, or a later meeting, Mr. McCarty handed plaintiff a typewritten sheet dated October 14, 1943, containing details of the proposed sale of the hotel.[1] At these first meetings plaintiff

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[1] This typewritten sheet, which was unsigned, was received in evidence as plaintiff's Exhibit "3", and read as follows:

"Re BEVERLY WILSHIRE HOTEL
October 14, 1943

Description:

Lots 18, 19, 20, 21, 22, 23, 24, 25, 26, 32, 33 and 34, also that portion of the Northerly 5 feet of the alley lying Southerly of and adjoining said lots 18 to 22 inclusive on the South, as the same was vacated by Ordinance No. 209 of the City of Beverly Hills, all of Tract No. 6649 as per map recorded in Book 70, Page 54 of Maps in the office of the County Recorder of Los Angeles County, California.

Except therefrom the Easterly 10 feet of lots 18, 23, 24, 25, 26 and vacated alley, and except the Westerly 10 feet of lots 22, 32, 33, 34 and vacated alley; and except the Southerly 25 feet of lot 32.

All buildings, furniture, fixtures and equipment on said property.

Price:

$2,000,000 payable as follows:

$50,000 cash to be deposited in escrow (to be forfeited if deal is not consummated within 30 days from date of escrow).

$550,000 upon close of 30 day escrow. Subject to a first Trust Deed of $775,000 in favor of the Connecticut Mutual Life Insurance Company of Hartford, Conn. which purchaser agrees to assume and pay installments as provided in said Trust Deed.

Said Trust Deed has at this date been reduced to approximately $675,000.

$725,000 Trust Deed, subject and second to the first Trust Deed. Interest @ 5% per annum payable monthly. Purchaser agrees to pay to Walter G. McCarty Corporation in payments of $12500 per month which shall include interest @ 5% per annum. Each payment which will be payable commencing December 1, 1943 shall be credited first on the interest then due and the remainder on the principal; and interest shall thereupon cease upon the principal so credited.

Said Trust Deed of approximately $725,000 shall be secured by all the real property described above, by a Mortgage of Chattels on all the furniture, fixtures and equipment contained in said hotel and buildings. Also it shall be secured by all the rents, issues and income from said property.

All taxes, interest, insurance, lighting rents and issues shall be prorated at close of escrow.

At close of escrow, in addition to the purchase price of $2,000,000 the purchaser agrees to purchase all inventories consisting among other things of liquors, merchandise, etc. at the present market price and pay cash for same at close of escrow. The purchaser further agrees to pay for when delivered all merchandise that has been ordered but not yet received.

All furniture, rugs, carpets, drapes, and equipment in apartment 800 except Room 811 thereof is not included in the sale of the Beverly Wilshire Hotel. Said equipment is the personal property of Walter G. McCarty. Purchaser agrees upon close of escrow to lease said apartment 800 excepting therefrom Room 811 to Walter G. McCarty for a period of five (5) years at a monthly rental of $300.00. Said rental shall include the usual service as is in effect in other apartments in said hotel.

All furniture, fixtures, etc. in storeroom No. 9508 Wilshire Building is the property of Walter G. McCarty Corporation. Said Corporation is to retain said storeroom free of rent for two months after close of escrow.

The sales price of the hotel includes only the furniture, etc. owned by the hotel and does not include any furniture owned and used by guests therein.

Interest	5% Int. from 5/1/40 to 5/1/45	
	4 3/4 Int. from 5/1/54 to 5/1/60	
Payments	5/1/43 to 5/1/45	$15,000.00 Quarterly
	5/1/45 to 5/1/50	13,750.00 Quarterly
	5/1/50 to 5/1/60	12,500.00 Quarterly

The above payments include principal and interest.

Ins. Fire & Earthquake-1,400,000 app.
1,250,000
War Damage—1,250,000."

stated to Mr. McCarty that he had in mind several prospective purchasers for the hotel but did not disclose their names. Shortly after his conversation with Mr. McCarty, plaintiff, through the law firm of Loeb & Loeb, contacted Mr. Arnold Kirkeby, a Chicago hotel operator and owner. Mr. Kirkeby stated that he was interested in a deal concerning the Beverly Wilshire Hotel, both by way of participating in the purchase and by way of operation. There followed numerous telephone conversations between the firm of Loeb & Loeb and Mr. Kirkeby, and plaintiff and Mr. Kirkeby relative to a proposed deal concerning the hotel, and conversations between plaintiff and Mr. McCarty. At one of these latter conversations, plaintiff told Mr. McCarty that Mr. Kirkeby was being considered as one of the members of a syndicate which contemplated purchasing the hotel, and terms of the proposed agreement of purchase and sale and escrow instructions were discussed with Mr. McCarty. On or about February 15, 1944, Mr. McCarty informed plaintiff that he was raising the price from $2,000,000 to $2,250,000. When plaintiff protested it was difficult enough to make the sale at the lower price, Mr. McCarty informed him the deal would have to be taken or left at the new price. Plaintiff told Mr. McCarty that he would still work on it and had the one buyer in the United States who would buy it, namely, Mr. Kirkeby. At this time Mr. McCarty handed plaintiff a memorandum dated February 15, 1944, on the Beverly Wilshire stationery with the printed name of the Walter G. McCarty Corporation. This memorandum was a carbon copy prepared on a letterhead sheet usually used for originals.[2] This document was given to plaintiff in response to his request for something in writing with reference to the terms upon which defendant would be willing to sell the hotel and the commission to be paid. In this memorandum to the real estate broker, the commission was reduced to $57,500. Plaintiff objected but finally agreed to continue working upon the deal. About March 21, 1944, the law firm of Loeb & Loeb wrote a letter to Mr. McCarty in which they set forth the terms upon which Mr. Kirkeby and his associates would be willing to enter into a deal for the hotel.

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[2] This memorandum read as follows:

"The Beverly Wilshire Hotel
Walter G. McCarty Corporation
Owner and Operator
Wilshire Blvd. between El Camino and Rodeo Drives
Beverly Hills, California
Feb. 15, 1944

Hotel and pool area		$2,250,000.00
Cash	$600,000.00	
1st T.D.	$662,000.00	
2nd T.D.	$988,000.00	
		$2,250,000.00

$988,000.00—Due on or before 6 years.
Payable $12,500.00 per month including interest @ 5% per annum.

Liquors and inventories extra. Cash on close of escrow.

Taxes, insurance, licenses, etc. pro-rated at close of escrow.

Lease of Apt. #800 for 5 years $300.00 per month.

Will give 2 years option on 8 lots in rear of pool area $130,000.00—
$13,000.00 for option and optionee to pay taxes.
$13,000.00 will be credited on purchase price if exercised.

Commission on hotel property $57,500.00.
(5% first $50,000.00
2½% on $2,200,000.00)

Will pay commission on optioned property if exercised.

If I can secure lots 27 and 28 (100 ft.) will include same in option @ $25,000.00
(Will not give option.)"

During this period plaintiff was in constant communication with Mr. Kirkeby, both by telephone and through correspondence. On April 17, 1944, plaintiff went to see Mr. McCarty and told him that Mr. Ziffren, associated with the law firm of Loeb & Loeb, was in Chicago and anticipated seeing Mr. Kirkeby. However, that unless he had the deal in writing there would be no need of even talking about it because both he and Mr. Kirkeby were afraid that since Mr. McCarty had raised the price once, he might raise it again when they had reached a deal. Mr. McCarty took a yellow piece of paper from his desk drawer, dated it April 17, 1944, and wrote the deal in his own handwriting thereon and handed it to plaintiff,[3] who made the following correction therein:

> "Option of 8 lots by payment of $13,000.00 2 yrs."

He also drew a line through the words "including lots 29 and 30, Tr. 6649" and changed the figure $1,775,000 to $1,750,000, also the figure $2,275,000 to $2,250,000, and changed the figure $750,000 to $700,000. At this meeting plaintiff told Mr. McCarty that while Mr. Ziffren was in Chicago, he would be talking to Mr. Kirkeby on the deal and that he wanted the terms of the second mortgage reduced from the amount set in the previous conversations and that they insisted that he get something in writing from Mr. McCarty as to the price. At this meeting plaintiff gave Mr. McCarty the names of the members of the proposed syndicate and told him Mr. Kirkeby was one of the group and was to operate the hotel. Upon receiving this memorandum, plaintiff sent a telegram to Mr. Kirkeby requesting him to telephone plaintiff. This Mr. Kirkeby did and he and plaintiff discussed the deal as set forth in the memorandum. Subsequently, plaintiff got Mr. McCarty to reduce the monthly payments on the second mortgage from $12,500 to $11,500. This fact plaintiff communicated to Mr. Kirkeby. Thereafter, various conversations took place between the respective parties and on April 24, 1944, Mr. Kirkeby wired plaintiff that he and his associates had decided to stay out of the Beverly Wilshire Hotel deal on account of the heavy amortization requirements on the second mortgage. Plaintiff thereafter kept in touch with Mr. Kirkeby

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[3] This paper dated April 17, 1944, read as follows:

"Kirkeby deal Apr. 17/44

Walter Marks, Broker

Furniture and equipment	$ 500,000	
Land and buildings	1,750,000	
~~including lots 29 and 30, Tr. 6649~~		2,250,000
1—First Payment to be deposited in escrow on or before		
1—Apr. 20, 1944	$700,000	
2—Purchaser assumes and agrees to pay 1st Trust Deed as and when due	655,314.18	
3—Purchaser to execute 2nd Trust Deed to Walter G. McCarty Corp. due on or before May 31,/49 Interest @ 5% per annum (details set forth below)	894,685.82	
		2,275,000

2nd Trust Deed payable $12500 per month including interest @ 5% per annum. Date of Trust Deed, June 1, 1944—Monthly payments commence July 1, 1944, and monthly thereafter up to and including May 1, 1949, at which time the balance of the principal shall be paid.

Option of 8 lots by the payment of $13,000.00 2 yrs.

Commission to Broker $57,500 payable at close of escrow.

5 yr. Lease of apt. 800, Cavana No. 7 and space in garage for two autos @ $300.00 per month."

and endeavored to make some satisfactory arrangement for payments on the second mortgage and he discussed with Genis, Swig and Store Properties, Inc. the possibility of their participating in the syndicate. About August 1, 1944, plaintiff arranged for Mr. Kirkeby to come to Los Angeles. Plaintiff met Mr. Kirkeby at his hotel and took him to see Mr. Genis where a general conversation ensued relative to the purchase of the hotel. The following day Mr. Marks suggested to Mr. Kirkeby that he buy the hotel himself. Mr. Kirkeby said he liked the idea and maybe he would. They then discussed the terms as previously presented to Mr. Kirkeby. After lunch Mr. Kirkeby said he wanted to go out and see Mr. McCarty. Mr. Marks then made an appointment for Mr. Kirkeby to see Mr. McCarty at his ranch alone. Thereafter plaintiff loaned Mr. Kirkeby his car and he drove out to see Mr. McCarty at his ranch. There they discussed the terms upon which the hotel was to be sold and the price of $2,250,000 was agreed on with terms almost identical to those upon which the deal was finally closed. On August 5, 1944, Mr. Kirkeby called plaintiff at his hotel and told him that he had promised to meet with Mr. McCarty on Monday, August 7th, to conclude the deal but that he was embarrassed because a Mr. Connie Hilton had called him on Friday and offered him the controlling interest in the Sherry Netherland Hotel in New York City. Mr. Kirkeby said he would have to decide on the Sherry Netherland deal instead of the Beverly Wilshire deal since he had been negotiating on that prior to coming to California. Plaintiff expressed his diasppointment but said he would continue to watch the deal and perhaps Mr. Kirkeby could handle it later. Mr. Kirkeby on August 7th telephoned Mr. McCarty and told him he did not have the money available to purchase his hotel and added that as soon as he got additional money he would get in touch with him. Thereafter Mr. McCarty attempted to negotiate a deal for the sale of the hotel to some people who lived in Detroit. This deal fell through and in October, 1944, Mr. McCarty telephoned Mr. Kirkeby and asked him if he still was interested in buying the hotel. Over the telephone they agreed on price and terms substantially the same as those they had agreed on in August. Shortly thereafter Mr. Kirkeby came to Los Angeles, an escrow was opened with the Title Insurance and Trust Company on November 1, 1944, and the deal was consummated. When Mr. Kirkeby arrived in Los Angeles plaintiff saw him and asked him if he intended to take care of him on the deal, to which Mr. Kirkeby replied that question was a matter between plaintiff and Mr McCarty. Subsequently Messrs. McCarty, Kirkeby and Ziffren met and Mr. McCarty told them that he did not propose to pay plaintiff a commission. On April 17, 1945, plaintiff instituted the present action. By appropriate pleading and objection in the trial court defendant contended that plaintiff's cause of action, if any, was barred by subsection 5, section 1624, of the Civil Code.[4]

Defendant contends that plaintiff's alleged cause of action was barred because there was not a sufficient memorandum signed by defendant to meet the requirements of subsection 5, section 1624, of the Civil Code, which provides that an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission is invalid unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent.

[1] This proposition is tenable. The rule is settled that in a suit by a broker to recover a real estate commission in order to show compliance with the requirements

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[4] Section 1624 of the Civil Code reads in part as follows:

"The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:

* * * * * * *

"5. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission;"

of section 1624, subsection 5, of the Civil Code, the writing signed by the party to be charged or his agent must unequivocally show on its face the fact of employment of the broker; that is, it must show an authority to act or negotiate a sale of the property for the owner. (Herzog v. Blatt, 80 Cal.App.2d 340 at 342, 180 P.2d 30, [hearing denied by the Supreme Court]; Morrill v. Barneson, 30 Cal.App.2d 598 at page 603, 86 P.2d 924; Egan v. Pacific Southwest Trust & Savings Bank, 92 Cal.App. 1 at page 3, 267 P. 719; Irwin v. Klimper, 56 Cal.App. 434, 205 P. 714; Patterson v. Torrey, 18 Cal.App. 346, at page 348, 123 P. 224; Kleinsorge & Heilbron v. Liness, 17 Cal.App. 534, 535, 120 P. 444, et seq. See also Shapiro v. Canada, 101 N.J.L. 425, 129 A. 870; Heyman v. Stopper, 85 N.J.L. 128, 88 A. 946.)

[2, 3] The purpose of this statute is to prevent fraud and perjury in the enforcement of obligations depending for their evidence on the unassisted memory of witnesses by requiring that enumerated transactions be evidenced by a writing signed by the party to be charged. The salutary effect of such a statute which is clear, unambiguous, and which has been widely publicized among persons engaged in real estate transactions, should not be limited or restricted by strained judicial construction to defeat the purpose of the people as expressed through their legislature.

In Egan v. Pacific Southwest Trust & Savings Bank, supra, a writing signed by the owner stating that she agreed to sell certain property at a designated price, a certain amount to be paid to the broker, was held not to constitute a sufficient memorandum in writing authorizing or employing the broker, but to be at most only a memorandum of an agreement to pay the broker the amount specified therein.

In Patterson v. Torrey, supra, a writing signed by the owner of the property stating the price and saying he would accept a certain other property in exchange at a designated valuation with an oral request to the broker to see the owner of the property to be exchanged, was held merely to state the price at which the owner was willing to sell or to exchange the other property and not to constitute an employment of the broker, nor to confer upon him any authority to negotiate a sale or exchange for compensation.

In Kleinsorge & Heilbron v. Liness, supra, it was held that the authority to sell real estate for another must be specifically conferred by the writing upon the broker in whom it was the intention to vest such an authority and that an agreement on the part of the owner to sell the property describing it and stating the terms of the payment does not confer authority upon the broker who negotiates the sale and is therefore not sufficient under the provisions of subsection 5, section 1624, of the Civil Code to sustain an action for a broker's commission.

In Irwin v. Klimper, supra, a provision contained in escrow instructions addressed by the owner of the property to the bank, stating that a certain amount is due to a real estate broker as commission and directing the bank to hold the balance of the purchase money after the payment of the expenses and the commission, was held to be an order which at most was an acknowledgment of an obligation on the part of the owner to pay the stated commission out of the purchase price on the completion of the transaction, and that it did not constitute an agreement authorizing or employing the plaintiff to sell the property or a promise to pay the commission and that plaintiff's cause of action for a broker's commission was barred under the provisions of section 1624 of the Civil Code.[5]

[4] Applying the foregoing rule to the facts in the instant case, none of the documents introduced in evidence showed any authority in plaintiff to negotiate a sale of the property in question, nor is there anything in any of the documents employing him as an agent to sell the property for compensation or a commission. The facts in the instant case are analogous to those in the cases cited supra, and the principle

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[5] It is to be noted that in 1922 subsection 6 of section 1624 read as subsection 5 of section 1624 of the Civil Code now reads.

of law is identical. Therefore, since there was not a sufficient note or memorandum executed by the defendant or its authorized agent authorizing the plaintiff to sell the Beverly Wilshire Hotel or employing him as an agent or broker to sell it for compensation, the trial court improperly entered judgment in favor of plaintiff.

In view of our conclusion, no useful purpose would be served by our discussing the other grounds for reversal urged by defendant.

The judgment is reversed.

SHINN, Acting Presiding Justice, and WOOD, J., concur.

Rehearing denied; SHINN, J., dissenting.

86 Cal.App.2d 313

KATZ v. DRISCOLL et al.

No. 13695.

District Court of Appeal, First District, Division 1, California.

June 19, 1948.

Hearing Denied Aug. 12, 1948.

1. Pleading 🔑225(2)

While granting of leave to amend after demurrer to complaint is sustained is ordinarily within court's discretion, granting leave is an abuse of discretion where complaint is not fundamentally deficient in alleging facts showing a right to some relief which can properly be given but is only defective with respect to manner or form in which facts warranting relief have been pleaded.

2. Executors and administrators 🔑49, 75

Statute requiring administrator to bring action to recover property conveyed by deceased in fraud of creditors recognizes that right to recover property so conveyed is an "asset" of his insolvent estate, and that the executor or administrator is a trustee thereof for benefit of creditors. Probate Code, § 579.

See Words and Phrases, Permanent Edition, for all other definitions of "Asset".

3. Executors and administrators 🔑129(3)

Primary object of statute requiring administrator to bring action for recovery of property conveyed by deceased in fraud of creditors is to enable trustee to reduce that asset to possession and administer it for benefit of creditors under supervision of probate court. Probate Code, § 579.

4. Executors and administrators 🔑431(1)

Under statute requiring administrator to bring action for recovery of property conveyed by deceased in fraud of creditors, creditor may not maintain action to set aside fraudulent conveyance until creditor has exhausted all means of procuring action to be brought by executor or administrator. Prob. Code, § 579.

5. Trusts 🔑371(2)

In action by administrator to recover property allegedly conveyed by deceased in fraud of creditors, complaint alleging that deceased transferred United States Savings Bonds with intent to defraud and avoid obligations, and that there was a deficiency of assets in his hands to meet obligations, was sufficient as against general demurrer to establish a trust in favor of plaintiff in proceeds of bonds when received notwithstanding erroneous contention that plaintiff was entitled to recovery of bonds themselves. Prob. Code, § 579.

6. Judgment 🔑252(5)

Where a plaintiff prays for certain relief to which he is not entitled and "for such other and further relief," he is entitled to a judgment for such relief as may be consistent with case made by complaint and embraced within the issues.

See Words and Phrases, Permanent Edition, for all other definitions of "For Such Other and Further Relief".

7. United States 🔑91

Treasury regulations and California statute governing United States Savings Bonds and giving a judgment creditor, trustee in bankruptcy, or a receiver of an insolvent's estate, the right to payment apply only to claims or levies on the bonds during lifetime of the owner and do not modify the further regulation prohibiting any impairment of rights of survivorship. Civ.Code, § 704.

8. United States 🔑91

When a co-owner who furnishes money to pay for United States Savings Bonds dies, bonds belong to surviving owner with no interest left in decedent's estate, the question being not one of gift but of contract under federal regulations. Civ.Code, § 704.

9. States 🔑4
United States 🔑91

Treasury regulations under which United States Savings Bonds are issued have force of federal law, and no state can vary terms of federal obligations or derogate from their full enforceability. Civ. Code, § 704.

10. United States 🔑91

As between the government and survivor or beneficiary of United States Savings Bonds and all other claimants, courts will recognize only the survivor or beneficiary. Civ.Code, § 704.

11. Money received 🔑8
United States 🔑91

Even in the case of fraud, the contract made by the government with a United States Savings Bond purchaser to pay his survivor cannot be changed or interfered with, but principles of equity and fair dealing require that person benefiting by such fraud may be required to disgorge the proceeds of the fraud independently of the contract between him and the government and without interference in its performance. Civ.Code, § 704.

12. Fraudulent conveyances 🔑110(1)

One cannot by any disposition of his own property put the same or income thereof beyond reach of his creditors so long as he himself retains right to receive and use it, though if conveyance is made with intent to hinder, delay, or defraud, it is void as to both existing and subsequent creditors; the intent of the grantee being immaterial. Civ.Code, § 3439.04.

13. United States 🔑91

Purpose of Treasury Regulations providing that beneficiary of United States Savings Bonds shall become the sole and absolute owner is to protect and hold the federal government immune from any attack on its performance of the contract as made in the bonds, and prevent implication of the government in disputes concerning ownership. Civ.Code, § 704.

14. Executors and administrators 🔑57

Under statute requiring administrator to bring action for recovery of property conveyed by deceased in fraud of creditors, administrator was entitled to portion of proceeds of United States Savings Bonds payable to beneficiaries, although not to the bonds themselves, where decedent purchased bonds and made them payable to beneficiaries in fraud of creditors notwithstanding Treasury Regulations and statute recognizing beneficiary of such obligations as sole and absolute owner. Civ.Code, § 704; Probate Code, § 579.

15. Executors and administrators 🔑153

In administrator's action to recover property conveyed by deceased in fraud of creditors, amendment of complaint to correct uncertainty as to what assets were pursued and what sum was necessary to make up deficiency between the assets and the amount necessary to pay claims and expenses of administration would be required. Probate Code § 579.

16. United States 🔑91

In action by administrator to recover property conveyed by deceased in fraud of creditors, where administrator was entitled to proceeds of United States Savings Bonds made payable to beneficiary by decedent in fraud of creditors, but not to the bonds themselves, order dissolving injunction restraining beneficiaries from taking possession of the bonds was proper. Probate Code, § 579.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Phil C. Katz, as administrator with the Will annexed of the estate of Michael Dolan, deceased, against Edward W. Driscoll and others, to recover United States Savings Bonds alleged to be assets of the estate of the decedent, and for other relief. From the judgment sustaining defendant's demurrer, and from an order after judgment dissolving an injunction, plaintiff appeals.

Judgment reversed with directions.

Henry F. Boyen and Frank J. Fontes, both of San Francisco, for appellant.

Elmer P. Delany and William A. Sullivan, both of San Francisco, for respondents.

BRAY, Justice.

Appeal from a judgment of the superior court on an order sustaining without leave to amend the defendants' demurrer to the complaint, and from an order after judgment dissolving an injuction.

The facts as alleged in the complaint are as follows: Michael Dolan died testate on August 2, 1946, and plaintiff was duly appointed administrator of his estate. In each of the four years, 1943 to 1946, Dolan applied to the State Department of Social Welfare for old age security benefits. In the application in each year, Dolan affirmed that he was eligible for such security and that he did not have personal property the value of which, less encumbrances, exceeded $600. In reliance upon said application the State Department of Social Welfare granted and paid to him as old age security benefits a total sum of $3700. The City and County of San Francisco granted and paid Dolan intermittently from 1937 to 1941 the sum of $411.55, for indigent aid, upon an agreement in writing by which Dolan agreed to reimburse the city and county for all indigent aid granted. In addition, Dolan became indebted to the city and county in the sum of $255.15 for care and treatment of him as a patient at the San Francisco Hospital from April 20 to May 25, 1946. Claims for the amounts herein mentioned were presented by the state and the city and county to the administrator of the estate and duly allowed but not paid.

The complaint then alleges on information and belief that the representations made by Dolan were false and untrue and that at all times when he received aid from the state and the city and county, he had personal property in excess of $600, namely, that he owned certain numbered United States Savings Bonds. The numbers, dates and maturity values of the bonds are detailed, a $1000 bond being payable to Dolan, or in the event of his death to defendant Rita C. Driscoll; a $100 bond being payable to Dolan, or in the event of his death to defendant William John O'-Brien, and the balance of the bonds being payable to Dolan, or in the event of his death to defendant Edward W. Driscoll. The total maturity value of all the bonds is $2250.

It is alleged that no consideration was paid by any of the defendants for these bonds and that the bonds were gifts in contemplation of death, made without the knowledge of the state or the city and county, with intent to defraud creditors and to avoid the obligations mentioned, and that the making of such gifts was not discovered until after Dolan's death. There is an indebtedness for expenses of last illness and burial, totaling $391.53. It is also alleged that Dolan possessed certain bank accounts totaling $1375.36, and that there is a deficiency of assets in the hands of the administrator to discharge the obligations of the decedent. It is alleged that the said creditors have applied to the administrator to prosecute an action for the recovery of the assets of the decedent. The complaint prays for the recovery of the bonds, and to cancel and set aside all transfers or gifts of said property, to quiet the title of the estate against defendants and "for such other and further relief as to the court may seem just, proper and equitable."

To this complaint, defendants filed a general demurrer which was sustained without leave to amend. Prior thereto, a restraining order pendente lite was issued restraining defendants from taking possession of the bonds until the final determination of the action, which order was set aside after the sustaining of the demurrer.

[1] While the granting of leave to amend after a demurrer is sustained to a complaint is ordinarily within the discretion of the court, it will be held an abuse of discretion to sustain without leave to amend a demurrer where the complaint is not fundamentally deficient in alleging facts showing a right to some relief which can properly be given, but is only defective with respect to the manner or form in which the facts warranting relief have been pleaded. Washer v. Bank of America, 21 Cal.2d 822, 136 P.2d 297, 155 A.L.R. 1338; Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Duffy v. Duffy, 82 Cal.App.2d 203, 186 P.2d 61.

While the complaint is poorly drawn and is undoubtedly vulnerable to special demurrer, and while the plaintiff, as will hereafter be pointed out, was proceeding upon the wrong theory, there are sufficient facts alleged to warrant the court in granting plaintiff relief.

[2-5] Section 579 of the Probate Code provides: "If the decedent, in his lifetime, conveyed any real or personal property, or any right or interest therein, with intent to defraud his creditors, or to avoid any obligation due another, or made a conveyance that by law is void as against creditors, or made a gift of property in view of death, and there is a deficiency of assets in the hands of the executor or administrator, the latter, on application of any creditor, must commence and prosecute to final judgment an action for the recovery of the same for the benefit of the creditors." "Section 579 of the Probate Code recognizes that right to recover property conveyed by decedent in fraud of creditors is an asset of his insolvent estate and that the executor or administrator is a trustee thereof for the benefit of creditors. The primary object of the statute is to enable the trustee to reduce that asset to possession and administer it for the benefit of creditors under the direction and supervision of the probate court. Hills v. Sherwood, 48 Cal. 386, 393. It has been held, however, that a creditor may not maintain an action to set aside a fraudulent conveyance, at least until the creditor has exhausted all means of procuring such an action to be brought by the executor or administrator. [Citing cases.] Thus the statute has as a secondary object the prevention of complications that would result if several creditors were to pursue the remedy and seek to apply the property to their individual claims." Webb v. Pillsbury, 23 Cal.2d 324, 328, 144 P.2d 1, 3, 150 A.L.R. 504. The gist of the allegations of the complaint is to the effect that Dolan in his lifetime transferred to defendants the bonds in question with intent to defraud his creditors and to avoid the obligations mentioned, and that there is a deficiency of assets in the hands of the administrator. Some of the allegations need enlarging and clarifying, but the basis of a cause of action under this section is there. Plaintiff erroneously contended that the complaint set up a cause of action for the recovery of the bonds themselves. As against general demurrer the facts above mentioned stated a cause of action establishing a trust in favor of plaintiff in the proceeds of the bonds when received. The mistaking of his remedy would not justify sustaining a demurrer without leave to amend where the facts justify other relief.

[6] Where a plaintiff, as here, prays for certain relief to which he is not entitled and "for such other and further relief" he is entitled to a judgment for such relief as may be consistent with the case made by the complaint and embraced within the issues. Hinkel v. Crowson, 83 Cal.App. 87, 256 P. 479; 21 Cal.Jur. pp. 68, 69. Plaintiff is not entitled to possession of the bonds themselves for the reason that United States Treasury Regulations prohibit the cashing of such bonds by any one other than the survivor mentioned in them. The pertinent regulations are found in United States Treasury Department Regulations Circular No. 530, and read as follows: Section 315.46 (c). "If the registered owner dies without having presented and surrendered the bond for payment or authorized reissue and is survived by the beneficiary, upon proof of such death and survivorship, the beneficiary will be rec-

ognized as the sole and absolute owner of the bond, and payment or reissue, as though the bond were registered in his name alone, will be made only to such survivor." Section 315.2. "* * * The form of registration used must express the actual ownership of and interest in the bond and, except as otherwise specifically provided in these regulations, will be considered as conclusive of such ownership and interest. The Treasury Department will recognize no notices of adverse claims to savings bonds and will enter no stoppages or caveats against payment in accordance with the registration of the bonds." Section 315.13. Judicial Proceedings (Judgment Creditors, Trustees in Bankruptcy, Receivers of Insolvents' Estates and Conflicting Claimants. "A claim against an owner or coowner of a savings bond and conflicting claims as to ownership of or interest in such bond as between coowners or the registered owner and a designated beneficiary, will be recognized when established by valid judicial proceedings and payment or reissue will be made, upon presentation and surrender of the bond, except as follows: (1) No such proceedings will be recognized if they would give effect to an attempted voluntary transfer inter vivos of the bond *or would defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner or beneficiary.* (2) A judgment creditor, a trustee in bankruptcy or a receiver of an insolvent's estate will have the right to payment (but not to reissue) and a judgment creditor will be limited to payment at the redemption value current thirty days after the termination of the judicial proceedings or current at the time the bond is received, whichever is smaller. (3) If a debtor, or bankrupt, or insolvent, is not the sole owner of the bond, payment will be made only to the extent of his interest therein, which must be determined by the court or otherwise validly established." (Emphasis added.)

[7] It is obvious that subdivisions 2 and 3, giving a judgment creditor, a trustee in bankruptcy, or a receiver of an insolvent's estate, the right to payment, applies only to claims or levies on the bonds during the lifetime of the owner, and do not modify in any way the limitation in subdivision 1 which prohibits any impairment of the rights of survivorship.

Section 315.46 (c) of the Treasury Regulations has in effect been adopted in this state by Civil Code Section 704, which provides in part as follows: "All United States savings bonds or other bonds or obligations of the United States, however designated, now or hereafter issued, which are registered in the name of one person payable on death to a named survivor, shall, upon the death of the registered owner, become the sole and absolute property of the surviving beneficiary named therein, unless the Federal laws under which such bonds or other obligations were issued or the regulations governing the issuance thereof, made pursuant to such laws, provide otherwise. This section shall not be construed to mean that prior to the enactment hereof the law of this State was otherwise than as herein provided." This section was enacted as an urgency measure, effective February 10, 1943, and the facts necessitating its passage as such, state (Stats. 1943, p. 270): "Doubt has arisen as to the interpretation of Federal regulations governing the issuance of United States war savings bonds and other United States bonds and obligations. In order that questions of ownership be settled and the sale of these bonds be not obstructed by conflicting interpretations, it is necessary that this act take effect immediately."

[8, 9] Conrad v. Conrad, 66 Cal.App.2d 280, 152 P.2d 221, held that when a coowner, who furnishes money to pay for the type of bonds involved here, dies, they belong to the surviving owner with no interest left in the decedent's estate. "* * * the question is not one of gift but of contract under the federal regulations, those regulations providing for exclusive ownership in the surviving co-owner, and * * * death terminates all interest of the other co-owner. Some of the bonds * * * were issued to two persons as co-owners, and others to the purchaser, and upon his death, to a named beneficiary. There seems to be no logical distinction to be made

between the rights in the bonds of a surviving co-owner or a surviving beneficiary." 66 Cal.App.2d p. 285, 152 P.2d page 224. See also Davies v. Beach, 74 Cal.App. 2d 304, 168 P.2d 452; Harvey v. Rackliffe, 1945, 141 Me. 169, 41 A.2d 455, 161 A.L.R. 296; In re Briley's Estate, 1945, 155 Fla. 798, 21 So.2d 595; United States v. Dauphin Deposit Trust Co., D. C., 50 F.Supp. 73; Myers v. Hardin, 1945, 208 Ark. 505, 186 S.W.2d 925; Harvey v. Rackliffe, 141 Me. 169, 41 A.2d 455, 161 A.L.R. 304; Moore's Adm'r v. Marshall, 302 Ky. 729, 196 S.W.2d 369, 168 A.L.R. 245.

"The Treasury regulations under which the bonds were issued * * * have the force of Federal law. * * * No state law can vary the terms of the Federal obligations or derogate from their full enforceability." Franklin Washington Trust Co. v. Beltram, 133 N.J.Eq. 11, 29 A.2d 854, 856.

It is interesting to note that the court in the Conrad case, supra, made a lengthy review of the evidence and allegations concerning fraud, and affirmed the finding of the trial court that there was none. The court stated: "We are not called upon to decide what the effect on the interest of plaintiff in the bonds would have been had the trial judge found" breach of trust. (66 Cal.App.2d page 290, 152 P.2d page 226.) That its decision might have been otherwise is indicated by the fact that the court carefully limited its decision in the following language: "*In the absence of breach of trust* on the part of plaintiff, who was the trusted agent of Mrs. Inman, we conclude that the bonds belonged to him after her death." 66 Cal.App.2d page 286, 152 P.2d page 224. (Emphasis added.)

[10-12] While the cases above cited hold that as between the government and the survivor or beneficiary of the bonds and all other claimants the courts will recognize only the survivor or beneficiary, there is no case that holds that where the bonds are the result of fraud, the persons defrauded cannot pursue the proceeds of such bonds in the hands of one who is a party to the fraud. To so hold would be to put a high premium on fraud. A person could steal his employer's money, use it to purchase United States bonds, and by directing that the bonds be payable to a survivor or beneficiary, preclude, in the event of his death, that employer from recovering his money. There is nothing in the federal regulations or law that requires such a construction. Even in the case of fraud, the contract made by the government with the bond purchaser to pay his survivor cannot be changed or interfered with, but principles of equity and fair dealing require that the person benefiting by such fraud may be required to disgorge the proceeds of such fraud independently of the contract between him and the federal government, and without interference in its performance. Section 3439.04 of the Civil Code provides: "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." "* * * upon grounds of public policy, it is further held that one cannot by any disposition of his own property put the same or the income thereof beyond the reach of his creditors, so long as he himself retains the right to receive and use it." McColgan v. Walter Magee, Inc., 172 Cal. 182, 186, 155 P. 995, 997, Ann.Cas. 1917 D. 1050. 12 Cal.Jur. p. 1016 on Fraudulent Conveyances states: "If, however, the conveyance is made with intent to hinder, delay or defraud, it is utterly void as to both existing and subsequent creditors. The intent of the grantee is wholly immaterial. Even though he takes no part in the fraud or has not the slightest suspicion thereof, he, having paid nothing for the property, cannot be permitted to retain, as against his grantor's creditors, the fruits of such fraud."

The only case concerning the effect of the government regulations in which the question of fraud was involved is In re Kalina's Will, 184 Misc. 367, 53 N.Y.S.2d 775, 778, but the question involved here of the right to pursue the proceeds of the bonds was not involved. There the surviving wife contended that by naming persons other than herself as beneficiaries of war bonds, her deceased husband effected an illusory transfer in fraud of her widow's rights under the New York Decedent Estate Law, Consol. Laws, c. 13. The court stated that in view of the provisions of section 24 of the Personal Property Law of New York, Consol. Laws. c. 41, which provided that "the right of an owner, coowner or beneficiary 'to receive payment of such bond according to its terms "may" not be defeated or impaired by any statute or rule of law governing transfer of property by will or gift or an intestacy * * *'" left the court no alternative but to confirm the bonds in the beneficiaries, even though the effect thereof was to permit a fraud on the widow. The court further pointed out that the Legislature alone could remedy a situation caused by section 24 itself.

[13] The rule of law governing the rights of a beneficiary under a bond, in the absence of fraud, is well settled. However, despite the fact that both the treasury regulations and Civil Code section 704 state that the beneficiary shall become the "sole and absolute" owner, and despite the fact that cases from almost all jurisdictions have repeatedly emphasized the importance of the inviolability of federal obligations, it is difficult to believe that any such laws or regulations were intended to countenance a fraud such as alleged in the instant case. The purpose of the treasury regulations is to protect and hold the federal government immune from any attack on its performance of the contract as made in the bond. In other words, they are designed to prevent the implication of the government in any disputes concerning ownership of the bonds, protect it from any suits which might result from payment to a designated beneficiary or coowner, and, for the purpose of promoting sales, guarantee the performance of the government in strict accord with the contract.

These laws and regulations are not intended to confer on the beneficiary the right to retain permanently the proceeds from the bonds irrespective of fraud or any illegality in the manner in which the bonds were obtained. To hold otherwise would, in effect, say that the treasury regulations not only guarantee payment to the named beneficiary, but, thereafter, when he receives the proceeds, follow him around indefinitely, and, like a protective halo, render him completely immune from any ordinarily legitimate claims thereto. For the purpose of payment and performance of the government's contract obligation, the beneficiary is recognized as the "sole and absolute" owner. But "the rights of survivorship conferred by these [treasury] regulations upon a surviving coowner or beneficiary" (Sec. 315.13 (1)) terminate there.

That, in the event of fraud, the treasury regulations do not prevent the application of a constructive trust in the proceeds of the bonds, is indicated by the decision in the case of Ibey v. Ibey, 1945, 93 N.H. 434, 43 A.2d 157. There the deceased husband purchased bonds payable at death to a son and two grandsons. The widow claimed that this was done with the intent to dispose of a large portion of his personal estate in fraud of her marital rights and in an attempt to deprive her of her distributive share in his estate. She waived the provisions of the will and elected to take her statutory rights. The court stated (43 A.2d p. 159): "If fraud as herein defined is found, it does not follow that the bonds, valid in themselves, belong to the estate. The widow is entitled to what she has lost, but otherwise the bonds are payable in accordance with their terms. The measure of damages is what the widow would have gained if the bonds had been made payable to the decedent's estate. To this extent, the bonds or their proceeds are subject to a constructive trust in favor of the plaintiff, if fraud is found. The federal government recognizes that ownership of such bonds may be different than the wording of them indicates." (Quoting section 315.13 as it existed in 1938, in substantially the same form as previously quoted herein.)

In Tobola v. Wholey, 75 Cal.App.2d 351, 170 P.2d 952, where bonds were purchased with partnership money and made payable to one of the partners and on her death to the other, the court decreed that the contingent beneficiary was entitled to the possession of one-half of the bonds. It was there said: "Nor is there any merit in appellant's contention that the trial court acted in contravention of section 704 of the Civil Code by decreeing respondent to be entitled to the possession of one-half of the war bonds. By such order, the ownership or title to the registered bonds has not been changed, but only the ability to dispose of them." 75 Cal.App.2d page 359, 170 P.2d page 957.

In Ervin v. Conn, 1945, 225 N.C. 267, 34 S.E.2d 402, where the court denied a contention made on behalf of the estate that the provisions of the bond, which it was claimed conferred absolute right of ownership on the survivors, merely constituted the designated persons agents to make the collection or receive payment of the bond. Although in Re DiSanto's Estate, 1943, 142 Ohio St. 223, 51 N.E.2d 639, and in Re Karlinski's Estate, 180 Misc. 44, 38 N.Y.S.2d 297, 40 N.Y.S.2d 22; 43 N.Y.S.2d 40, there is language which might be construed to mean that even the proceeds of the bonds are absolute in the hands of the survivor or beneficiary, no question of fraud was involved in those cases. In fact, in Re DiSanto's Estate, supra, 51 N.E.2d page 642, the court expressly said: "There is no question in this case of a transfer in fraud of creditors or the widow."

[14, 15] Inasmuch as the complaint did set forth a cause of action under section 579 of the Probate Code, establishing the right of the plaintiff to a portion of the proceeds of the bonds, although not to the bonds themselves, the demurrer should not have been sustained without leave to amend. Attention is called to the fact that the plaintiff is not entitled to all the proceeds of the bonds, but only to so much thereof as is needed to make up the deficiency of assets in the hands of the administrator necessary to meet the expenses of administration and the allowed claims of the creditors set forth in the complaint. The complaint alleges that the decedent was the owner of a certain promissory note secured by deed of trust on real property, but fails to give the value thereof. This causes an uncertainty as to what the assets are and what sum is necessary to make up the deficiency between the assets and the amount necessary to pay the claims and expenses of administration. Therefore the complaint will have to be amended.

[16] Inasmuch as the plaintiff is not entitled to the bonds, the order dissolving the injunction restraining defendants from taking possession thereof was properly made.

The judgment is reversed and the trial court is directed to permit amendment of the complaint in accordance with the views herein expressed.

PETERS, P.J., and WARD, J., concur.

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86 Cal.App.2d 289

PEOPLE v. AVILEZ.

Cr. 2506.

District Court of Appeal, First District, Division 2, California.

June 18, 1948.

Hearing Denied July 15, 1948.

1. Criminal law 🔑264

Where committing magistrate and deputy district attorney knew at time scheduled for preliminary hearing that defendant's family had retained private counsel but that counsel would be late in arriving for hearing, and without advising either public defender or defendant of that fact magistrate accepted statement that defendant had given up idea of private counsel for want of funds, and immediately proceeded with the taking of defendant's pleas of guilty, the public defender making merely a pro forma appearance for defendant, so that when counsel arrived defendant had been bound over to Superior Court, defendant's right to "assistance of counsel" was violated. Pen.Code, §§ 858, 987; Const. Cal. art. 1, § 13; U.S.C.A.Const.Amends. 6, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Assistance of Counsel".

2. Criminal law ⚷641(1)

The constitutional provision giving accused right of counsel was adopted to secure to accused all benefits which may flow from employment of counsel to conduct his defense, the observance of which provision is a fundamental right without which there is no legal trial. Const. art. 1, § 13.

3. Criminal law ⚷641(1)

Under the California constitutional provision respecting a defendant's right of counsel, California courts must maintain the right to its full extent, even when not forced to do so by federal review. Const. Cal. art. 1, § 13; U.S.C.A. Const.Amends. 6, 14.

4. Criminal law ⚷641(1)

The constitutional right of counsel is not provided by a mere token or pro forma appearance of attorney, since defendant is entitled to the effective and substantial aid of counsel at all stages of the proceedings. Const. Cal. art. 1, § 13, U.S.C.A.Const. Amends. 6, 14.

5. Criminal law ⚷641(1)

An appointment of counsel without opportunity to confer with accused and to prepare his defense does not satisfy constitutional guarantee of right of counsel. Const. Cal. art. 1, § 13; U.S.C.A.Const. Amends. 6, 14.

6. Criminal law ⚷232, 264

The constitutional right to aid of counsel applies to preliminary examination and arraignment as well as to trial and is not obviated by a plea of guilty. Pen.Code, § 987; Const.Cal. art. 1, § 13; U.S.C.A. Const.Amends. 6, 14.

7. Criminal law ⚷641(1)

Where a defendant is entitled to counsel, he should be afforded a fair opportunity to secure counsel. Const. Cal. art. 1, § 13; U.S.C.A.Const.Amends. 6, 14.

8. Criminal law ⚷641(3)

Defendant's right to aid of counsel must be protected by trial judge with a caution increasing in degree as offenses dealt with increase in gravity. Const.Cal. art. 1, § 13; U.S.C.A.Const.Amends. 6, 14.

9. Criminal law ⚷641

Public defender stands in same relation to accused he is appointed to represent as an attorney regularly retained, and he must investigate carefully all defenses of fact and of law which may be available to accused and confer with him about them before he permits accused to foreclose all possibility of defense and submit to conviction without a hearing by pleading guilty, particularly where defendant is accused of a great number of serious crimes.

10. Criminal law ⚷274

Where defendant, in entering plea of guilty before committing magistrate, was effectively denied right of private counsel, in Superior Court defendant should have been permitted to change his plea. Pen. Code, §§ 858, 987; Const.Cal. art. 1, § 13; U.S.C.A.Const.Amend. 6, 14.

11. Criminal law ⚷274

The rule that withdrawal of plea of guilty is in sound discretion of trial court and requires establishing of mistake, fraud, duress or overreaching does not exclude right to withdrawn plea vitiated by violation of constitutional rights. Pen.Code, §§ 858, 987; Const.Cal. art. 1, § 13; U.S.C.A. Const. Amends. 6, 14.

12. Criminal law ⚷264

Under the rule that question of guilt or innocence is not decisive where in course of trial essential rights of defendant are disregarded or denied, where defendant's right of counsel was abridged, judgment of conviction on a plea of guilty could not be upheld on ground that defendant did not deny guilt and was therefore not prejudiced. Const.Cal. art. 1, § 13; U.S.C.A. Const.Amends. 6, 14.

13. Criminal law ⚷1159(3)

Substantial conflict of evidence resolved by Superior Court would not be disturbed on appeal.

◆

Appeal from Superior Court, City and County of San Francisco; Melvyn I. Cronin, Judge.

Frank S. Avilez was convicted on pleas of guilty of rape, assault to commit rape, assault with a deadly weapon, robbery and burglary, and he appeals.

Reversed and remanded for trial.

Melvin M. Belli and Emmet F. Hagerty, both of San Francisco, for appellant.

Fred N. Howser, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Defendant appeals from the judgments of conviction in sixteen actions against him comprising seven counts of rape, sec. 261 of the Penal Code, four counts of assault to commit rape, sec. 220 of the Penal Code, one count of assault with a deadly weapon, sec. 245 of the Penal Code, ten counts of robbery, sec. 211, Penal Code, and ten counts of burglary, sec. 459, Penal Code, in relation to fourteen separate attacks on female victims, adjudged to have been committed by defendant in San Francisco in the period from December 7, 1946, to July 11, 1947.

Appellant, on being arraigned in the municipal court of the City and County of San Francisco, pleaded guilty as to each of the thirty-two counts. He was then represented by the Public Defender. However, when appellant appeared before the superior court for judgment his present attorneys were substituted. They interposed in his behalf the following motions: 1. To be allowed to withdraw his pleas of guilty on the grounds of (a) lack of mental capacity, (b) duress, mistake and promise of reward influencing the pleas, (c) because the pleas were entered without advice of counsel of his own choice or any counsel and because the knowledge of the availability of private counsel was withheld from him. 2. For continuance for psychiatric examination. 3. For probation. 4. To test defendant's sanity under section 1368 of the Penal Code. 5. To proceed under sections 5500 et seq. of the Welfare and Institutions Code. 6. In arrest of judgment.

These motions were supported by an affidavit of the attorneys and testimony of the defendant; witnesses were also heard in opposition. The court then granted the defendant's motion for psychiatric examination pursuant to section 1368 of the Penal Code and ordered all other proceedings stayed.

Written reports of three qualified psychiatrists agreed that defendant was a "psychopathic personality" but that there was no "psychosis" and that he was legally responsible. On the basis of these reports and the evidence, the court adjudged the defendant to be legally sane, as provided in section 1368 of the Penal Code and denied the other motions.

Judgment was then passed as to each count except one count of burglary with intent to commit rape which was dismissed. In all causes the court fixed the degree of each robbery at first degree, found that the defendant at the time of each burglary was armed with a deadly weapon, to wit, a knife, and sentenced defendant to San Quentin for the terms prescribed by law, the sentences to run concurrently so far as they involved the same victim, but consecutively as to the fourteen separate acts, involving different victims.

On appeal counsel contends that defendant was deprived of his liberty without due process of law, that he was not accorded a fair or any trial, that he was not accorded benefit of counsel, and that he was taken advantage of by hurried proceedings concurred in by both the District Attorney and the committing magistrate. He argues that on these grounds he should have been allowed to withdraw his pleas of guilty, quoting People v. McGarvy, 61 Cal. App.2d 557, 142 P.2d 92. The only ground requiring extended discussion is that relating to the proceedings before the committing magistrate.

Appellant was arrested on Saturday, July 12, 1947, about 9 a. m. and for many hours questioned by police inspectors and assistant District Attorneys. He was booked at the city prison at 5 p. m. of that day. On Monday, July 14, 1947, he appeared in the municipal court where bail was set at $200,000 bond or $100,000 cash. He was then represented by the Public Defender. The Public Defender asked whether defendant intended to employ private counsel, to which defendant answered "yes." On Monday night his present counsel visited appellant in the city prison. Inspector Breen testified that after the visit of counsel, appellant told him that the attorneys wanted him to plead insanity, that he did not want to do so, that he was sane and guilty and wanted to get this over as soon as possible.

On Tuesday, July 15, at about 9:30 a. m. the private counsel telephoned R. Swettman, Chief of the Complaint Division in the District Attorney's office at the Hall of Justice and advised him that appellant's family had retained them, that they would appear that morning for appellant and requested that the case be held until they got there. Mr. Swettman agreed that he would notify the court. Mr. Swettman informed the judge in chambers that he had received the phone call, but Inspector Breen, who went in with him, told the judge that appellant wanted the Public Defender to defend him. Neither the appellant nor the Public Defender, both present in court, was informed of the message of the retained counsel. Before the hearing Inspector Breen told the Public Defender that the appellant wanted him to represent him, and defendant affirmed this. The Public Defender then said, "there are 32 charges against you." Appellant answered, "I know; I have admitted them all; I want to plead guilty." The Public Defender did not discuss the nature of the charges with appellant. All the information he had concerning the alleged offenses was gained from looking through the complaints that morning. He had no other conversations with appellant; he did not discuss appellant's mental capacity with him.

When shortly thereafter appellant appeared before the court the following took place with respect to his representation:

"The Court: Frank Avilez you told us yesterday morning, when you appeared before this Court, in response to a question of this Court, (and) Mr. Kenny, the Public Defender, the statement was made by you that you were going to obtain private counsel, have you changed your mind about that?

"The defendant: Yes.

"Mr. Kenny: He stated he has no funds. His wife visited the office and she has no funds to employ private counsel.

"The Court: It will be the order of this Court that Mr. Gerald Kenny, the Public Defender, will be appointed to represent Frank Avilez in these proceedings."

[1] The taking of the pleas commenced immediately after the appointment of the Public Defender. His role with respect to the pleas consisted in informing the court that appellant intended to plead guilty on each of the thirty-two charges and that they waived the reading of all complaints. He did not avail himself of the continuance to which the court told the appellant that he was entitled to prepare his defense. When his present counsel appeared in court the hearing had been completed and the appellant had been bound over to the superior court. We think that these facts show a violation of appellant's basic right to the assistance of counsel for his defense.

[2, 3] This right is guaranteed in our courts by article I, section 13 of the California Constitution and in the federal courts by the Sixth Amendment to the United States Consititution; a violation of that right may under some circumstances amount to a denial of due process under the Fourteenth Amendment. People v. Chesser, 29 Cal.2d 815, 820, 178 P.2d 761; Powell v. Alabama, 287 U.S. 45, 60, 53 S. Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527; Glasser v. United States, 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680. In the federal courts the right is an absolute requirement under the Sixth Amendment (Johnson v. Zerbst, 304 U.S. 458, 467, 58 S.Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357) but the same fixed requirement does not apply to state courts under the due process clause of the Fourteenth Amendment, although the assistance of counsel may sometimes be essential as part of due process both where an accused contests a charge against him or pleads guilty. Foster v. People of State of Illinois, 332 U.S. 134, 137, 67 S.Ct. 1716, 91 L.Ed. 1955; Bute v. People of Illinois, 333 U.S. 640, 68 S.Ct. 763. However, the same right guaranteed an accused in fede-

ral courts by the Sixth Amendment is protected in this state by article 1, section 13 of our Constitution (People v. Lanigan, 22 Cal.2d 569, 575, 140 P.2d 24, 148 A.L.R. 176); it was adopted to secure to the accused person all the benefits which may flow from the employment of counsel to conduct his defense (In re Rider, 50 Cal. App. 799, 195 P. 965); as in the federal courts it is considered a fundmental right without which there is no legal trial. People v. Simpson, 31 Cal.App.2d 267, 270, 271, 88 P.2d 175. Our state courts will therefore maintain this right absolutely and to the full extent, even when they are not forced to do so by federal review.

[4-8] The protection so guaranteed is not provided by a mere "token" or "pro forma" appearance of an attorney (People v. Chesser, supra, 29 Cal.2d 815, 821, 178 P.2d 761) but a defendant is entitled "to the effective and substantial aid of counsel at all stages of the proceeding." People v. Zammora, 66 Cal.App.2d 166, 235, 152 P.2d 180, 215. An appointment of counsel without opportunity to confer with the accused and to prepare his defense could convert the appointment into a sham and a mere formality which would not satisfy the constitutional guarantee. People v. Dorman, 28 Cal.2d 846, 850, 172 P.2d 686. To the same general effect: People v. Lanigan, supra, 22 Cal.2d 569, 577, 140 P.2d 24, 148 A.L.R. 176; People v. McGarvy, 61 Cal.App.2d 557, 561, 142 P.2d 92; Powell v. Alabama, supra, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527; Hawk v. Olson, 326 U.S. 271, 66 S.Ct. 116, 90 L.Ed. 61; Johnson v. United States, 71 App.D.C. 400, 110 F.2d 562; McDonald v. Hudspeth, D.C., 41 F.Supp. 182, 187. This fundamental right to the aid of counsel applies also to preliminary examination and arraignment. Pen.Code, secs. 858, 987; People v. Napthaly, 105 Cal. 641, 39 P. 29, and is not obviated by a plea of guilty. People v. Chesser, supra, 29 Cal.2d 815, 821, 178 P.2d 761; Williams v. Kaiser, 323 U.S. 471, 474, 65 S.Ct. 363, 89 L.Ed. 398; Walker v. Johnston, 312 U.S. 275, 280, 61 S.Ct. 574, 85 L.Ed. 830. Where a defendant is entitled to counsel he should be afforded a fair opportunity to secure counsel of his own choice. People v. McGarvy, supra, 61 Cal.App.2d 557, 562, 142 P.2d 92; Powell v. Alabama, supra, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527; United States v. Bergamo, 3 Cir., 154 F.2d 31, 34; People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356; Walker v. State 194 Ga. 727, 22 S.E.2d 462, 465; Jackson v. State, 55 Tex.Cr.R. 79, 115 S.W. 262, 264. "That right, based as it is on a fundamental principle of justice must be protected by the trial judge." (People v. McLaughlin, supra, 53 N.E.2d 356, 357) "and with a caution increasing in degree as the offenses dealt with increase in gravity." Glasser v. United States, 315 U.S. 60, 71, 62 S.Ct. 457, 465, 86 L.Ed. 680.

In the present case a fair opportunity to secure the aid of counsel of his own choice was withheld from defendant and the aid of counsel furnished was not effective and substantial. As set out before, the record shows that the Public Defender stated to the court in the presence of appellant that the intention to employ private counsel was abandoned because neither appellant nor his wife had funds. Nevertheless the court, and the District Attorney, both informed that private counsel was retained and on their way, failed to apprise appellant or the Public Defender of that fact. By omitting this they failed to protect appellant's right to an attorney of his own choice and actually deprived him of the opportunity to have the assistance of his present counsel in the entry of his pleas.

It is true that the retained counsel did not appear at the time the cause was set for hearing. In their affidavit they state that at the time set they were appearing in federal court; that in such a case it was customary to inform the court in the way they did and that normally the case would then be held until arrival of counsel. This statement is not disputed. Although the courts cannot in every case await the convenience of some attorney, they should exercise care not to handicap to his prejudice a defendant who is not responsible for the fact that his counsel is engaged elsewhere. People v. Manchetti, 29 Cal.2d 452, 458, 175 P.2d 533; see also Walker v. State, supra, 22 S.E.2d 462, 465. Under the circumstances of this case the absence of the retained counsel can not excuse their tacit elimination.

With respect to the ineffectiveness of the aid of the Public Defender in this case the following language from Powell v. Alabama, supra, 287 U.S. 45, 48, 55 S.Ct. 55, 60, 77 L.Ed. 158, 84 A.L.R. 527, seems appropriate if only the word "trial" is replaced by "plea": "It is not enough to assume that counsel thus precipated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: '* * * The record indicates that the appearance was rather pro forma than zealous and active * * *.' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense."

[9] The Public Defender, heard as a witness for the People, contended that when appellant declared to him that he wanted to plead guilty there was nothing else for him to do without obstructing justice. With this point of view, presented also respondent, we do not agree. The Public Defender stands in the same relation to the accused he is appointed to represent as an attorney regularly retained. In re Hough, 24 Cal.2d 522, 529, 150 P.2d 448. It is his task to investigate carefully all defenses of fact and of law which may be available to the defendant and confer with him about them before he permits his client to foreclose all possibility of defense and submit to conviction without a hearing by pleading guilty. This applies with special force to cases like the one at bar where defendant stands accused of a great number of serious crimes, many of which involve distinctions of degrees and circumstances. Compare Williams v. Kaiser, 323 U.S. 471, 474, 475, 65 S.Ct. 363, 89 L. Ed. 398. By giving his client such aid the attorney does not obstruct, but assists justice.

As in People v. McGarvy, supra, 61 Cal. App.2d 557, 561, 142 P.2d 92, there was here undue haste in the disposition of the pleas by the court, the prosecution and the defense. "The defendant needs counsel and counsel needs time." Hawk v. Olson, 326 U.S. 271, 278, 66 S.Ct. 116, 150, 90 L.Ed. 61. The insufficient time afforded to appellant violated his constitutional right to full defense of counsel of his own choice. Compare also Powell v. Alabama, supra, 287 U.S. 45, 59, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527; Walleck v. Hudspeth, 10, Cir.,128 F.2d 343, 345; Dumas v. State 54 Okl. Cr. 207, 16 P.2d 886, 888. None of the cases cited squares exactly with the facts of this case. The case most similar is People v. McGarvy, supra, 61 Cal.App.2d 557, 142 P. 2d 92, on which appellant mainly relies. In that case the defendant was arrested on a Sunday morning; the following afternoon he was arraigned in the justice's court on a complaint in two counts, one of murder, one of manslaughter; he then stated that he wanted an attorney but had no money and asked whether an attorney could be appointed by the court. He was advised that the justice's court had no such authority but that he did not need an attorney at the preliminary hearing. The court then adjourned till the following day at 2:00 o'clock. That same Monday a girl who wanted to inform defendant that the family had procured a lawyer for him, who would visit him the next morning, was refused admission to the defendant by the sheriff's office. On Tuesday the defendant was brought into court at 10:25 a. m. instead of 2 p. m. Before pleading he had a conversation of twenty to thirty minutes with an attorney whom the district attorney had requested to "at least talk to him." He then pleaded "guilty" to the charge of manslaughter and "not guilty" to the charge of murder upon the attorney's advice. Ten minutes later he appeared with the attorney before the superior court for sentence. Upon motion of the district attorney the murder charge was dismissed and defendant sentenced on his plea of guilty of manslaughter. When the retained counsel arrived Tuesday at 11 o'clock the proceeding had been concluded. Motion to set aside the judgment and change the plea was denied.

[10] There are obvious distinctions also between these facts and those in the case at bar, but there is a certain similarity and it is important that the court in the Mc Garvy case applies to these facts the same recognized principles we have set out here and concludes that the defendant should have been permitted to change his plea. We are convinced that also in this case appellant should have been granted such permission.

[11] Respondent argues that the withdrawal of a plea of guilty is in the sound discretion of the trial court and requires establishing of mistake, fraud, duress or overreaching (citing among other cases People v. Bulter, 70 Cal.App.2d 553, 561, 161 P.2d 401). There are expressions to that effect in that case and in others in which the accused pleaded guilty in the expectation of immunity, probation or clemency (e. g., in Re Hough, supra, 24 Cal.2d 522, 531, 150 P.2d 448) but we do not understand these expressions to exclude the right to withdraw a plea vitiated by violation of constitutional rights not enumerated. The right to withdraw a plea of guilty vitiated by lack of counsel is recognized in People v. Chesser, supra, 29 Cal.2d 815, 178 P.2d 761,and People v. McGarvy, supra, 61 Cal. App.2d 557, 142 P.2d 92. The denial of appellant's motion to withdraw his plea on that same ground constituted an abuse of discretion.

[12] Neither can the judgment be upheld on the ground that appellant does not deny guilt and is therefore not prejudiced. In the affidavit of his attorneys it is stated that appellant is not guilty of all the charges to which he has pleaded. At any rate the question of guilt or innocence is not decisive where in the course of the trial essential rights of the defendant are disregarded or denied. People v. Cowan, 44 Cal. App.2d 155, 159, 160, 112 P.2d 62; People v. Dorman, supra, 28 Cal.2d 846, 852, 172 P.2d 686. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, supra, 315 U.S. 60, 62 S.Ct. 457, 467, 86 L.Ed. 680, quoted in People v. Lanigan, supra, 22 Cal.2d 569, 575, 140 P. 2d 24, 148 A.L.R. 176.

[13] Appellant incorporates in his opening brief (pp. 5-14) all of the attorneys' affidavit filed in the superior court and certain evidence there given by appellant but he does not base any specific argument on it. It is not clear whether the contentions other than those treated above are maintained on appeal or not. At any rate they are of little weight. The mental incapacity to plead is refuted by his having been found legally sane and by the opinion of his own expert: "The subject is triable. He has no such mental disorder as prevents his being able to conduct a just and rational defense through his attorneys." His contention as to duress (handcuffing and lack of food during many hours of interrogation; that he was threatened with a kidnaping charge if he did not talk and the promise that he would get only five years if he cooperated) were expressly denied by competent evidence.

The contention that the Public Defender advised him to plead guilty, that "everything will be all right," and that they would try to have all sentences run concurrently was denied by the Public Defender as a witness. Appellant's contentions that he did not understand or remember to what he had pleaded guilty need not be worthy of belief in the light of the reports of the psychiatrists as to his memory and understanding. As to all these points there is a substantial conflict in the evidence resolved by the superior court.

However there is no conflict in the record with respect to the undue haste and the denial of appellant's right to effective representation by counsel of his choice.

The judgment is reversed and the cause remanded for trial. It is further ordered that the trial court shall permit defendant to change his plea if he be so advised.

GOODELL and DOOLING, JJ., concur.

86 Cal.App.2d 412

PEOPLE v. MORTON et al.

Cr. 4862.

District Court of Appeal, Second District, Division 1, California.

June 28, 1948.

1. Criminal law 🔑736(2)

Whether proffered confession was freely and voluntarily made was for trial court, not for jury.

2. Criminal law 🔑1153(6)

Propriety of trial court's decision on admissibility of confession is to be determined by reviewing tribunal in view of discretion with which trial court is clothed, and, where evidence bearing on question is conflicting, decision will not be reversed.

3. Criminal law 🔑532

Circumstances are determinative of admissibility of proffered confession, and all facts attending making of confession are to be considered in determining whether confession was made voluntarily.

4. Criminal law 🔑519(3)

Mere fact that confession was made to police or other officer of law while accused was under arrest does not necessarily render confession involuntary and inadmissible.

5. Criminal law 🔑519(9)

Mere fact that confession is made in answer to questions does not require its rejection though such fact may be important element in determining whether answers were voluntary.

6. Criminal law 🔑1158(4)

Reviewing court cannot say that trial court committed error in admitting confession unless such error appears as matter of law from record presented.

7. Criminal law 🔑532(2), 1144(12)

Trial court has considerable discretion in determining whether confession was free and voluntary, and, where evidence on subject is conflicting, it must be assumed that testimony concerning confession was properly admitted.

8. Criminal law 🔑520(1, 5)

In prosecution for armed robbery, admission of confession which defendant claimed was obtained from him by promises of immunity and undue influence and was signed by him without reading it because of promises made to him was not error, in view of trial court's thorough examination into voluntary character of confession and in view of conflict in the testimony.

9. Criminal law 🔑534(2)

In prosecution for armed robbery, where defendant was positively identified as man who came into service station and held up attendant at point of gun, conviction did not rest alone on confession.

10. Criminal law 🔑877

In prosecution for armed robbery, acquittal of companion who had admitted that he was with defendant on night of robbery did not establish an alibi for defendant and prove his innocence.

11. Criminal law 🔑1159(2)

There must be no substantial evidence in record which on any hypothesis would support finding of guilt before conviction will be reversed for insufficiency of evidence.

12. Robbery 🔑24(1)

Evidence sustained conviction of armed robbery of service station.

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Harvey Morton and Donald A. Downs were charged with robbery committed while armed with a deadly weapon. Defendant Downs was convicted and he appeals.

Affirmed.

Nathan Newby, Jr., of Los Angeles, for appellant.

Fred N. Howser, Atty. Gen., and James A. Doherty, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Defendants were charged by a second amended information with the crime of robbery, committed while armed with a deadly weapon, to-wit, a revolver. Defendant Morton was also charged with two prior convictions of felonies and defendant Downs with one prior conviction for which they served terms of imprisonment in a State prison. Both admitted the prior convictions and pleaded not guilty to the offense charged. The jury returned a verdict of not guilty as to defendant Morton, and found defendant Downs guilty of robbery of the first degree, and that he was armed at the time of the commission of such offense. Thereafter the oral motion for a new trial made by defendant Downs was denied. This appeal is prosecuted by him from the ensuing judgment of conviction.

It is here contended by appellant that (1) the court erred in admitting the "alleged" confession made by him; (2) that the acquittal of defendant Morton establishes an alibi for appellant and proves his innocence; and (3) the facts do not support the verdict of the jury.

The record herein discloses that the two defendants were arrested by Los Angeles Police Officers Cecil and Stanshaw at about 2:45 a. m. of July 17, 1947, at which time defendants were seated in an automobile parked in front of 511 East 59th Place, Los Angeles; that as the right door of the automobile was opened upon the order of Officer Cecil, a fully loaded five-chambered revolver with the serial number filed off, fell from the car to the curb; that when defendant Morton, who was sitting in the right-hand seat, was searched, a pair of dark glasses was found in his left-hand shirt pocket; that this defendant apparently hid the glasses in the car, where they were later discovered by the officers; that he also had one or two dollar bills in his pocket and enough change to make a total of $8.99. A search of Downs, the appellant, who was in the driver's seat, produced the sum of $9.41, consisting of one or two one-dollar bills and the balance in small change. A nearly empty whiskey bottle was also found in the car, and although neither defendant appeared to be under the influence of liquor, the breath of each showed that he had been drinking. Both the revolver and the dark glasses were introduced in evidence.

In a line-up at the 77th Street Police Station later in the morning, appellant was identified by Campbell Peter Ledgerwood as one of the two men who had robbed him of approximately $18.42 at 1:30 or 2:00 a. m. on the morning of July 17. The defendant Morton was not identified.

At the trial Ledgerwood testified that he was employed as a service station attendant at 5720 South Vermont Avenue, Los Angeles; that on the night of July 16th, as was the custom, he worked alone from 8:30 p. m. until 12:30 or 1:00 a. m.; that after closing the station at 1:00 or 1:30, said witness was engaged in cleaning up the station; that all the lights in the station, except the 100 or 150-watt night light in the office were off, and the street lights, except for one light on every other post, were also turned off; that at approximately 1:30 or 2:00 a. m. appellant and an unidentified man approached Ledgerwood, and Downs asked him for a gallon of gas in a can, meanwhile the other man stood a few feet away and said nothing; that Ledgerwood told appellant he did not wish to reopen his cash report and suggested that they try another station down the street a block. However, the two men did not depart and appellant again approached the witness who was unsuccessfully attempting to start a car parked in the station, and said, "You cannot get yours started either, can you?" The witness answered "No." and proceeded to lock up the office, when appellant said to him: "Come on in the office." The witness complied, and appellant then said: "Open it up", or "Open the safe up." About this time Ledgerwood noticed that appellant was carrying a gun. The witness testified he could see only about three-fourths of an inch of the gun, but he could see the sight at the end of the barrel, and knew that it was a gun; that he was in fear of the gun and opened the top safe and gave appellant all the cash, around

$18.32 or $18.42. This money consisted of three or four one-dollar bills and a quantity of change. Appellant also demanded that the bottom safe be opened, but the witness did not have the key to that safe. Downs (appellant) then directed the witness to walk down the street and not return until he thought appellant and his companion had gone. The witness did as directed, returning a little later and calling the police. Although admittedly unfamiliar with firearms, the witness Ledgerwood testified he was sure that appellant was holding a gun at the time of the robbery, and upon cross-examination gave the following testimony:

"Q. And you don't know whether this is the gun or not? A. No, I don't; I did not see enough of it.

"Q. Are you familiar with firearms? A. No, I never handled one in my life; I am afraid of them and I don't know anything about them.

"Q. How do you know this was a firearm or a gun? A. I just took it for granted, because I saw the sight on the end of it. unless it was a piece of small tubing or something like that with a sight on it.

"Mr. Johnston: That is speculative, your Honor.

"The Witness: It was the barrel of a gun all right; I could see the sight on the end of it."

This witness further testified that while he was in the station with appellant, he noticed a man standing outside on the sidewalk; that he could not say that this was the same man who came to the station with appellant; that he could not describe the man's appearance except that he was wearing a pair of dark glasses.

Officer Tidyman, the investigating officer, testified that on the day following the holdup, he had three conversations with appellant at the 77th Street Station; that the witness and appellant were the only persons present and that the conversations were free and voluntary, without promise of immunity or hope of reward. At the second conversation, appellant was told that Ledgerwood had identified him as the man who held up the service station, whereupon appellant admitted to Officer Tidyman that he was the man and that Morton was his accomplice. At the third conversation, Tidyman reduced to writing the substance of his conversation with appellant, showed his written notes to appellant and asked him to sign the writing. After reading the notes for approximately three or four minutes, appellant signed the paper. In substance, this conversation reduced to writing by Tidyman is as follows:

"He told me that the gun belonged to him, and that the numbers were filed off when he got it, and he had purchased it from a man for $15.00; that he did not know who the man was, did not know his name, but that he did not think the gun was hot. He said he had picked Morton up the evening prior to the holdup at his home, I believe the address was 845 West 56th Street, and that they had ridden around in his mother's car and had gone to a number of cocktail lounges, and two or three other locations, and I don't recall exactly what they were, and that they had been drinking during the evening. He said that Mr. Morton wanted to pull a holdup, and they drove around some more, but Morton got cold feet, so when they stopped at the service station that was held up, that he went in and held the man up and Morton stayed outside"; and they split the money approximately 50-50." This witness further testified that he wrote out the so-called confession in the presence of appellant, who freely and voluntarily signed his name thereto, using the officer's pen, and that no force, violence or duress were used by said witness in order to get appellant to sign the confession.

Appellant, both on voir dire examination outside the presence of the jury, and before the jury when testifying in his own behalf, gave his version of how the confession came to be signed, claiming that promises of immunity and undue influence were used upon him and that he signed the confession without reading it, not because it was true but because of the promises made him. Appellant testified in substance with respect to the circumstances surrounding his signing of the confession, as follows:

That it was about 2:00 a. m. of July 17, 1947, when he was arrested, and that around 8:00 he was called out of his cell for a lineup to be identified and was then lead back to his cell; that Mr. Tidyman followed him and told him that he had been identified as the gunman, whereupon appellant told him there must be some mistake and to bring in the man so that he could talk with him; that the officer left, returning in five minutes with the information that the man had gone, and asked appellant if he wished to admit the crime; that appellant said he did not, as he had no connection with it. "I did not at any time admit my guilt to any crime to Mr. Tidyman, but the words in this statement are his own version of what happened * * *. I am on parole at present from San Quentin, and the night we were arrested, the shorter of the two arresting officers notified me that Harvey (Morton) was also on parole. * * * That in itself is a violation of parole. We are not allowed to associate with another inmate. * * * I had not known that he was on parole, and he did not know that I was. Well, that meant that I would be sent back to San Quentin for a violation of parole, and I also was intoxicated, and that had some bearing on it, so at the time of the signing of this statement, Mr. Tidyman told me, he said, 'Don, you know you are going back to prison, because you violated your parole,' and I said, 'Yes.' He said, 'Why don't you come clean and tell us what this is all about? If you will admit it, I will try and help you all I can.' I asked him, or I told him at first that I had no connection with this crime, he spoke of, and then he told me, he said, 'Well, if you will sign it, if you will admit this crime, I will see to it that this charge of robbery is dropped, and you can go back to San Quentin on a straight violation of parole.' * * * If I signed the confession, the charge would be dropped and I would not have to come up and stand trial, I could go right on back to San Quentin, and these three months which I have spent here now could have been counting on my time, so I thought I could lose nothing by signing it. I still said nothing about admitting the crime or anything, and he drew up this form which is more or less his own version of what happened on that night and asked me to sign it, which I did. Immediately after I signed it, he called my parole officer * * * and explained the case and the circumstances * * * he asked whoever was on the other end of the phone how he would go about getting the charge dropped, and at the time before I signed it he told me that it was up to himself and the victim to drop the charge, and that is the reason I signed it. There are statements in here, some of which are true, that I have acknowledged all along the line, and there are some in here that are just ridiculous. * * * I did not commit the crime, I don't know what the events were, but whatever events he could make up as to how the crime was handled, was all right with me; I was signing a confession and I did not care what was in it."

The version given by appellant was contradicted in all substantial particulars by officer Tidyman, and by the witness Jollings, the State Parole Officer in charge of Downs and Morton, and who, according to Downs, had been called on the telephone by Tidyman, who stated in Downs' presence that the robbery charge would be dropped. Jollings testified that he had no recollection of this, although he made a written memorandum of the conversation. Jollings further testified in the presence of the jury that appellant admitted to him that he had committed the offense and at no time claimed to have made a deal with the police department by which he would not be prosecuted if he confessed to this robbery. The confession was admitted in evidence over the objection of appellant's counsel.

In answer to the trial court's question: "How did your friend's gun happen to be in the automobile you were in?" appellant stated: "I can explain that. The night before I was arrested, a friend of mine who lives in the same apartment * * * asked if I would take him over to collect * * * a debt, and I said yes. He did not have a car, so I drove him over to this man's house, and he talked to him and he came back and said, 'We will have to go down to their office,' * * * and we went into the office, and this fellow had left a revolver for these men to sell. They are gunsmiths, and they were supposed to have sold the revolver and sent him the money. * * * They had sold the revolver and had not made any attempt to pay him the proceeds, so there was a little argument, and my friend became quite cross and told them to get the gun back, so they said, 'Well, we haven't got it here, you will have to come back tomorrow if you want it.' So the next day, the day of the night I was arrested, I took him back to the gunsmith's and he would not go inside. He sat out in the car and asked me to go and get the gun * * * and he (the gunsmith) gave it to me and I put the revolver in my pocket and took it out and gave it to him, and on the way home he stopped and bought a bottle. He was intoxicated then, and when I got home I let him out of the car and he went on in the house * * * and a short time later I went over and picked up Harvey. I don't know how the gun got in there, unless he laid it down and evidently did not pick it up again."

Appellant urges that "the court did not diligently examine the circumstances surrounding the making of the confession"; and that "the confession is an absolute necessity to the prosecution as the only evidence upon which Downs could have been convicted * * * or in any way connected with the commission of the crime."

The above resume discloses that the question of the voluntary character of the confession was thoroughly examined during the trial herein by interrogatories addressed not only to appellant but to Officer Tidyman and as well to Mr. Jollings, the State Parole Officer. Before Officer Tidyman was permitted to testify regarding the signed statement made by appellant, he was asked:

"Was that conversation free and voluntary? A. Yes.

"Q. And made without any promise of immunity or hope of reward? A. None.

"Q. And without the use of any force, violence or duress? A. That's correct.

"Q. Morton was not present at that time, nor within hearing? A. No, he was not.

"Q. What was the conversation?"

Mr. Jollings testified to the following effect.

"Q. Will you state in substance what Officer Tidyman said to you in reference to the dropping of any robbery charge against Downs? A. He did not say anything about dropping any charges; he merely discussed with me about the arrest. * * *

"Q. Did you have a conversation with the defendant Downs in the County Jail on or about August 4th of this year? A. Yes.

"Q. What was that conversation in reference to the dropping of any robbery charges? A. I don't remember discussing dropping the charges. We discussed the fact that he was in violation of his parole and I asked about the particular arrest.

"Q. What did he tell you? * * * A. He said he admitted he was with the other man that particular evening, and he knew he was in violation, and that they did the job.

"The Court: Is that what he said, 'I did the job'?

"The Witness: I don't know his words that he used, but I could tell what I wrote. He said he admitted his guilt and said he could not understand why he did it. * * *

"Q. By Mr. Johnstone: Did the defendant at any time tell you that he had entered into any deal with the police department whereby, if he confessed the robbery, he would not be prosecuted for the robbery? * * * A. No. He did not say he had entered into any deal with any particular party. * * *

"Q. By Mr. Johnstone: In other words, on August 4th, the defendant at no time mentioned to you, at the time he told you he committed the robbery, that he was doing so because the police department promised him that if he confessed the robbery, he would not be prosecuted for it? A. He did not tell me that.

"Q. He did not tell you he only confessed to the robbery, but that he did not actually commit it? A. No, sir.

"Q. He told you he had committed the robbery? A. Yes."

[1-3] As stated in 4 Cal.Jur.Supp. 663, section 202: "The question as to whether

a proffered confession was freely and voluntarily made by the defendant is one which is to be determined by the trial court, not by the jury.

"The propriety of the court's decision in resolving the question as to admissibility of the confession is to be determined by the reviewing tribunal in view of the discretion with which the trial court is clothed. Where the evidence bearing on the question is conflicting, the decision will not be reversed.

"The circumstances of the case are determinative of the question as to admissibility of the proffered confession; the issue is not to be resolved by reference to any rule of law. The scope of the inquiry extends to all circumstances attending the making of the confession, and all such facts are to be considered by the court in determining the question as to whether the confession was made voluntarily or involuntarily."

[4-7] Also, in People v. Lisenba, 14 Cal.2d 403, 421, 94 P.2d 569, 578, the court stated: "The mere fact that the confession was made to a police or other officer of the law while the accused was under arrest, does not necessarily render the confession involuntary and inadmissible. So, also, the mere fact that a confession is made in answer to questions will not authorize its rejection, though the fact of its having been so obtained may be an important element in determining whether the answers were voluntary * * * a reviewing court cannot say that the trial court committed error in admitting a confession of guilt, unless such error appears as a matter of law from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary, and, where the evidence is conflicting on the subject, it must be assumed that the testimony concerning a defendant's admission was properly admitted."

[8] In the circumstances presented by the record herein, no error was committed by the trial court in admitting the confession in evidence.

[9] As to appellant's point that the confession is the only evidence upon which his conviction can be based, this is completely refuted by the record. Appellant was positively identified by Ledgerwood as the man who came into the service station and held him up at the point of a gun. While it is true, that appellant's mother, Mrs. Barrett, and her friend, Mrs. Tillim, both testified that they had a conversation with Ledgerwood on July 19, 1947, at 6:00 p. m., at which time he stated to them that he could not honestly say that he identified the defendant Donald Downs as the man who committed the robbery, this testimony merely created a conflict in the evidence which was resolved by the jury against the appellant.

[10] Appellant also urges that the acquittal of defendant Morton establishes an alibi for appellant and proves his innocence. Defendant Morton admitted that he was with appellant from 7:30 p. m. of July 16, 1947, until their arrest around 2:45 a. m. of July 17th; and testified that during this period they were making the rounds of various cocktail lounges drinking beer and whiskey until they became intoxicated. While Morton had a pair of dark glasses on his person, which he sought to conceal, and had money in his pocket in an amount equal to approximately one-half of that stolen from Ledgerwood, he was never identified as being at the scene of the holdup, for the reason that the companion of appellant remained at a distance from Ledgerwood during the time he was being held up.

It does not follow that because the jury was unable to find defendant Morton guilty beyond a reasonable doubt that it, therefore, gave entire credence to his testimony that he and appellant were together all during the evening and did not commit the robbery charged. The verdict is conclusive proof that the jury did not accept Morton's story at its face value.

[11, 12] The verdict of the jury convicting appellant of robbery is amply supported by the evidence. In order to overthrow the verdict of conviction, there must be no substantial evidence in the record which on any hypothesis would support a finding that appellant is guilty as charged. As hereinabove shown, evidence was pre-

sented establishing that a sum of $18.32 or $18.42 was taken from the victim Ledgerwood by appellant in the early morning hours of July 17, 1947; appellant was positively identified as the person who took the money while armed with a deadly weapon, and that the victim Ledgerwood was in fear of the gun.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

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